

NOTE I

In the interests of brevity and clarity the use of the term "Soldier" has been adhered to throughout the Pamphlet in spite of the fact that the Welfare Organization described therein is now responsible for all three fighting services. Where applicable the words 'soldier', 'military', etc. should therefore, be considered as applying to members of the R.I.A. and I.A.F.

NOTE II

The Pamphlet is informative only and must NOT be quoted as an authority for any of the information contained therein.

NOTE III

A copy of every I.A.O. and A.I. (I) mentioned in the Pamphlet will be found (together with certain others on the same subjects) in Appendix Z. It is particularly important that holders of the Pamphlet keep up to date by obtaining copies of future relevant I.A.Os and A.Is (I) as they appear.

Four letters issued by G.H.Q. (I) are also reproduced.

NOTE IV

The section of G.H.Q. (I) responsible for the welfare of Indian soldiers and their families was previously designated "AG 17(c)" (1). This designation has now been changed to "Wcl 3(b)" and where the old designation appears in previous orders and instructions it should be amended accordingly.

CONTENTS

PAGE

PART I—WELFARE.

Sailors, Soldiers and Airmen's Board Organization	..	1—5
Civil Liaison Officer Organization	..	5—8
Combined layout of the S.S.A.B. & C.L.O. Organizations		8—16
Submission of petitions	.	17—19
Miscellaneous Welfare Measures	.	19—24
Resettlement (Provisional)	.	24—29

PART II—FINANCIAL.

Pay and Allowances		29—31
Pensions and Gratuities		31—38
Family Allotments	.	38—40
Miscellaneous Pensions Gratuities, etc	..	40—41

PART III—POSTAL.

Addressing of letters and arrangements for writing	..	42—43
Postal Concessions	..	43—46
Telegrams	.	46—47
Money Orders and Saving Bank Accounts	..	47—48

PART IV—P OF W (AND "MISCELLANEOUS").

Pay and Allowances	.	..	49—50
Family Allotments and Pensions	.	..	50—53
Postal Information	.	..	53—59

APPENDICES.

Notes on the submission of petitions and complaints	..	60—64
R.A.L. Instructions 337	..	64
List of Charitable Funds controlled by the L.S.A.B.	..	65—66
Rules for the administration of the Indian Defence Services Benevolent Fund	..	67—68
Form of application for a grant from the Indian Defence Services Benevolent Fund (D.D. 40).	..	68—70
Rules for the completion of Form D.D. 40	..	71—72
Rules for the administration of the Defence Forces Relief Fund	..	73—74
Rules for the administration of the V.C.O.'s and L.W.O.'s Benevolent Fund	..	74—75
Rules for the administration of the Sir Victor Sassoon Fund	..	75—76
Rules for the administration of the Indian Forces Medical After-Care Fund	..	76—79
A note on "Fauji Sevadars" ..	..	79—81
Important L.A.Os. and A.Ls. (I) concerning Family Welfare Matters	..	81—112

Matters of interest to Indian Personnel of the Armed Forces and their families

PART I.—WELFARE

Chapter I.—Sailors', Soldiers' and Airmen's Board Organization

1 The Sailors' Soldiers and Airmen's Board Commission exists to promote the well being of and to watch the interests of serving sailors soldiers and airmen in their civil capacity, and of ex servicemen. As such this organization is responsible for the welfare of the families of servicemen and ex servicemen. It works under the direction and control of the Government. In addition there exists a branch known as the Civil Liaison Officer's Office, which is described in Chapter II.

The Indian Sailors', Soldiers' and Airmen's Board (ISSAB)

2 This is the central organization located in NEW DELHI. It is mainly responsible for financing the organization.

(a) Composition —

Three members of H E the Viceroy's Executive Council (one of whom is President)

H E the Governor of the Punjab

The Defence Secretary

Flag Officer Commanding, Royal Indian Navy

The A G in India

Air Officer Commanding, Air Forces of India Command

The F A —Military Finance

The Auditor General in India

An Under Secretary to Defence Dept (Secretary to ISSAB).

(b) Duties —

Co ordination of the work of Provincial S S A Bs and Agency S S A Bs

General Policy with special reference to the wishes of the A G in India

Control of Charitable Funds (See para 7)

Provincial Sailors', Soldiers' and Airmen's Boards (P S S A B s)

3 At the head of the Provincial organization is the P S S A B which is normally located in the Provincial capital

(a) Composition —

Varies considerably but normally may be expected to include some or all of the following —

The Governor of the Province	}	President
Military Secretary to the Governor		}	Secretary
or A Secretary to Govt or a Recruiting Officer/ C C L O		
Commissioners/or Revenue Members	}	Members
Deputy Commissioners or Collectors		
I G Police		
Military Formation Commanders		
C C L O s		
R O s		
Director of Public Instruction		
P M G of the Circle		
Other officials of Civil Govt		
Influential businessmen		

(b) Duties —

Co ordination of the work of District S S A B s

Passing on directions issued by I S S A B

Policy regarding matters peculiar to the Province, (e.g., Educational Concessions)

Control of Charitable Funds, where such exist

District Sailors', Soldiers' and Airmen's Boards (D S S A B s)

4. The working unit is the D S S A B which is normally located adjacent to the Deputy Commissioner's/Collector's office. D S S A B s are established in all districts from which recruits have, or had up till recently, been obtained in sufficient to justify the formation of a board. (See Chap

(a) Composition —

Deputy Commissioner/Collector	President
Civil Liaison Officer	} Military Vice President
or	
Assistant Civil Liaison Officer	} Members (Composition varies according to local circumstances and average composition)
Superintendent of Police	
Recruiting Officer (or A R O)	
Supdt of Post Offices of the Division concerned	
A leading member of the District Bar	
A lady member (particularly where the Sevada scheme is in operation) if available	
One or two influential businessmen	
Military members (including ex I O I s as well as V C O s)	
Representatives of Tehsil/Zail sub committees (see para 5 below)	}
An ex V C O (if available) is employed as full time Secretary As a war measure some boards have civilian secretaries	

(b) Duties —(General)

The following are the chief functions of DSSABs —

(i) Constantly to endeavour to promote and maintain a feeling of goodwill between the civilian and military classes

(ii) To give all possible assistance to the President of the Board in his capacity as head of the district in all administrative matters connected with the ex soldier and his family or the families of serving soldiers

(iii) To represent and explain to the civil authorities all matters of particular moment to military classes that require the attention of the local administration

(iv) Generally to watch over the welfare of the ex soldier and his family and the interests of serving soldiers absent with their units

(c) Duties —(Welfare)

(i) To circulate information regarding educational concessions available for soldiers' children and to persuade the families to take advantage of them

(ii) To communicate information regarding employment, facilities for training for civilian vocations, available con-

cessions to discharged men and to maintain registers of ex-soldiers desirous of obtaining employment

(iii) To ascertain and intimate the whereabouts of an absent soldier to his dependants and to communicate to him news of all important matters affecting his family's welfare

(iv) To procure legal advice in the case of a law suit against an absent soldier where there is no male member of his family present

(v) To encourage and assist the settlement of disputes out of court

(vi) To assist an absent soldier's family in the event of disease or famine

(vii) To assist ex soldiers and their dependants in securing medals pensions arrears of pay etc

(viii) To keep a watch on the adequacy of the number of pension paying branch post offices and if there is a need for more such offices to bring the fact to notice

t
medical assistance

(x) To investigate applications for relief from the various military and civil charitable funds

(d) Welfare Workers —

Welfare workers are appointed by Deputy Commissioners/Collectors as Presidents to assist in carrying out the duties detailed in sub parts (b) and (c) above. These Welfare Workers are purely honorary part time workers. They are normally retired V C Os or N C Os of good social standing, specially selected from among pensioners available. Normally they are paid bare out of pocket expenses from funds allotted to D S S A Bs by C L Os. Some however undertake the work entirely at their own expense and are out of pocket by so doing. Their work in enquiring into petitions and complaints is arduous and often thankless. It involves much travelling from village to village and calls for much unselfish work.

5 Tehsil (or Taluka) and Zail Sub-Committees — In the more heavily recruited districts where there are very few

numbers of servicemen's families. Tehsil or Zail sub-committees are formed. The object of these is to enable the D S S A Bs to maintain a closer touch with the individual family in the village than would otherwise be possible.

The president is normally the Tehsildar, Zaildar or Mamlatdar and where necessary a Secretary (honorary) is appointed. These sub-committees are represented on the central D S S A B and are the representatives of the D S S A B in the Tehsil/Zail.

6 States Sailors Soldiers and Airmen's Boards (SSSABs)—These are established in some Indian States and correspond to D S S A Bs in British India. Some are responsible for the welfare of members of the Imperial Forces as well as of I S F personnel serving in or out of the State. In some groups of States, there is an Agency Sailors' Soldiers' and Airmen's Board (A S S A B) presided over by the Resident and with a membership which includes all the Political Agents and Presidents of the S S S A Bs concerned. Its functions are to co-ordinate the work done by the S S S A Bs and at all times to advise and assist them in the proper discharge of their duties.

7 Charitable Funds—The I S S A B controls a number of charitable funds. Full particulars of these showing the classes of persons eligible for assistance from them, the procedure to be adopted, etc., will be found in Appendices C to K.

Chapter II—The Civil Liaison Officer Organization

1 Working alongside the Sailors Soldiers' & Airmen's Board Organization (Civilian), is the Civil Liaison Officer Organization which is largely Military. This organization has been brought into being as a result of special war conditions and is supplementary only to the S S A B Organization. Its officers advise, assist and to some extent supervise the work of D S S A Bs, but the welfare of ex-soldiers and of military families remains a S S A B responsibility.

2 The functions of the Civil Liaison Officer Organization are —

(a) To form a link between the civil and military authorities on all levels.

(b) To enable the military authorities directly to watch the interests of the enlisted classes

(c) To assist civil authorities in their D S S A B work

(d) To assist all ranks in bringing their legitimate wants and difficulties to the appropriate civil authority and to assist the latter in meeting or solving them

These duties at G H Q (I) are vested in the Directorate General of Welfare Education and Resettlement of the Adjutant General's Branch

3 The organization of the Civil Liaison staff is as follows —

(a) A Chief Civil Liaison Officer (C C L O) in touch with each important provincial government in his area forming a link between these governments and G H Q (I)

(b) Under him a group of Civil Liaison Officers (C L Os) each of whom will again have under him —

(c) A group of Assistant Civil Liaison Officers (A C L Os)

Ranks held by the above officers are

C C L O —Colonel

C L O —Lt Col or Major

A C L O —Captain

4 The duties of officers of the Civil Liaison Organization in their various grades are as follows —

(a) Close contact with Provincial Governments and all civil officials, and liaison between them and their corresponding military authorities

(b) Close contact with civil departments and institutions such as Posts and Telegraphs Education Police, Publicity Bureaux National War Front Provincial War Boards, P S S A Bs and D S S A Bs Selection Boards for E C Os etc etc

(c) Co operation with Indian States regarding cases of State subjects serving on the Imperial establishment and of British subjects serving in the States

(d) Assistance to C Os of units and to individuals who for any reason they are in dispute with civil officials or consider that their representations have not received adequate consideration

(e) Assistance and advice to Regimental Officers touring the recruiting areas of their units either officially under unit arrangements

(f) Visits to units (at the request of the unit only)

(g) Constant touring to establish personal contact with district officials and the people of the main recruiting areas, which gives opportunity for indirect propaganda, the dissemination of news assistance in settling cases out of court and for keeping a finger on the public pulse

(h) Detecting and reporting all grievances of a general nature which affect morale

(i) General supervision and direction of D S S A B s

(j) Contact with Civil Employment Exchanges and Services Employment Bureaux (when formed) to put would be employees in touch with would be employers

(k) At the request of a civil official the investigation of any individual case which is beyond the scope of the D S S A B

5 Fauji Sevadarnis (Women Military Welfare Workers)—It has long been realised that female relatives of soldiers are reluctant to bring their grievances to notice through male welfare workers even when these women are not in purdah. Many parts of the country are now so heavily recruited that in many families there is no remaining male relative to represent complaints. It was decided therefore, that Fauji Sevadarnis should be employed to contact these women, to advise and assist them and to serve as a channel through which their grievances could be ventilated. Sanction has been obtained for the employment of 2 000 of these Sevadarnis, together with a proportion of Head Sevadarnis and Inspectresses for supervisory duties and the majority have now been recruited and are at work in the areas where their presence is most necessary. The Fauji Sevadarni Scheme is an adjunct of the Civil Liaison Officer Organization and works under the orders of the C L O (Further details will be found in Appendix "L")

6 The Civil Liaison Officer Organization working in collaboration with the S S A B organization ensures that contact is maintained with every part of the country from which the

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(f) Visits to units (at the request of the unit commander only)

(g) Constant touring to establish personal contact with district officials and the people of the main recruiting areas, which gives opportunity for indirect propaganda, the dissemination of news assistance in settling cases out of court and for keeping a finger on the public pulse

(h) Detecting and reporting all grievances of a general nature which affect morale

(i) General supervision and direction of D S S A Bs

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6 The Civil Liaison Officer Organization working in collaboration with the S S A B organization ensures that contact is maintained with every part of the country from which the

army recruits at all heavily. It ensures that machinery exists to meet war requirements and to deal with the many problems which are bound to arise after the war.

7 W V S—The W V S is cooperating both with D S S A Bs and with the Civil Liaison Officer Organization to promote the welfare of the families of Indian servicemen. This co-operation is of particular assistance in the areas where the Fauji Sevadarni scheme is in operation.

8 Responsibility of C Os—In order that D S S A Bs and officers of the C I O Organization may be able to fulfil their duties as regards ex-soldiers and the families of serving soldiers on active service it is imperative that they be in possession of full information regarding them. Commanding Officers are required to submit this information to C L Os (A C L Os and D S S A Bs) (S S S A Bs) under the provisions of I A Os 1219/41 and 1307/44 and it is imperative in the interests of the maintenance of morale that these I A Os are promptly and regularly obeyed.

Chapter III—Combined layout of the S S A B and C L O Organizations

The following table shows the layout of the C L O Organization and the address and area of responsibility of each officer. D S S A Bs (S S S A Bs) exist in the Districts (States) marked with an asterisk. P S S A Bs exist in the following Provinces—

N W F P—Peshawar

Punjab—Lahore

Bombay—Bombay

C P—Nagpur

Madras—Madras

U P—Lucknow

Bihar—Patna

Assam—Shillong

A S S A Bs exist in—

Rajputana—Mt Abu

Western India States—Rajkot

C.C.L.O

C.L.O

A.C.L.O

DISTRICTS/STATES
(SSABs exist in
District States
marked with an
asterisk).

PRO-
VINCE/
INDIAN
STATE.

NORTHERN AREA

(a) British
IndiaC.L.O
NWFP
Peshawar{ A.C.L.O
NWFP
Peshawar

Peshawar*
Mardan*
Kohat*
Dera Ismail Khan*
(incl Waziristan)
Hazara *(Abbotta
bad)
Nowshera.*

N W
F PC.L.O Rawal
pindi-Jhelum
Area C/o
District Head
quarters
Rawalpindi{ A.C.L.O, Rawal
pindi Area C/o
Distt H.Q.
Rawalpindi

Rawalpindi*
*Attock (Campbell
pore)
Mianwali*

{ A.C.L.O Jhelum
Area C/o Ad
ministrative
Comdt Jhelum

Jhelum*
Shahpur* (Sargodha)
Gojrat*

Punjab.

{ A.C.L.O, Lahore
Area, 28,
Davis Road
Lahore

Sialkot*
Lahore*
Amritsar*
Gurdaspur*
Gujranwala*
Sheikhpura*
Lyallpur*
Jhang*
Montgomery*
Multan*
Dehra Ghazikhan.
Muzaffargarh.

C.L.O Lahore-
Sind Area, 28,
Davis Road
Lahore{ A.C.L.O, Sind
Area, 12
Or tram Lines
Hyderabad
(Sind)

Upper Sind Frontier
Dadu
Sukkur*
Nawabshah
Thar Parkar
Hyderabad*
Larkana
Karachi*

Sind

Winter:—28
Davis Road,
Lahore.Summer—C/o
Postmaster,
Sindia.

C.C.L.O	C.L.O	A.C.L.O	DISTRICTS/STATES. (SSABs exist in Districts/States marked with an asterisk)	PROVINCE/ INDIAN STATE
C.C.L.O Northern Area, Winter—28 Davis Road Lahore. Summer—C/o the Post- master Simla.	C.L.O Jullundur Ambala- Delhi Area Jullundur Cantt	A.C.L.O Jullundur Area C/o C.L.O Jullundur Ambala Delhi Area Jullundur Cantt A.C.L.O Ambala Delhi Area Rohtak.	Kangra* (Dharamsala) Hoshiarpur* Jullundur* Ferozepore* Ludhiana* Ambala* Gurgaon* Rohtak* Karnal* Hissar* Delhi* Simla.	Punjab.
(b) Indian States	C.L.O V W F P Pesh awar	Nd	Dur Swat Chitral Gilgit Peshawar Amb.	Northern West Frontier States
C.C.L.O Northern Area, Winter—28. Davis Road Lahore. Summer—C/o Postmaster Simla.	C.L.O Rawal pindi-Jhelum Area, C/o Dutt H Q Rawalpind	Nd	Jammu & Kashmir with — S.S.A.Bs at Jammu* Muzaffargarh* and Palandri* (Poonch).	Kashmir Agency
	C.L.O Lahore Sind Area, 29 Davis Road Lahore	N /	Bahawalpur* Khairpur Kalat Khairpur Las Bela.	Punjab State Punjab States Baluchistan States.
	C.L.O Jullundur Ambala Delhi Area Jullundur Cantt.	Nd	Patiala* Nabha* Jind* Kapurthala* Faridkot* Malerkotla* Chamba* Lahore* Mandi* Patna† Dujana† Bilaspur* (Simla Hills) and all Punjab States except Bahawal- pur & Khairpur & all Punjab II States except Tehri Garhwal.	Punjab States.

† Temporarily attached with P.S.A.Bs. Gurgaon and Rohtak, respectively.

C.C.L.O.

C.L.O.

A.C.L.O.

DISTRICTS/STATES.

(SSAB* exist in District States marked with an asterisk)

PROVINCE
INDIAN
STATE

SOUTHERN AREA

(a) British India.	C.L.O., Bombay C.P. & Berar Area, Climo Road Poona.	A.C.L.O., Bombay Area Climo Road, Poona.	Satara* Ratnagiri* Ahmednagar* Kolaha* Poona* Bijapur* Belgaum* Dharwar* North Kanara* Sholapur* East Khandesh* West Khandesh* Ahmedabad Kaira Broach Panch Mahala Surat Nasik* Secunderabad* (Deccan) Thana. Bombay Suburban	Bombay
C.C.L.O., Southern Area, C/o A.D.R., Southern Area Poona.			Jubbulpore* Nagpur* Amraoti* Akola* Ycotmal* Buldana* Nimar Betul Hoshangabad* Saugor* Chundwara* Wardla Chanda Mandla Balaghat Bhandara Bilaspur* Raipur* Drug	Central Provinces.

			DISTRICTS/STATES. (SSABs exist in Districts/States marked with an asterisk).	PROVINCE/ INDIAN STATE
C.C.L.O.	C.L.O.	A.C.L.O.		
C.C.L.O., Southern Area, C/o A. D.R., South- ern Area, Poona.	C.L.O. Madras Bangalore Area, Corn wallis Bar- racks, Banga- lore.	A.C.L.O. Northern Madras Area, C/o Postmaster Masulipatam.	Vizagapatam* East Godavari* (Cocanada) West Godavari* (Ellore) Bastar* (Chulaka Iapudi) Guntur* Nellore* Madras City* Chingleput* (Saidapet)	Madras
		A.C.L.O. Central Madras Area, Cornwallis Barracks, Bangalore.	Kurnool* Bellary* Anantapur* Cuddapah* Chittoor* North Arcot* (Vellore). South Arcot* (Cuddalore). South Kanara* (Mangalore) Bangalore* Nilgiris	
		A.C.L.O. Southern Area, C/o Postmaster, Salem.	Salem* Trichinopoly* Tanjore* Madurai* Ramanath* (at Madurai) Tinnevely* Coimbatore* Malabar (Calicut)	
(b) Indian States	C.L.O., Madras Bangalore Area, Corn wallis Bar- racks, Banga- lore.	.. ..	Travancore* (Trivendrum) Cochin* (Trichur) Mysore* Pudukkottai Ramanaswami Salem Coorg French Indian Settlements.	Madras States Other Administra- tions.
C.C.L.O. Southern Area, C/o A. D.R., Southern Area, Poona.	C.L.O., Bom- bay C.P. & Berar Area Climo Road Poona.	.. ..	Hyderabad* Mysore States— (a) Bellary (b) Anantapur (c) Anantapur (d) Elor (e) Jamshedi (f) Jait (g) Kollapur (h) Kurnool (i)	

DISTRICTS STATES

(Also exist in
Districts States
marked with an
asterisk).

PROVINCE/
INDIAN
STATE

C I O

C I O

A C I O

C I O,
Southern
Area (V/A
A B H,
Southern
Area India

C I O,
Bharat
Area (V/A
Bharat
Area India

A I

(i) Khandwa
(Jr)
(j) Miraj (Jr)
(k) Miraj (Jr)
(l) Multol
(m) Multol
(n) Multol
(o) Multol
(p) Multol
(q) Multol
(r) Multol
(s) Multol
(t) Multol
(u) Multol
(v) Multol
(w) Multol
(x) Multol
(y) Multol
(z) Multol

U I, AND EASTERN INDIA AREA.

(a) British
India.

A C I O Meerut
Area, 3 R A
Meerut

Dalra Dun*
Sabarnpur*
Mazaffarnagar*
Meerut*
Halandabahr*
Aligarh*
Etah*

A C I O Agra
Area, Shri Gur
Nivas Vial Na-
gar Colony, Agra.

Mottra*
Agra*
Mainpuri*
Farrukhabad*
Etawah*
Jalaun*
Hamirpur*
Banda*
Jhansi*

C C I O, U P
and Eastern
India, Room
No. 25, Civil
Secretariat,
Lucknow

C I O,
Western
U P Area,
53, The Mall
Meerut.

A C I O, Bareilly
Area, No
8 Cantt, Bareilly

Fast Almora*
(H Q at Pithora
garh).
West Almora*
(H Q at Almora)
Moradabad*
Bareilly*
Badaun*
Shajahanpur*
Sitapur*
Hardoi*
Bijnor

U. P.

DISTRICTS/STATES.
(SABs exist in PROVINCE/
Districts/States INDIAN
marked with an STATE,
asterisk)

C.C.L.O

C.L.O

A.C.L.O

(C.L.O., Western
U.P. Area 53,
The Mall,
Morad

A.C.L.O. Bareilly
Area No. 8
Bareilly

Pilibhit
Kheri
Garhwal* (directly under
under C.L.O.,
Western U.P.
Area)

A.C.L.O., Luck
now Area Room
No. 25 Civil
Secretariat,
Lucknow

Lucknow*
Bara Banki*
Unao*
Cawnpore*
Fatehpore*
Rae Bareilly*
Fyzabad*
Bahraich*
Gonda*

U. P.

A.C.L.O., Allaha-
bad Area C/o
H.Q., Allaha-
bad Area
Allahabad.

Allahabad*
Partabgarh*
Sultanpur*
Basti*
Gorakhpur*
Azamgarh*
Jaunpur*
Benares*
Gazipur*
Mirzapur*
Ballia*

C.C.L.O., U.P.
and Eastern
India Room
No. 25 Civil
Secretariat,
Lucknow

C.L.O., Luck
now & East-
ern India
Area, Room
No. 25, Civil
Secretariat,
Lucknow

A.C.L.O., East-
ern Ind Area,
Hong Kong
Buildings, Dal
housie square,
Calcutta.

Saran*
Shahabad*
Champaran*
Muzaffarpur
Patna*
Gaya*
Palam
Darbhanga
Monghyer
Hazaribagh
Ranchi*
Bhagalpur
Santal Parganas*
Manbhum
Purnea
Singbhum*

Bihar.

Sambalpur
Keonjhar
Garjam
Angul
Puri
Cuttack

C.C.L.O.

C.L.O

A.C.L.O

DISTRICTS/STATES
(SSABs exist in PROVINCE/
Districts/States INDIAN
marked with an STATE
asterisk)

C.C.L.O., U.P.
and East-
ern India,
Room No. 25
Civil Secreta-
riat, Luck-
now.

C.L.O., Luck-
now and
Eastern
India Area
Room No
25, Civil
Secretariat,
Lucknow.

A.C.L.O., East-
ern India
Area, Hong
kong
Buildings,
Dalhousie
square
Calcutta.

Balasore
Klonadmalx

} Orissa

Daryeling
Jajai guri
Dinajpur
Rangpur
Malda
Rajshahi
Bogra
Mymensingh*
Burbhum
Murshidabad
Bankura
Burdwan
Nadia
Pabna
Dacca*
Faridpur*
Tippura*
Noakhah*
Bakargang*
Chittagong*
Jessore
Khulna
24 Parganas*
Howrah
Hooghly
Madanpur
Calcutta
Chittagong Hill
Tracts

} Bengal

Goalpara*
Kamrup
Darrang
Lakimpur
Sibsagar
Caro Hills
Shillong*
Nowgong*
Naga Hills
Chachar*
Sylhet*
Lushai Hills
Khasi and Jaintia
Hills (British)
Sadiya
Frontier Tracts

} Assam

C.C.L.O.	C.L.O.	A.C.L.O.	DISTRICTS STATES (States exist in Districts States marked with an asterisk)	PROVINCE / INDIAN STATE.
(b) Indian States	C.L.O. Luck now and Eastern Ind. Area, Room No. 25 Civil Secretariat, Lucknow	Nil	Khasi Hill States Manipur Rhotan Sikkim All Eastern States Except — (a) Jharkar (b) Bastar (c) Khairagarh (d) Kawardha (e) Nandgaon (f) Chikhandan Benares* (Rampur).	
C.C.L.O. UP and Eastern India Room No. 25 Civil Secretariat, Lucknow	C.L.O. West- ern U P Area, A3 The Mall, Meerut.	Nil	Gwalior* Rampur Khandadha Rawa and all states in the Bandelkhand Agency of the Cen- tral India States. Tehri-Garwal.	
RAJPUTANA AND AJMER MERWARA.				
(a) British India	C.L.O., Raj and Ajmer Merwara, Ajmer	A.C.L.O., Raj and Ajmer Merwara Ajmer	{ Ajmer* Merwara	
NIL (b) Indian States	C.L.O., Raj and Ajmer Merwara, Ajmer	A.C.L.O. Raj and Ajmer Merwara, Ajmer	Baroda and all Gujarat States Alwar* Bharatpur* Bikaner* Jaipur* Jodhpur* Mewar* (Udaipur) Nal* Pithor* Karauli* Abot and all other Raj- putana States. Rajkot* and all other West- ern Indian States Central India (Indore Bhopal etc.) except states in	} Rajputana.
NIL				

Chapter IV—Submission of Petitions

British India

1 The D S S A B deals largely with civilians and with soldiers in their civil capacity. In British India the Deputy Commissioner or Collector is head of the civil district and as such is president of the D S S A B in his district. Thus, all petitions and complaints whether from serving soldiers through their Commanding Officers or from serving or ex-soldiers and families in the villages should be addressed to the Deputy Commissioner/Collector whether there is a D S S A B in the district in question or not.

The only exceptions to this ruling are given in paras 2, 3 and 4 below, in all other cases it is most important that this procedure be adopted (I A O 899/44 refers)

It is most important that all officers should take particular care to ensure that correspondence addressed to Civil Officials is courteously worded as befits the rank of the addressee. The necessity for punctiliousness in this respect cannot be over emphasised. In this connection attention is drawn to I A O 2145/43

Indian States

2 Petitions and representations on behalf of serving soldiers and their families whose homes are in Indian States, will be forwarded to the C I O concerned (see Chapter III) who will deal with them in accordance with such arrangements as may exist between himself and the State Government concerned.

It is most important in dealings with States to avoid anything which may be construed as interference with the State Administration or prerogatives. For this reason it is imperative that this procedure be strictly adhered to. In the past, much harm has been done by junior and inexperienced officers signing peremptory letters addressed to State Officials.

Petitions and representations from ex-soldiers and their families regarding purely military matters should be addressed to the S S S A B concerned or where there is no S S S A B to the C I O concerned.

Regarding Family Allotment Money Orders

3 Petitions from soldiers serving overseas or in concessional areas regarding non payment or delay in payment of family allotment money orders should be forwarded to Record Offices or Depots concerned for onward transmission to the D C | Collector (or C L O in the case of Indian States) These establishments are in a position to know whether the money orders have or have not been despatched or paid to payees and before forwarding the petition to the D C |Collector or C L O. the O C Record Office|Depot will—

(a) Endorse on it the number and date of the acknowledgement receipt of the relevant F A M O if it has been received back duly signed or with the thumb impression of the allottee, or

(b) Indicate on it the date on which the F A M O was despatched and state that the acknowledgement receipt has not yet been received back

(I A O 1723/43 refers)

4 In very exceptional cases as in case of inordinate delay petitions or complaints forwarded by units regarding residents in British India may be addressed direct to an officer of the Civil Liaison Officer Organization. Matters of general policy as opposed to individual complaints and cases of dispute or dissatisfaction with the civil authorities regarding the handling of petitions should invariably be referred to the Civil Liaison Officer Organization and NOT to D C |Collectors

Apart from formal petitions and complaints all those who require advice or assistance should apply to their D S S A B , or to a welfare officer attached thereto or to an officer of the C L O Organization This is in any case the most satisfactory and speedy method by which relatives of soldiers and ex-soldiers can ventilate their grievances and Indian Ranks should be encouraged to advise their families to adopt this method rather than to address the soldier (see I A O 192/44)

5 Responsibilities of O Os.—Experience has shown that a considerable percentage of the petitions and complaints submitted by I O Rs are found on investigation to be false, frivolous or forwarded in continuation of a long standing feud. These unfounded petitions clog the machinery and so delay the m-

investigation of genuine complaints. In addition false petitions tend to alienate the sympathy of the civil officials. It is in the interests of the genuine petitioners, therefore that rules have been laid down which should be carefully studied by C Os and their provisions explained to their men.

C Os and other officers should at all times impress on their men that the C L O Organization and District and State Sailors', Soldiers and Airmen's Boards exist to look after their families at home. In writing to their relatives men should be asked to discourage their families from expecting that petitions on their behalf will invariably be submitted by the absent soldier.

Under R A I (Inst) 397 (reproduced in Appx "B") certain petitions are debarred outright. Further, every petition should be examined on the lines suggested in Appx 'A', before it is forwarded by a C O for investigation. To assist C O's in this respect all petitions must be examined by a "petition committee" (vide Appx 'A' para 12) where the unit composition makes the formation of these committees a practical possibility. When forwarding the petition the C O will attach the certificate set out in Appx 'A' para 14. To avoid duplication of investigation and consequent confusion and delay it is imperative that each petition be addressed to one authority only (I A O 984/42 refers).

Chapter V—Miscellaneous Welfare Measures

1 Educational Concessions.—Provincial Governments, Chief Commissioners, States, etc., have granted certain educational facilities and concessions, in the light of local needs and their financial resources, to the children (brothers and sisters also in the case of the Punjab and Madras and wives in the case of Madras) of men who take part in the present war. Enquiries regarding these concessions should be made from the local Civil authorities or the C L O. concerned.

2 Training of Blinded Servicemen.—A centre for training Indian blinded servicemen has been opened in Dehra Dun by St. Dunstan's. In future no soldier who has been blinded, or whose sight is seriously impaired, will be discharged but will be transferred to the I M H Dehra Dun as soon as he is fit.

to travel. Those considered suitable for training at St. Dunstan's will be trained to become useful members of society able to earn for themselves. During the first four months of training men will receive full pay and allowances, free rations, etc. Thereafter they will receive whatever pension is due to them. In addition St. Dunstan's will extend to men undergoing training certain very generous privileges. Full details and instructions will be found in I A O 18/44 as amplified by I A O 979/44.

3 Disabled Servicemen.—Queen Mary's Technical School for disabled Indian servicemen, exists to provide free training in certain selected trades to I O Rs and enrolled non combatants who have been invalided from the service. Men receive free rations and accommodation for the period of the course and also a small allowance in cash. A limited number of men are allowed to bring their families with them. Full particulars may be had from —

The Superintendent, Queen Mary's Technical School, Pan Road, Kirkee

4 Appointment of an Attorney.—(a) Where any officer or soldier actually serving the Government in a military capacity is a party to a suit and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorise any person to sue or defend in his stead (Code of Civil Procedure, First Schedule, Order XXVIII, Rule 1). In the case of an I C O, V C O or I' O R an authority in the following form will be sent to the court in which the case is to be heard —

*Whereas I (name) inhabitant of village
Tehsil... . in the district of . . .
son of of the caste of . . .
at present of rank in company
....., regiment , stationed
at having occasion to institute (or
defend) an action for (nature and object of suit and name of
adverse party) do hereby nominate and appoint (name, resi-
dence and caste and relationship, if any) to be my attorney,

*If security instructions do not allow of this form being completed in full, an explanation for the information of the court should added.

and I bind myself to abide by whatever he the said attorney may do on my behalf in the prosecution (or defence) of the said suit. The said attorney will either prosecute (or defend) the suit in person or will appoint one or more of the authorized valids of the court to prosecute (or defend) the same under the instructions of the said attorney as he may think proper. In the event of an appeal being preferred from the judgment passed in the suit, the said attorney is hereby empowered to act for me on the appeal in a like manner as in the original suit.

Signature

Signed in the presence of

(b) A power of attorney to institute or defend a suit executed by an officer or soldier in military employ is not chargeable with any court fee (Act VII of 1870 Section 19 Clause 1)

5 Indian Soldiers (Litigation) Act—(a) The Indian Soldiers (Litigation) Act provides for the postponement of civil suits in which the adverse party to a complaint etc., is an Indian soldier who is serving in a war area or is under orders to proceed on field service etc. A Collector may intervene if an Indian soldier is unrepresented in a law case and is unable to appear. The court must normally suspend the suit and report to the O. C. unit or the Depot, who advises whether postponement of the proceedings is advisable. A court is empowered under the Act to set aside decrees or orders passed against an Indian soldier who is on field service upon application from the soldier. Further many lawyers and District Bar Associations are ready to give free legal assistance to serving soldiers in cases certified by D. S. S. A. Bs, it being understood that such help will be afforded only in a legal manner and in open court.

(b) If	Indian soldier though
not a party	really concerned with
the outcome	that his interests are

likely to be prejudiced by his inability to attend the Court may suspend the proceedings

Indian soldiers who have been recruited from Indian States may rest assured that the States' Governments concerned have introduced protection from litigation during the war in respect of legal proceedings in State Courts in a like manner as it has been afforded in British India

(c) The interests of Indian soldiers in regard to the enforcing of the payment of debts due to them are adequately protected by the provision of section II of the Indian Soldiers' (Litigation) Act 1925

(d) In spite of the provisions of this act it is pointed out that, in cases where the right of pre-emption is claimed it is still necessary for action to be taken by the man concerned within one year of the sale regarding which he makes claim (1 A O 25/44 refers)

(e) Owing to the high cost of stamps required for judicial cases many ex-soldiers find they are unable to take their cases to court and they are consequently deprived of a judicial hearing. It is pointed out however that any one who is too poor to pay the prescribed court fees can apply to the court to allow him to sue as a pauper in which case he is not liable to pay any court fee (other than fee payable for the service of process)

6 Disposal of Families—Families of Indian Soldiers and non-combatants (enrolled) who are borne on authorised married establishments and are residing in government quarters can proceed to their homes at government expense when the heads of these families proceed on active service, or in other circumstances when ordered. Alternatively families may in these circumstances, proceed at government expense to the Training Centre Group Centre or Depot, provided that accommodation for them there is available and is not required for any other purpose (Vide Passage Regs., para 197)

7 Visits to Men in Hospital—Free conveyance will be granted to not more than two persons one of whom must be relative visit an officer cadet or I.O.R. reported as dangerous military hospital in India. The cost of conveyance be of the same class (allowable to the patient)

on arrival of the visitors at the hospital [A I (I) 100/44 refers]
 Similar concessions are allowable under Passage Regs para
 200 and A I (I) 94/42

8 Notification of Casualties—All casualties sustained by Indian Ranks, which are due to enemy action, and all cases of serious and dangerous illness including deaths, are notified to next of kin by record offices as soon as the information is received by them. Additional information regarding a particular casualty is also sent to the next of kin as received.

9 Ignorance of Soldiers' Whereabouts—This can best be remedied by the family's keeping in touch with the Training Centre/Depot or Unit to which the soldier belongs. Families can also obtain helpful information by consulting the local D S S A. B. Commanding Officers can help in this respect by impressing upon all ranks the necessity for writing regularly to their homes and by seeing that all letters bear the correct address of the unit (in this connection attention is drawn to I A. O 2387/43) since in many cases non receipt of replies from home is the cause of soldiers ceasing to write. O S C Depots and Training Centres have a definite responsibility in this respect under I. A. O 1021/44.

10 Punitive Police Tax—Provincial Govts and Commissioners, generally, have admitted the principle that the family of a serving soldier should not be liable for the payment of Punitive Police Tax, unless there is evidence that the family in question has by its behaviour forfeited the right to benefit by this exception. Should cases arise in which this principle is not followed reference should be made to the D S S A. B.

11 Local Concessions—The above concessions are for the most part applicable to all Provinces alike. In addition to these, there are many other local concessions peculiar to individual Provinces (e.g., canal water, taqavi, tenancy legislation, etc.) Such concessions can always be ascertained either from the P S S A. B. concerned or from the D S S A. B. of the District in which the soldier concerned lives.

12 Officers' Welfare Tours—One of the best methods of maintaining morale upon the home front and of detecting and redressing genuine grievances is for regimental officers to maintain touch with the men and their families in the villages.

by means of welfare tours of their recruiting areas. Such tours are authorised under I A O 278/44 and commanding officers are advised, when possible, to send each officer in turn on a tour of one of the unit recruiting areas as soon as they attain sufficient proficiency in the language to make this worthwhile. Officers proceeding on welfare tours will conform strictly to I A O 540/44.

13 Settlement of Accounts—One of the most common causes of discontent amongst ex servicemen and their families is delay in settling up men's accounts on discharge or invalidment from the service. Men are very often sent home on leave pending discharge with only a few rupees in their pockets and are told that a M O in full settlement of their accounts will be sent to them later. Although this course may be necessary on occasions, it results in delay before the man actually receives the money which is due to him and he is also unable to query his account. Thus, besides the bad effect upon morale of sending a man back to his village almost penniless the men themselves have quite often an unjustified suspicion that they have not received their full dues.

Commanding officers should give this point careful consideration and should take all possible steps to see that men's accounts are fully settled up before they are sent back to their villages.

Chapter VI.—Resettlement (Provisional)

A Directorate of Resettlement has been formed in the Directorate General of Welfare, Education and Resettlement, G H Q (I). This Directorate is charged with the Resettlement and Vocational Training of Technical, Non technical and Rural personnel and of Disabled men. The machinery and projects in view are given below.

2 Machinery.—The machinery is to consist of a Services Resettlement Liaison Officers (S R Ls), Employment Officers (S E Os), Civil and Services Bureaux.

on arrival of the visitors at the hospital [A I (I) 100/44 refers]
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12. Officers' Welfare Tours—One of the best methods of maintaining morale upon the home front and of detecting and redressing genuine grievances is for regimental officers to maintain touch with the men and their families in the villages

3 Technical Resettlement—The Labour Department is responsible for the re employment of technical ex service personnel (including officers) and, in order to further the interests of these personnel an A A G of the Directorate of Resettlement will be permanently posted with the Labour Department

Training Centres and Depots will forward index cards of demobilised technical men to the Civil Employment Exchange or Services Employment Bureau nearest to men's homes. The Services Employment Bureaux after noting the names and addresses of men and their Card Index will forward the cards to the appropriate Civil Employment Exchange. The latter will then hold index cards of all men living in the Area covered by their Exchange, thus ensuring that the names of ex servicemen are always available when it comes to placing men in jobs. These cards are being prepared in Training Centres and Depots for every serving man, including enrolled non combatants and show the trade category of each technical man. The service categories have been grouped in consultation with the Labour Department to show the equivalent civil category which will be accepted for employment in civil industry.

The various departments of the Central Government all Provincial Governments and some State Governments have already guaranteed a percentage ranging from 50 per cent to 75 per cent of appointments to ex servicemen.

In order to increase the number of technical jobs that will be available to absorb ex servicemen after the armistice, various schemes are being explored in the Directorate of Resettlement, such as Road Transport Boards, Factory Bns, Industrial Co operative Societies and Radio Factories.

4 Non Technical Resettlement—The resettlement and re-employment of non technical ex servicemen is not the responsibility of the Labour Department. It is the responsibility as far as G H Q (I) is concerned of the Directorate of settlement but their efforts will depend on the decision of Central Government and the resettlement schemes which are handled by (Resettlement and Re-employment) of Committee of Council.

Officers Commanding Training Centres and Depots will send the index card of every demobilised man to the Services Employment Bureau or Joint Manager of the Civil Employment Exchange nearest to his home

It will be the duty of the Training Centres and Depots to inform each man where his card has been sent and also to ensure that he knows the address of the D S S A B and A C L O nearest to his home. Many men will apply for employment to one of the latter rather than to an Employment Bureau. It will be the duty of the C L O and S S A B organizations to assist men to get work either direct or through Exchanges or Bureaux.

Various schemes have been evolved in the directorate of Resettlement for the betterment of conditions in rural areas and for the employment of non technical ex servicemen. These include Agricultural Headquarters and Welfare Institutes Zamindari Bns Health Corps Road Construction Bns and Corps of Commissionaires. These schemes are considered by Committee No 1 (Resettlement and Re-employment) of the R C C. Some have been already accepted and have been brought to the notice of Provincial Governments. It is probable that each Provincial Government will produce its own scheme which in some cases the above Provinces may also have adopted. A number of ex service men

5 Demarcation between Resettlement and Civil Liaison.—S R L Os and S F Os will direct would be employers of labour to Civil Employment Exchanges or to Services Employment Bureaux. C L Os/A C L Os will direct would be employees to the Bureaux. That is the general lines of demarcation between the function of the two organizations working under the control and coordinating direction of the C C L O.

6 Vocational Training.—The scheme for training men so as to be ready to play a useful part in any reconstruction plans commences with the mass mental preparation which, it is hoped will be effected by Education (Current Affairs). This will, in future be termed War Time Education and uplift subjects will in the fairly near future be dealt with in a

"Winning the Peace" series, assisted by various aids such as Provincial lecturers drama parties, films, gramophone records and posters. Furthermore, practical training will be given in Training Centres by the establishment of Demonstration Plots and Exhibition Rooms which recruits can visit in "off" hours.

Intensive vocational training cannot begin until the Armistice comes. Then, it is hoped, instruction will be carried out in all units. In order to provide instructors, Provinces have been asked to make preparations to train a cadre of selected men for every Training Centre. This cadre will in turn train selected men from each dependent unit, who will pass on their knowledge to the rank and file. Some Provinces desire to begin training now and it is hoped that this will be possible at Training Centres by the training of selected men from the trickle already being demobilised. The training of instructors in certain subjects will be carried out by G. H. Q. (I.), Medical Directorate and Engineer in Chief's Branch.

Vocational Training for Technical men is not far advanced. Information is awaited from the Labour Department as to which trades should be taught, having regard to Labour demands for workers. A large proportion of the training that it is decided to arrange will be carried out in Civil Centres and Army Instructional establishments. Some technical trades of the village industry nature will be included in the training programmes mentioned in the preceding paragraph.

PART II—FINANCIAL

Chapter VII—Pay & Allowances

1 Basic pay—The basic pay of all Indian soldiers and enrolled non combatants was increased by two rupees a month from 1 Apr 42. This brings the basic pay of a soldier up to Rs 18 a month and that of an enrolled non-combatant up to Rs 17.

The basic pay of V C Os has also been increased with effect from 1 Sept 44 and now stands at —

Risaldar Major/Subadar Major	Rs 200—15—260 (plus personal allowance of Rs 50 p m under existing rules)
Risaldar/Subadar	Rs 110— 10 —150
Jemadar	Rs 80 5 10

2 Proficiency pay—This is granted at the discretion of the C O. The original rate of Rs 2-8-0 a month could be granted after one year's service. Proficiency pay of one rupee a month can now be granted after six month's service. This can be increased to Rs 3-8-0 a month after one year's service.

3 Good Service pay—This is granted at the discretion of the C O to N C Os who satisfy him as to their zeal and efficiency. N C Os with two four and six years services as N C Os could be granted Rs 2, 4 and 6 a month respectively. These rates now apply in half the time—in other words after one two or three years service as N C Os. The third rate is, however, admissible only to Havildars (or equivalent rank).

4 Special Proficiency Pay—With effect from 1 Jan 44 Special (non tradesmen) Proficiency Pay at the rolling rates may be granted to Indian Soldiers below the rank of Jemadar, and enrolled non combatants excluding those in receipt of trade pay engineer pay signal pay M T pay or grade pay etc.

Rate A .

1 0 Rs —On or after 6 months' service excluding boy service

Rs 1 p m

Non combatants—After 6 months' service

Rs 2 p m

Rate B.

I. O. Rs.—On or after 12 months' service
excluding boy service Addl Rs 2 p m

Non-combatants—After 12 months' service Addl Re 1 p m

The grant of Special (non tradesmen) Proficiency Pay to Indian Soldiers, other than full N. C. Os, is subject to the passing of prescribed tests. This pay is admissible in addition to ordinary Proficiency or Good Service pay.

5 Expatriation allowance—This is granted to Indian troops service overseas at the following rates —

				Per month
				Rs
Subadar Major	..	..	..	22
Subadar	..	..	..	22
Jemadar	..	..	..	14
Havildar	..	..	..	11
Naik	..	..	..	11
L/Naik	..	..	..	7
Sepoy	..	..	..	7
Enrolled non-combatant			..	7

6. Batta.—This allowance is sanctioned when Indian troops are serving in a field service area at the following rates :—

Per month.

Rs

Subadar Major	..	..	..	21
Subadar	..	..	..	21
Jemadar	..	..	..	14
Havildar	..	..	..	11
Naik	..	..	..	11
L/Naik	..	..	..	8
Sepoy	..	..	..	8
Enrolled non-combatant		..	..	5-8-0

7 Deferred pay—A soldier earns this for every month of service but it is not paid to him until he is discharged or promoted V C O. It is a compulsory form of saving designed to ensure that the soldier has some capital to assist him to settle down in civil life when he leaves the army. The present rates are —

I O Rs

Rs 3 p m

Non combatants

Rs 1 p m

It should be noted that deferred pay is not paid to a man with less than four years service unless he (a) is mustered or (b) is killed on field service (including operations conducted under the Special Procedure Pamphlet) or (c) dies or is invalided as a result of field service (including operations conducted under the Special Procedure Pamphlet). Deferred pay is admissible to I O Rs who are killed, die or are invalided as a result of hostile action on the N W Frontier before completion of four years service provided the death or invalidment was not due to the man's gross negligence or misconduct.

Chapter VIII.—Pensions & Gratuities

[N B—With effect from 1st November 1943 all Service, disability and family pensions have temporarily (for 1 year in the first instance) been increased at the following scale, vide A. I (I) 15/44 —

(i) For pensions not exceeding Rs. 20 p m

Rs 3 p m

(ii) For pensions exceeding Rs. 20 p m but not exceeding Rs 40 p m

Rs 4 p m

(iii) For pensions exceeding Rs 40 p m but not exceeding Rs 44 p m

An amount which will bring the pension up to Rs 44 p m

Children's allowance are regarded as part of the family pension and do not separately earn any increase under the above scale]

1 Service pensions—The rates of ordinary pensions vary with the total length of service the rank held and the cause of discharge

Ranks	Length of service	Pension admissible,
Reservist	15 years combined colour and reserve, service	Rs 3 p m or a gratuity of Rs. 300
Sepoy and others ranking as such.	15 years.	Rs 5 p m
Nalks	18 years .	Rs 6 p m.
Havildar and other equivalent ranks	18 years	Rs 9 p m
	21 years	Rs 12 p m
Jemadars	20 years	Rs 15 p m
	21 years	Rs 30 p m
	22 years	Rs 32 p m
	23 years	Rs 34 p m
	24 years	Rs 37 p m
Subedar and Subedar Majors including those of equivalent rank	24 years	Rs 40 p m
	25 years	Rs 55 p.m
	26 years	Rs 57 p m
	27 years	Rs 60 p m
	28 years	Rs 63 p m
	29 years	Rs 66 p m
	30 years	Rs 69 p m
	31 years	Rs 72 p m
	32 years	Rs 75 p m
Enrolled non combatant—After	25 years	Rs 5 p m

NOTE 1—The pensions of Subedars or Subedar Majors are usually doubled if they are given honorary rank of Lieutenant or Captain before being discharged.

NOTE 2—Subedar Majors or Risaldar Majors are generally allowed to enhance their pension by their personal allowance of Rs 50 per mensem.

NOTE 3—Special gratuities and pensions are granted as compensation for premature discharge on account of government policy

2 Special Pensions—Special pensions are allowed when individuals are discharged in special circumstances other than by reasons of state policy, before they have earned their ordinary pensions, but have rendered 15 years qualifying service and over

Rank.	Pension admissible
Nalks or others ranking as such	Rs. 7 p.m.
Havildar and others ranking as such	Rs 9 p.m.
Jemadars	Rs 25 p.m.
Subedar and Subedar Majors, and equivalent ranks	Rs. 45 p.

3 Special Gratuities—(a) Soldiers discharged in special circumstances with less than 15 years service are granted gratuities as follows —

Length of service

Gratuity

5 to 10 years

3 months pay and G S, G C & P P, if any.

10 to 15 years

6 months pay and G S, G C & P P, if any

(b) Non combatants (enrolled) when discharged for cause beyond their control are granted gratuities as follows —

With 5 to 10 years service

3

With 10 to 15 years service

4

With 15 to 20 years service

5

With 20 to 25 years service

6

} months pay

4 Disability pensions—When a man is disabled for cause attributable to military service a disability pension is granted. The rates of disability pension vary with the percentage of disability and the rank held. The rates of disability pension are different for field service and peace service. Higher rates of disability pension are granted where a service pension has also been earned. The table below shows the rates of disability pension in respect of combatant personnel of the Indian Army where no service pension has been earned.

Rank	Disability pensions at Field Service Rates									
	100 %	90 %	80 %	70 %	60 %	50 %	40 %	30 %	20 %	Under 20%
Sepoy	18	16	14	13	11	9	8	8	8	2 months' pay, G S, G C, or 1 P, if any
Naik	22	20	17	16	13	11	10	10	10	Do
Havildar	25	22	20	18	15	12	11	11	11	Do
Jemadar	60	57	51	51	48	45	42	33	36	Do
Subedar or Subedar Major.	110	104	99	93 8	83	82 8	77	71 8	66	Do

Disability pension is admissible to an enrolled non combatant at $\frac{3}{4}$ the rate payable to a Sepoy in similar circumstances.

5 Special Family Pension and Children's Allowance — These awards are admissible when a soldier is killed on active service or dies of an attributable cause. The rates which depend on the rank of the deceased are as follows —

Rank	Pension of family pension	Pension of children's allowance
Sepoy Naik and Havildar	Rs 5 p m	Rs 2 p m
Jemadar	Rs 10 p m	Rs 4 p m
Subedar or Subedar Major	Rs 15 p m	Rs 6 p m

NOTE 1 — An ordinary family pension of Rs 20 per mensem is granted to the family of Veterans Commissioned Officers granted honorary King's commission or commissions as honorary Indian Commissioned Officers while on the effective list and who die of non-attributable causes.

NOTE 2 — The families of enrolled of non combatants are eligible to receive family pensions and children's allowances at $\frac{3}{4}$ the rate admissible in the case of sepoys.

6 Death Gratuities — When soldiers are killed in action or die of wounds received in action, their families are granted in addition to family pension death gratuities at the following rates —

	Rs
Enrolled non combatants	75
Sepoy Naik and Havildars	100
Jemadar	600
Subedar or Subedar Major	1200

Ex gratia death gratuities are allowed in deserving cases of death due to diseases and accidents arising on overseas service.

These gratuities are intended to obviate hardship titles to pensions are being verified and the other necessary formalities are being completed.

7 Procedure for claiming Disability pensions—A soldier who contracts a disability which is likely to interfere with his efficiency as a soldier is brought before a medical board. If the medical board declares him unfit for further service he is invalided with convenient speed. His right to a disability pension depends on his invaliding disability being attributed to military service and being of a pensionable degree. Steps to claim the pension are then taken by the O C Training Battalion, Depot or Centre, concerned. A higher rate of disability pension is admissible if the disability is attributed to field service.

Delays in the grant of disability pensions are mainly due to —

(a) A soldier changing his address after discharge and not informing his commanding officer or the pension sanctioning or paying authorities

(b) Failure on the part of a soldier who is granted a disability pension for a specified period, to appear before re-survey boards on being called for, or failure to represent his claim for continuance of pension to the authorities concerned

(c) Delay on the part of the Depot, etc., in putting up a complete case for sanction.

As regards (a), responsibility rests with the soldier upon whom the importance of informing his C O or the pension disbursing officer should be impressed. If the soldier is in doubt as to whom he should address he should consult the local DSSAB. As regards (b), responsibility for bringing the soldier before a re-survey medical board when necessary rests with the C O concerned. If the Soldier does receive intimation when it is normally due he should write at once to his O C or the pension disbursing officer or consult the local DSSAB.

8 Procedure regarding Family pensions—(a) A family pension is payable to the heirs of a soldier or enrolled non-combatant whose death is attributed to military service. Death may occur in a military hospital or at his home. In the latter case the death must be reported at once, together with a description of its cause to the O C the unit under which the man last served. Family pension claims are initiated by

the O C depot/unit etc who submits them for the orders of the pension sanctioning authority. After the latter has decided that case is attributable the former sends it to the local civil authorities (see I A O 899/44) for investigation as to the eligibility of the heirs. However in fatal battle casualty cases, action to verify the eligibility of the heirs through local civil authorities is taken without first obtaining the orders of the pension sanctioning authority (See I A O's 143/44 and 485/44). Delays in payment of family pensions are mainly due to —

(1) Non-submission of a report to the C O when a soldier dies at his home from the disease associated with his disability pension or in connection with the disability for which he was granted sick leave

(ii) Non-submission of a report when the first recipient of a pension dies and other eligible heirs are still alive

—

The necessity for the submission of reports in respect of both (1) and (ii) above should be impressed on soldiers' families

(b) When a soldier or enrolled non-combatant dies on active service his heirs are immediately informed by the O C Training Battalion Depot or Centre concerned who is responsible for the submission of a family pension claim on behalf of the heir nominated by the man. The DSSAB concerned is also informed (vide I A O 1219/44 para 4)

(c) All enquiries from interested members of a deceased soldier's family should be addressed to the O C concerned. If there is doubt as to which military officer should be addressed the local DSSAB should be consulted

9 Payment of pension—(a) All grants of pension are notified in pension circulars printed copies of which are forwarded to all pension disbursing officers, who issue "calls" to pensioners intimating the date on which they must attend for payment. Pensioners (other than family pensioners) are issued with last pay certificates by their commanding units for production before the pension disbursing officer when claiming the first payment of pension. If there is any delay in the issue of the last pay

the soldier should at once write to his commanding officer or to the pension disbursing officer. When the pension is sanctioned a pension certificate is issued to the soldier. On its production by the pensioner, together with the last pay certificate, the pension paying officer will make payment.

(b) Purdah Nashin ladies who are not accustomed to appearing in public, and pensioners who cannot appear personally owing to age or infirmity may draw their pensions through a representative who is required to produce the following documents —

(1) The pensioner's pension certificate

(ii) A written authority from the pensioner to the representative

(iii) A life certificate on the form supplied by the pension disbursing officer

(c) Pensions are payable at the intervals shown on the pension certificate

(d) Pensioners resident in the Punjab who are in receipt of pensions below Rs 50 per mensem may draw them by money order, at their own expense, from the nearest treasury. Applications to do so should be submitted in writing to the pension disbursing officer.

(e) All enquiries regarding transfer of pension accounts from one station to another, or complaints regarding the non receipt of pensions, should be addressed in writing to the pension disbursing officer or to the local DSSAB

10 Review of claims which have been rejected because the death or disability was not considered to be due to war service—With effect from 16th August 1943, the Government of India introduced new rules which were to govern decisions on pension cases. These rules were the application to India of the Ministry of Pensions rules, which came into effect in the U.K. from the same date.

All claims which have been considered and rejected under the rules in operation before 16th August 1943 are being reviewed, and if they are admissible under the rules now operating, payment of pension will be made with retrospective effect from 16th August 1943.

Officers commanding units, depots and centres, etc., are responsible for forwarding to the reviewing authority on

behalf of the claimants all cases which have been rejected since 3rd September 1939 and prior to the issue of Army Instruction (India) No 43/1944 dated 5th February 1944 which introduced the new rules

Chapter IX—Family Allotments

1 Commanding Officers should impress upon all ranks the necessity for providing for their families (See I A O 1053/42)

2 A soldier whose account is maintained on the war system can arrange through his commanding officer, to make a regular allotment to his family. All that the soldier is required to do is to ask his commanding officer to take the necessary action with the depot or training battalion. The soldier should ensure that the full name and address in India [father's name (or husband's name in the case of married females) village tehsil district and the nearest Post Office] of the person to whom he wishes to make an allotment are given. Family allotments may be made in favour of two persons at the same or different places in India.

3 Payment of family allotments is arranged by officers commanding depots or training battalions as follows—

(a) If the Allottee resides in the station or locality where the depot or training battalion is situated the commanding officer of the depot or training battalion pays the allotment direct to the Allottee in cash once a month. Where local payment of family allotments in cash is not convenient payments may be made by money order on the blue money order form at the discretion of the officer commanding the depot or training battalion. No money order or other commission is charged.

(b) If the Allottee lives in an out-station the officer commanding the depot or training battalion arranges for the allotment to be paid to the Allottee by money order once a month free of money order or other commission, on the blue money order form.

(c) For Gurkhas the Officer Commanding Gurkha Record Office Kunraghat or Ghoom can arrange family allotments through the British envoy at

of Nepal, Khatmandu Payment of family allotments to the families of Gurkha soldiers residing at a considerable distance from Khatmandu can be made by the recruiting officer for Gurkhas Kunraghat in a lump sum once a year during the Winter months

4. Family allotments are now despatched from depots/record offices in approximate even numbers daily from 5th to 28th of each month (*vide* A I (I) 380/43) Relatives should be told to note the day on which the Family Allotment is usually paid and if payment in any month is delayed by more than 15 days, they should bring the fact immediately to the notice of the O C Depot/Record Office or the local D S S A B

5 It costs the soldier nothing in transit charges to make a family allotment from his pay and the allottee also has to pay nothing on this account All that is necessary is for the correct particulars of allottees to be given to the officer commanding the Depot/Training Centre, who should be kept informed of any changes in addresses of allottees

6 As a general rule changes in the amount of family allotment will be permitted only once a quarter but officers commanding units may permit changes at other times when special circumstances justify this Whenever a change is made or an allotment is discontinued the reason must invariably be explained to the allottee by the O C Depot/Record Office (I.A.O 793/44 refers)

7 Soldiers are also entitled to the further concession of making at any time casual remittances to their specified nominees through public accounts from the individual balances standing to their credit In cases of urgency, units in the field may arrange by air mail with Depots etc., to make such remittances.

8 An arrangement also exists whereby Indian soldiers (including recruits) serving under normal peace conditions can make regular remittances, through the official accounts to their families. Such remittances are entirely at the expense of the soldier

9 Insurance Premia.—Indian other ranks serving overseas, and those serving in certain areas in India may remit insurance premia through the public accounts, either to a specified allottee for payment to an insurance company, or

to the insurance company concerned direct Payment will be made in the same way as for a family allotment, and will, subject to certain conditions, continue to be paid even after a soldier is reported "missing" or "prisoner of war"

Policies issued by the majority of insurance companies do not cover war risks. It is, therefore, very important that a soldier, before he goes on field service, should ascertain whether his policy provides for war risks and, if not, he should arrange for its modification to cover such risks by the payment of an extra premium. Failure to take this action may result in a soldier being inadvertently deprived of valuable benefits under his policy.

In no circumstances will the impending move of the soldier or his new location be disclosed to the insurance company

Chapter X—Miscellaneous Pensions, Gratuities, etc.

1 Post-War Reconstruction Fund—Two rupees a month for each serving soldier and one rupee for each non-combatant is paid annually into a fund designed for financing welfare schemes for the benefit of Indian soldiers and their families. In no circumstances is any money from this Fund payable to any individual. This Fund came into effect in April, 1942

2 Special Pension for Blinded Soldiers—A special pension of Rs 5 per mensem is granted by the ISSAB to every Indian (including Anglo Indian) soldier and enrolled non-combatant blinded as the result of his service during the present war (IAO 150/42 refers)

3 Charitable Funds controlled by the ISSAB—The following funds controlled by the ISSAB exist to provide relief to Indian Ex Servicemen (and their dependants) who have been discharged from the service and are not eligible for relief or a pension from public funds

- (a) Indian Defence Services Benevolent Fund
- (b) Defence Forces Relief Fund
- (c) VCOs and IWOs Relief Fund
- (d) Sir Victor Sassoon Fund
- (e) Indian Forces Medical After Care Fund

Full details of these funds, their purpose and the procedure for applying for relief will be found in Appendices "O" to 'K'

4 Relief for Indian Servicemen and their Families from the UP War Purposes Fund—A relief scheme for the benefit of Indian Servicemen (including enrolled non combatants) and their dependants belonging to the UP has been instituted by H E the Governor of the UP Full particulars of the scheme and method of application for relief will be found in I A O 2858/42 (as amended by Corr No 57/44)

5 Relief for Indian Servicemen and their families from the NWFP War Purposes Fund—A relief scheme for the benefit of Indian Servicemen (including enrolled non combatants) and their dependants belonging to the NWFP has been instituted by H E the Governor of the NWFP Full particulars of the scheme and method of application for relief will be found in I A O 983/43 (as amended by Corr No 58/44)

6 Relief for Indian Servicemen and their dependants belonging to the Punjab—H E the Governor of the Punjab has instituted a scheme for the relief of disabled servicemen (and enrolled non combatants) belonging to the Punjab and their dependants Full particulars of the scheme and method of application will be found in I A O 1458/43 (as amended by Corr No 59/44)

7 Relief for Indian Soldiers and non combatants (enrolled) and their families from the Rajputana War Purposes Fund—A relief scheme for Indian troops and non-combatants (enrolled) and their families belonging to Rajputana has been instituted by the Resident for Rajputana from the Rajputana War Purposes Fund Full particulars and method of application will be found in I A O 2211/43

8 Savings—With a view to encouraging the soldier to save money against the day when he will leave the Army, interest is paid at the rate of annas six for each complete sum of Rs 50 of undisbursed pay which is lying at the end of each quarter in the accounts of VCO's and IOR's whose accounts are maintained on the war system. Interest so earned is exempt from income tax.

Interest will not be credited if the soldier informs his commanding officer that he does not wish to receive it

PART III.—POSTAL.

Chapter XI — Addressing of Letters and Arrangements for Writing

1 The regular receipt of letters from home is one of the chief factors in maintaining the morale of the fighting soldier. Likewise the receipt in the villages of regular communications from absent menfolk is a most important factor in maintaining morale upon the home front. Commanding Officers should therefore do everything within their power to encourage and assist the regular exchange of correspondence between soldiers and their relatives at home (vide I.A.O. 1397/42).

2 One of the chief reasons for the non receipt of mail either by the soldier or his relative is the incorrect addressing of letters. Commanding Officers should therefore ensure that every letter which leaves their Unit bears the correct address of the Unit written (or stamped) in a legible manner. It should be part of the Unit Censor's duties to ensure that this is done. I.A.Os 2387/43 and 1225/44 contain useful suggestions on these lines and should be carefully studied. When troops use the green envelope it is suggested that they be encouraged to have the address stamped on the paper before they write their letters.

3 Addressing of Correspondence.—The number, rank, name and unit of the soldier must be clearly written in the address.

(a) Surface Mails for soldiers proceeding overseas should be addressed c/o Base Postal Depot, Bombay.

Example — No 12345 Sepoy Ram Singh,
218 Punjab Regt
c/o Base Postal Depot
BOMBAY

(b) Air Mails for soldiers proceeding overseas should be addressed c/o Base Air Post Depot Karachi.

Example — No 12345 Sepoy Ram Singh
28 Punjab Regt
c/o Base Air Post Depot,
KARACHI

NOTE — When the soldier has communicated his overseas address, correspondence should be addressed and not c/o Base Postal Depot, Bombay Karachi.

over-
Depot,
J

(c) Correspondence for soldiers serving in India should be addressed c/o the appropriate Base Post Office or Civil Post Office

Examples —No 12345 Sepoy Ram Singh
2/8 Punjab Regt
c/o 100 Ind Adv BPO
OR
No 12345 Sepoy Ram Singh
2/8 Punjab Regt
LAHORE

4 Insured letters—Insured letters cannot be sent addressed to or from Army Post Offices

5 Writing of letters—In the villages members of the Civil Liaison Officer Organisation Welfare Workers Fauji Sevadarnis etc are constantly engaged in arranging parties of voluntary letter writer to assist illiterate relatives to write to their serving men. Commanding Officers should similarly arrange for literate servicemen to write regular letters for their illiterate comrades

Chapter XII—Postal Concessions

1 Postage—Surface Mail—(a) To places in India—Indian Soldiers serving overseas and in the concessional areas in India are entitled to send ordinary correspondence weighing up to two tolas to their homes free of postage. All other troops and all relatives must pay postage on their letters and postcards at the normal inland rates (except in the case of prisoners of war—see Chapter XVII)

(b) To places abroad—Indian soldiers serving anywhere in India are entitled to send ordinary correspondence weighing up to 2 ozs to places overseas free of postage

(c) Relatives of Indian soldiers are often under the impression that they need not stamp their letters addressed to men on active service. Commanding Officers should impress upon their men the desirability of informing their relatives that this is not so since unstamped letters are either returned to the sender or the addressee is asked to pay double the correct postage charge

2 Postage—Air Mail—The rate of postage on Air Mail letters to troops overseas has been reduced from 14 As to 8 As per half ounce or 1 1/4 tola. If the weight of a letter exceeds half an ounce charges are payable at 14 As. per half ounce.

Air Mail Post Cards are available at all Post Offices at a cost of 4 As each. These are strongly recommended for use by relatives writing to men overseas.

3 Recruits Joining Post Card—On a recruit first joining his training centre or Recruits Reception Camp, he is entitled to send his next of kin one free post card announcing his arrival and giving his correct official address (IAO 1021/44 refers). It is the responsibility of Commanding Officers to see that these post cards are promptly despatched and are correctly and legibly completed as regards the address. On occasions where clerks are detailed to write cards for illiterate recruits it is not uncommon to find that the cards are almost illegible. This point needs careful watching.

4 Safe Arrival Cards (IAF Z 2159)—When Indian soldiers arrive overseas from India a safe arrival post card is despatched by the OC to the next-of-kin of each man. This card informs the next-of-kin of the correct address of the soldier and contains other information of interest to the next-of-kin. It is most important that these cards are invariably and promptly despatched in accordance with the procedure outlined in IAO 396/44.

5 Free Air Mail Letters—On arrival at overseas destinations soldiers can send two free Air Mail Letters to their next of kin in India. They will be supplied with the necessary postage stamps in two batches, the first immediately on arrival overseas and the second after about a month, or earlier if circumstances justify the despatch of the second letter before the expiry of a month. It is important that—

(a) the first letters be posted very soon after arrival overseas,

(b) all individuals take advantage of the concession,

(c) the letters are correctly addressed to the kin.

Two free air mail envelopes with explanatory letters supplied to the next-of-kin of soldiers when they first

(c) Correspondence for soldiers serving in India should be addressed c/o the appropriate Base Post Office or Civil Post Office

Examples —No 12345 Sepoy Ram Singh
2/8 Punjab Regt
c/o 100 Ind Adv B P O
OR
No 12345 Sepoy Ram Singh
2/8 Punjab Regt
LAHORE

4 Insured letters—Insured letters cannot be sent addressed to or from Army Post Offices

5 Writing of letters—In the villages members of the Civil Liaison Officer Organisation Welfare Workers Fauji Sevadarnis etc are constantly engaged in arranging parties of voluntary letter writer to assist illiterate relatives to write to their serving men folk Commanding Officers should similarly arrange for literate servicemen to write regular letters for their illiterate comrades

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(a) the first letters be posted very soon after arrival overseas

(b) all individuals take advantage of the concession,

(c) the letters are correctly addressed to the next-of-kin.

Two free air mail envelopes with explanatory ' supplied to the next-of-kin of soldiers when they

oversers. These envelopes should be posted to the soldiers in accordance with the instructions contained in the explanatory letters. Next of kin are advised to post the first letter as soon as possible after they receive the printed envelopes and the second letter should be posted two or three weeks later unless some urgent matter arises which the next of kin desires to communicate earlier to the soldier overseas. Next of kin should understand that all they need to do is to write a letter on thin or light paper place it in the envelope sent to them and post it. The letters are not to be stamped and the weight of a letter must not exceed half an ounce (equivalent to 1 1/4 tolas approximately).

6 Air Letters—Soldiers serving overseas are entitled to send six Air Letters per four weeks to their relatives in India at the reduced rate of 3 annas per letter. The cost of the postage will be met by the soldier. Soldiers serving in India are entitled to send Air Letters to friends and relatives in East African Forces Middle East Forces British North African Forces Allied Armies in Italy and Panforce. The postage is 4 annas.

7 Free Air Mail Greetings Letter Cards—Soldiers serving overseas may send one free Air Mail Letter Card on the occasion of the main religious festivals. The object of this concession is to enable the individuals overseas to send free letters on occasions (such as Christmas Day for Christians) when it is customary to write to near relatives. For this reason the main religious festivals of Id ul Fitr (Mohammadans), Diwali (Hindu) Guru Nanak's Birthday (Sikhs) Dusehra (for Gurkhas only) or Christmas (Christians) have been chosen.

8 Airgraph Service—The airgraph service at the concessional rates of 3 annas per letter is available to the U.K. Eire Canada Newfoundland Australia New Zealand New Hebrides Fiji and Tonga Islands. H.M. Forces in Gibraltar, the Forces the Allied the British West and Gambia 1st Sierra Leone

A Special Airgraph form is obtainable from Post Offices and full instructions for the use of the form will be found on the reverse.

These forms must be franked by the signature of the Officer Commanding or the duty and the unit etc. for military personnel on leave forms, nearest military headquarters and through India by Embarcation.

The transit period between date of destination may be expected to be not less than

Chapter XIII—Telegrams

1 E F M Telegram Service—This is between Indian soldiers serving over seas and relatives in India. It is unit for d and is available to all Countries in the British Empire and also to Bahrein and Muscat, Iceland and Faroe Islands.

2 E F M Telegrams will be addressed as follows:

- (i) Army Number (in case of Other Ranks)
- (ii) Rank
- (iii) Initials and name
- (iv) Squadron|Battery|Company (if known)
- (v) Battalion and Regiment or appointment and headquarters
- (vi) The words "FIELD SERVICE" (or the words "the Expeditionary Force if known")

3 These telegrams must bear the indication "EFM" before the address.

4 Only standard texts as given in the printed list available at any P. O. are permitted in this class of telegram. The message is limited to three numbers selected from the list. Telegrams not covered by the standard texts will have to be sent as one of the other classes of telegram available and paid accordingly. Senders must consult the list of standard texts available at the Post Office accepting such telegrams. The choice of choosing the texts and writing the appropriate numbers on the telegram form rests solely with the

5 The signature on E F M telegrams ordinarily should not exceed two words, one of which must be the surname

6 The following is an example of a telegram —

E F M = 12345 Sepoy Ram Singh
2/15 Punjab Regiment
FIELD SERVICE
15 19 29
Prithvi Singh

This message will, when delivered read “ 12345, Ram Singh, 2/15 Punjab Regiment Field Service No news for some time Please write Love Prithvi Singh ’

7 This class of telegrams is charged for at the flat rate of Rs 1—11 per telegram with the exception of telegrams to Iceland and the Faroe Island the flat rate for which is Rs 2 per telegram The total number of chargeable words in the text and signature must not exceed 6 The figure groups indicating standard texts must be written separately They are each counted as one word even when completed by a name or number in letters

8 In no case will telegrams for personnel proceeding over seas be sent c/o Embarkation Commandants or with incomplete addresses

9 Ordinary Telegrams—Ordinary telegrams to which the above concessions do not apply, will be charged for in the usual way including the address Particulars of charges may be obtained from the local Post Master

They will be addressed as for an E F M telegram with the exception that the indication E F M will not be included

Chapter XIV—Money orders and Savings Bank Accounts

1 Money Orders—Money Orders cannot be sent for payment by an Army Post Office

2 Difficulty in obtaining payment of money orders—Complaints are often received about delay in payment of money orders sent by Indian troops to their families In several

instances it is alleged that certain postmen demand illegal gratification and that when such payment is not forthcoming, money orders are deliberately returned with the remarks 'Addressee not found' or 'Addressee not known'. Instructions have been issued by the Director General, Posts and Telegraphs to obviate these irregularities and to provide for the prompt delivery of money orders. Departments of the Central Government have also addressed their local officers on the subject and an arrangement exists whereby District Officers, etc., help the postal authorities in tracing addressees (see also I A O 2503/42).

3 Savings Bank Accounts—A P O Savings Bank Account can be opened or money deposited in a Savings Bank Account already opened in India in any Army Post Office.

A soldier on active service can authorise a near relative of his to operate his Savings Bank account or discharge Postal Cash or Defence Certificates. To do this the letter of authority should be sent through the O C of the Unit direct to the Post Master of the Office in India where the Savings Bank Account stands open or where the Certificates are registered. The relative so authorised will be allowed to transact Savings Bank work or discharge the Certificates on production of the Savings Bank Pass Book or Certificates in the usual manner. The Savings Bank Pass Books can be sent free of postage to the relative through the Post Office in the Field. Similarly it can be returned to him free of postage.

PART IV—P OF W (AND "MISSING")

Chapter XV—Pay and Allowances

1 Indian soldiers and others subject to the Indian Army Act reported prisoners of war —

(a) Pay will continue unless and until it has been proved before a Court of Enquiry that a soldier was taken prisoner of war through neglect of duty or misconduct on his own part

(b) The above procedure will also apply in the case of a soldier who was first reported missing and is afterwards declared to be a prisoner of war, any arrears of pay due being credited to his account and any over payment on account of family pension if granted in the meantime being waived

2 Indian soldiers and others subject to the Indian Army Act reported missing —

(a) The pay of a soldier reported missing will continue to be credited in his pay account for a period of two calendar months after the end of the month in which intimation is received in India in the unit or depot concerned that the man is missing

(b) If the news of the soldier's death is received in India in the unit or depot concerned before the expiry of the two months his pay will be credited in his pay account only up to and for the date of his death

(c) If there is definite evidence that a missing soldier was alive on a date subsequent to the expiry of two months his pay will be credited up to and including that date

(d) If a soldier reported missing rejoins subsequently and his commanding officer is satisfied that the absence of the soldier was due to circumstances beyond his control or if a soldier is found to be interned in a neutral Country not through his own fault, the accounts of the soldier concerned will be adjusted so that any over payment on account of family pension, etc., is waived, and any arrears due to the soldier, on account of pay, are paid

(e) Death will normally be presumed after the lapse of a period of nine calendar months after the end of the month in which intimation was received in India by the unit

or depot concerned that the man was missing. In the case of Indian Military Personnel who were serving in Hong Kong, Malaya, Burma and the Far East and who have been reported missing or about whom no official intimation has been received, it has been decided that death shall not be presumed without further orders.

3 Civilian Subordinates—Civilian personnel (gazetted or non gazetted) taken prisoners of war, reported missing or presumed dead will be treated similarly for purposes of the grant of pay family pensions and continuance of family allotments.

Chapter XVI—Family Allotments and Pensions (P of W and "Missing")

1 Family Allotments—Prisoners of War—(a) Allotments already in issue continue to be paid at the original rates, and until it is proved before a court of enquiry that a man was taken prisoner of war through neglect of duty or bad conduct on his part.

If a soldier is first reported missing and afterwards found to be a prisoner of war, any arrears of pay will be credited to his account and any overpayment on account of family pension if granted in the meantime, will be waived. In that case the family allotment will recommence from the date on which the family pension was stopped.

(b) If the soldier did not elect to make a family allotment an officer not below the rank of lieutenant colonel or in a training battalion training centre depot or record office, who maintains the accounts of the individual, or any higher authority, may authorise the payment of a reasonable family pension to the soldier's dependants. If the soldier had made a family allotment but it was fixed at too low a rate the same authority may increase it to an amount considered necessary for the adequate maintenance of the dependants concerned. As a general rule the increase in this way will not exceed 60 per cent. of the amount admissible to the soldier.

(c) In addition to allotments, payment of a lump sum grant to a dependant of the soldier from the credit balance shown in his account is permissible in special and necessitous cases.

(d) Payments of insurance premia (if any) will continue to be made through public accounts (vide Ch IX para 9)

2 Family Allotments—'Missing'—(a) Allotments already in issue will continue to be paid for a period up to seven months from the date the next of kin was informed that the individual was missing, provided that no definite information as to the soldier's fate has meanwhile been received

These payments will be made even though pay has ceased to be credited to the soldier's account the amount being drawn monthly and remitted to the allottee by the O C the depot or unit in India

(b) There are similar provisions as to authorising or increasing allotments, as to the payment of lump sum grants to dependants, and as to the payment of insurance premia, as are shown above in relation to prisoners of war but where allotments are authorised or decreased as shown above, the payment of them is, in the case of missing personnel, only permissible for a period up to seven months from the date when the casualty was notified to the next of kin

[Note—In the case of Indian soldiers (including V C Os) who were serving in Hong Kong, Malaya, Burma and the Far East, who have been reported "missing" or about whose fate no official intimation has been received, special temporary rules have been introduced providing for the continuation of family allotments until further orders]

3 Special Family Allowance—"Missing"—(a) From the time that the family allotment ceases [vide para 2(a) above] until death is presumed [vide Ch XV para 2(e)] a special family allowance, at the rates specified below, will be granted to the recipient of the family allotment

(b) After death is presumed or established a special family allowance, at the rates specified below, will be granted to the beneficiary nominated for a family pension until the family pension is granted. This special family allowance is granted in both cases without verification.

The rates of special family allowance are as follows —

Viceroy's Commissioned Officers (excluding Assistant Surgeons (I.C.) and Veterinary Assistant Surgeons) holding honorary King's Commission or commission as honorary Indian Commissioned Officers except those granted honorary rank of Lieut. or Capt. under R.A.I. Rules 245 and 538

Rs 75 p.m. plus Rs 6 p.m. for each living child shown on the kindred portion of the sheet roll

Assistant Surgeons (I.C.) and Veterinary Assistant Surgeons holding honorary King's Commission or commission as honorary Indian Commissioned Officers

Rs 50 p.m. plus (1) an increase Rs 5 p.m. for each year or part of — — — — —

the sheet roll

Subedar Majors Subedars and others ranking as such.

Rs 50 p.m. plus Rs 4 p.m. for each living child shown on the kindred portion of the sheet roll

Jemadars and others ranking as such

Rs 25 p.m. plus Rs 4 p.m. for each living child shown on the kindred portion of the sheet roll

I.O.Rs

Rs 8 p.m. plus Rs 2 p.m. for each living child shown on the kindred portion of the sheet roll

Enrolled non-combatants and civilians governed for family pensions under military rules —

On pay less than Rs 200 a month but not less than the minimum pay of Subedar of Indian Infantry

Rs 50 p.m. plus Rs 4 p.m. for each living child shown on the kindred portion of the sheet roll

On pay less than the minimum pay of a Subedar of Indian Infantry but not less than the minimum pay of a Jemadar of Indian Infantry

Rs 25 p.m. plus Rs 4 p.m. for each living child shown on the kindred portion of the sheet roll

On pay less than the full minimum pay of a Jemadar but not less than two-thirds of the minimum pay of a Jemadar of Indian Infantry

Rs 16 p.m. plus Rs 3 p.m. for each living child shown on the kindred portion of the sheet roll

On pay less than two-thirds of the minimum pay of a Jemadar of Indian Infantry but not less than the pay of a Sepoy of Indian Infantry

Rs 8 p.m. plus Rs 2 p.m. for each living child shown on the kindred portion of the sheet roll

On pay less than the pay of a Sepoy of Indian Infantry

Rs 6 p.m. plus Rs 1.5 p.m. for each living child shown on the kindred portion of the sheet roll

(c) In addition to allotments, payment of a lump sum to a dependant of the soldier from the credit balance of his account is permissible in special and necessitous cases.

(d) Payments of insurance premia (if any) will be made through public accounts (vide Ch IX para 2).

2 Family Allotments—Missing.—(a) Allotments already in issue will continue to be paid for a period up to seven months from the date the next of kin was informed that the individual was missing provided that no definite information as to the soldier's fate has meanwhile been received.

These payments will be made even though pay has ceased to be credited to the soldier's account the amount being drawn monthly and remitted to the allottee by the O C the depot or unit in India.

(b) There are similar provisions as to authorising or increasing allotments, as to the payment of lump sum grants to dependants and as to the payment of insurance premia as are shown above in relation to prisoners of war but where allotments are authorised or decreased as shown above, the payment of them is in the case of missing personnel only permissible for a period up to seven months from the date when the casualty was notified to the next of kin.

[Note—In the case of Indian soldiers (including V C Os) who were serving in Hong Kong, Malaya, Burma and the Far East, who have been reported 'missing' or about whose fate no official intimation has been received special temporary rules have been introduced providing for the continuation of family allotments until further orders.]

3 Special Family Allowance—'Missing'.—(a) From the time that the family allotment ceases [vide para 2(a) above] until death is presumed [vide Ch XV para 2(e)] a special family allowance, at the rates specified below, will be granted to the recipient of the family allotment.

(b) After death is presumed or established a special family allowance, at the rates specified below, will be granted to the heir-nominated for a family pension until the family pension is granted. This special family allowance is granted in both cases without verification.

The rates of special family allowance are as follows :—

Viceroy's Commissioned Officers [excluding Assistant Surgeons (I C) and Veterinary Assistant Surgeons] holding honorary King's Commission or commission as honorary Indian Commissioned Officers except those granted honorary rank of Lieut or Capt under R.A.I. Rules 245 and 538

Rs 75 p.m. plus Rs 6 p.m. for each living child shown on the kindred roll portion of the sheet roll

Assistant Surgeons (I C) and Veterinary Assistant Surgeons holding honorary King's Commission or commission as honorary Indian Commissioned Officers.

Rs 50 p.m. plus (i) an increase of Rs 5 p.m. for each year or part of a year of service as hony K C O. or as

the sheet roll.

Subedar Majors, Subedars, and others ranking as such.

Rs 50 p.m. plus Rs. 4 p.m. for each living child shown on the kindred roll portion of the sheet roll.

Jemadars and others ranking as such

Rs 25 p.m. plus Rs 4 p.m. for each living child shown on the kindred roll portion of the sheet roll.

I O Rs

Rs 8 p.m. plus Rs 2 p.m. for each living child shown on the kindred roll portion of the sheet roll

Enrolled non combatants and civilians governed for family pensions under military rules :—

On pay less than Rs 200 a month but not less than the minimum pay of Subedar of Indian Infantry.

Rs. 50 p.m. plus Rs 4 p.m. for each living child shown on the kindred roll portion of the sheet roll.

On pay less than the minimum pay of a Subedar of Indian Infantry but not less than the minimum pay of a Jemadar of Indian Infantry.

Rs. 25 p.m. plus Rs. 4 p.m. for each living child shown on the kindred roll portion of the sheet roll.

On pay less than the full minimum pay of a Jemadar but not less than two-thirds of the minimum pay of a Jemadar of Indian Infantry.

Rs. 16 p.m. plus Rs. 3 p.m. for each living child shown on the kindred roll portion of the sheet roll.

On pay less than two-thirds of the minimum pay of a Jemadar of Indian Infantry but not less than the pay of a Sepoy of Indian Infantry.

Rs. 8 p.m. plus Rs. 2 p.m. for each living child shown on the kindred roll portion of the sheet roll.

On pay less than the pay of a Sepoy of Indian Infantry.

Rs. 6 p.m. plus Rs. 1.8 p.m. for each living child shown on the kindred roll portion of the sheet roll.

The children's allowance will be drawn in the case of sons up to 18 years of age and in the case of daughters up to 16 years of age. It may however, be paid in respect of a daughter above 16 years of age provided she is not married.

Temporary increase (vide A I I 15/44) where admissible will be drawn in addition.

(c) Family pension will be granted from the date up to and for which the pay of a person is credited to his pay account [vide Ch XV para 2(a)]. Where the allottee in respect of a family allotment is a different person from the heir eligible for family pension recovery of any overpayment of family allotment will be waived. Where the allottee and the heir to the family pension is one and the same person the difference will be paid in cases where family pension exceeds the family allotment. The recovery of the overpayment will be waived.

Chapter XVII—Postal Information (P of W and "Missing")

1 General—Letters for Prisoners of War should as far as possible be written in English as letters written in any other language are often held up by the enemy censorship.

Letters written in Indian scripts by next of kin should be forwarded to the Regimental Depot of the prisoners of war concerned. Such a letter intended for a prisoner of war should be enclosed in an outer cover addressed to the Regimental Depot in India. The cover should be endorsed "Letter for Prisoner of War" and need not be stamped. Letters intended for Prisoners of War in enemy hands should contain references to personal matters only and should not disclose any information likely to be of use to the enemy.

The name and address of the sender should be shown on the back of the envelope in the case of non service personnel. Instructions for service personnel are given in I A O 313/43.

Articles addressed to Prisoners of War or Civil Internees in enemy countries and which bear patriotic slogans (e.g., "V" for Victory) are liable to be confiscated at destination. Relatives are advised therefore, not to use signs or slogans of this nature when addressing such persons. Any articles

detected in the course of transmission by post which offend in this respect will be returned to the senders

2 As in the case of men on active service, the receipt of mail from home is of prime importance in maintaining the morale of Prisoners of War. Relatives should be encouraged in all ways to write regular and cheerful letters to their menfolk who are unfortunate enough to be in captivity. In this connection attention is drawn to I A O 182/44 (as amended by Corr No 204/44) for strict and prompt compliance.

To enable relatives to write to Prisoners of War Depots/Record Offices are authorised to despatch to each relative 3 free envelopes per month [vide G H Q (I) letter No B/74569/2/A G 13(b) dated 14th August 1941 and B/74569/3/A G 13(b) dated 18th Dec 1941—reproduced in Appendix "Z"]. These envelopes should bear the address of the Depot/Record Office (vide para 1 above) so that letters in the vernacular may be translated for onward despatch when necessary and a check may be kept upon the number of letters being written [see also G H Q (I) letter No 13926/P W 2 dated 5th April 1944 and No 84059/A G 17(c) (ii) dated 5th May 1944 reproduced in Appendix "Z"]. Under I A O 870/42 a sum of Rs 15 is payable to clerks etc at the Depot/Record Office for every 200 letters they translate for Prisoners of War.

3 Postage.—Letters and postcards may be sent free of charge by Prisoners of War Post. If sent by air mail they are conveyed at a concessional rate of eight annas for letters and four annas for postcards. The air mail service is at present available to Europe only.

4 Letters to Prisoners of War in Japanese Hands

(A) Method of address —

Letters should be addressed as follows —

(i) *If the Camp address is known*

Prisoners of War Post

Service des prisonniers de guerre

Regt No Rank Name
Indian Prisoner of War
Camp Address.

e.g. 123456 Sepoy Mohd. Khan,
Indian Prisoner of War
Barracks 3 Shanghai
War Prisoners Camp,
Japanese Field Post,
Office No. 106,
Shanghai,
CHINA.

(11) *If the camp address is not known —*

Prisoners of War Post

Service des prisonniers de guerre

Regtl No	Rank	Name	<i>eg</i> 2358 Naik Mohd Khan
Unit	(If captured on or before	6th Bn The Sikh Regt	
31 Jul '42 only)			

Locality where last heard of	Malaya
Indian Prisoner of War	Indian Prisoner of War
Huryojohokyoku	Huryojohokyoku
Tokyo, JAPAN	Tokyo JAPAN

The Units of personnel captured after 31 July 1942 must NOT be disclosed

(B) Special Restrictions

Letters must NOT exceed 25 words

Letters should be typewritten where possible otherwise they should be written in BLOCK CAPITALS

There is no Air Mail service and letters cannot be registered or insured. Parcels cannot be sent. Telegrams cannot be sent except through the Indian Red Cross

For further details see the leaflet "Letters to Prisoners of War and Civilian Internees in Japanese hands" copies of which may be obtained from A G's Branch P W 2, G H.Q (I), Simla

5 Letters and Parcels to Prisoners of War in German Hands

(A) Method of address :

(1) *If the Camp address is known —*

Prisoners of War Post

Kriegsgefangenen Post

Regtl No	...Rank	Name	<i>eg</i> No 147 Sepoy Ram Singh
Indian P O W	No .	...	Indian P O W No 2187
Camp ..	..	..	Stalag V D/Z
Country .....	.....	.....	Germany.

(ii) *If the Camp address is not known —*

Prisoners of War Post.

Kriegsgefangenen Post

Regtl No Rank Name

Indian Prisoner of War in German
lands

C/O Agence Centrale des Prisonniers de
guerre

Palais du Conseil General GENEVA
Switzerland

(iii) *If the former Italian Camp address is known but
transfer to a German Camp has not been reported*

Prisoners of War Post

Kriegsgefangenen Post

Regtl No Rank Name

Former Indian Prisoner of War in Italy
at Camp

C/O Agence Centrale des Prisonniers de
guerre

Palais du Conseil General
GENEVA Switzerland.

(B) The Despatch of Parcels

Next of kin are advised not to send parcels as needs of Prisoners of War are amply provided for in the parcels sent by the Indian Red Cross through the Indian Comforts Fund, London

Parcels may be sent free and should be addressed in the same way as letters. The name and address of the Prisoner of War and of the sender must be written on the cover and a list of the contents must be enclosed. Parcels must not weight more than 10 lbs

Prohibited Articles—Parcels must not contain any of the articles detailed below —

(1) Written communications (letters must be
rately).

- (ii) Printed matter (Newspapers and periodicals may however, be sent to *internees* in neutral countries)
- (iii) Pictorial illustrations and photographs
- (iv) Money stamps stationery and playing cards
- (v) Articles in tubes tins and other receptacles which cannot be easily opened for inspection
- (vi) Spirits or solidified spirit for cooking stoves matches or other inflammable material
- (vii) Food [but see sub para (c) (vii) below]
- (viii) Photographic apparatus field glasses sextants, compasses electric torches and other instruments of use for naval and military purposes haversack watches scissors knives tools pens nibs and fountain pens
- (ix) Medical comforts this includes medicines of all kinds drugs and bandages
- (x) Complete suits coloured trousers other than khaki sports coats or blazers mackintoshes or any kind of over coat

(C) Permissible Articles

The following are among articles which may be sent —

- (i) Blankets
- (ii) Books [See note (a) below]
- (iii) Brilliantine in tins
- (iv) Brushes of all kinds
- (v) Button cleaning outfits (solid not liquid polish)
- (vi) Chewing gum
- (vii) Chocolate in slabs not exceeding 2 lbs in weight in any one parcel
- (viii) Cigarettes
- (ix) Cigarette filter tips cigarette rolling machines and cigarette papers

(x) Clothing including underwear, civilian or service shirts any footwear wind chesters knitted comforts or uniform (for prohibited articles see above column), coloured silks and cottons plain linen or canvas for embroidering

(xi) Dentifrice (solid or powder but NOT in tubes)

(xii) Frames with tale or unbreakable glass

(xiii) Gramophone records [see note (b) below]

(xiv) Hussifs containing usual items

(xv) Kit and sleeping bags

(xvi) Knitting needles and wool

(xvii) Pipes

(xviii) Pencils

(xix) Safety tin openers

(xx) Safety razors and blades

(xxi) Shoe polish (solid NOT liquid or in tubes)

(xxii) Small musical instruments

(xxiii) Soap of all kinds

(xxiv) Tobacco and Tobacco pouches.

(xxv) Towels face cloths and sponges

These firms will only accept orders for books intended for prisoners of war in enemy hands and will in no case accept books for despatch

Note (b)—The sole right for despatch of gramophone records lies with the Red Cross Commissioner Simla to whom gramophone records securely packed should be forwarded for onward transmission at owners' risk.

6 Letters to former Prisoners of war who have escaped to Switzerland

(A) Method of Address —

Letters (other than Air Mail) should be sent by prisoners of War Post and addressed as follows —

Prisoners of War Post

Services des Prisonniers de guerre

Regtl No	Rank	Name	No 4301 L/Nak Mohd Khan
Camp d Internment Militaire			Camp d Internment Militaire
Name of nearest Town			Adelboden
SWITZERLAND			SWITZERLAND

(B) Special Restrictions etc

The normal charges for Switzerland are applicable for cables and letters sent by air mail. The Air Mail Rates are Rs 1/2 per half ounce or part thereof and in the case of postcards 8 annas per card.

Parcels are not permitted at present

Newspapers, periodicals and books can however be sent in the same way as to private individuals in Switzerland by placing orders with holders of censor permits and by the payment of normal postage rates.

7 Telegrams—Telegrams may not be sent direct to Prisoners of War but in exceptional cases the Indian Red Cross Commissioner Kelvin Grove Simla will arrange for messages to be sent by telegram if the cost is paid.

APPENDIX "A"

Notes on the Submission of Petitions and Complaints.

TYPES OF PETITIONS —

The following are amongst the commonest kinds of cases brought before C.Os —

1 Civil Complaints — (a) Cases already filed in revenue, criminal and civil courts. Obviously once a case is "sub judice" no one can directly interfere but the soldier may be under the impression that his interests are not being properly looked after by his representative, the case may be dragging on, he may genuinely doubt the impartiality of the court, he may believe that the court is disregarding the provisions of the Indian Soldiers (Litigation) Act of 1923, or he may have other apparently good reason to apprehend that his interests are suffering. In such cases of course, the C O may forward the petition.

(b) Complaints regarding land, tenancy, rent, revenue, partitions, etc.

(c) Complaints affecting law and order in various forms

(d) Complaints against minor officials

The C O obviously cannot always judge the soundness or otherwise of the grounds of such complaints. The best he can do is to examine the complainant, and if "prima facie" it appears that he has a genuine grievance (e.g., the complaint is not raking up something decided long before he joined the Army or is not bringing up something which can perfectly well wait till he next goes home or can be dealt with by an adult relative) he should forward the petition to the Deputy Commissioner Collector or C L O. It must be realised that in such cases it is a very considerable time before a final reply is received.

(d) Is the marriage monogamous or are there any other wives, and if so, is the wife in question first, second, etc ?

(e) Have the parties ever lived together ? If not what stage has the marriage ceremony reached ?

(f) Are there any children ?

(g) What is the approximate date of illegal abduction, etc ?

(h) Did it happen before the man joined the army or before he came overseas ?

(i) Has he been home since ? If so, what did he do about it ?

What, if any previous legal or other proceedings has he taken ?

(j) When did the man (i) join the army, (ii) go overseas ?

(k) The attitude of his own and the girl's family towards the alleged abduction and any other circumstances such as violence, theft, etc

The object of asking these questions is to discover whether anything can be done. If it is a flagrant case of forceful abduction, due to the absence of the man on service, the Welfare Officer might then have a good case to take up with the civil authorities. In this connection attention is drawn to I A O 560-41

7 Petitions presented by Soldiers on behalf of Relatives—A by no means uncommon type

Petitions are frequently received on behalf of brothers, fathers, uncles, etc., who are hale and hearty and quite capable of conducting their own cases or of presenting their own petitions to the proper authorities

These are clearly cases in which the relatives of men in the services have made use of C O's to exert their influence on their behalf to gain some advantage, which in many instances has already been refused on good grounds by the authorities concerned

Such cases should not be entertained, vide R A I Instruction 327 (reproduced in Appx "B")

8 News regarding relatives—One of the commonest types of cases which occurs is a complaint by parents or wives that they have news of their relatives overseas or on active service in India

Officers Commanding units or formations or in local areas in India should treat such cases with the greatest care and

to make

men to write letters for the illiterate When circumstances do not permit of a letter being written in the vernacular, Field Service Postcard (A.F.A. 2012) should be used

9 Petitions for grants of land—These are not to be forwarded vide R A I Instruction 397 (reproduced in Appx 'B')

10 Examination of Petitions In order to ensure that each petition is thoroughly studied before being forwarded, C Os will ensure that English translations of all petitions in the vernacular are prepared and attached to the originals (I A O 95/43 refers)

11 All petitions should contain a full and clear statement of the facts of reasonable suspicions and of the remedy or assistance sought but they should be as short as possible and contain nothing irrelevant to the point at issue It has been found that the best way to ensure that all extraneous matter is excluded is for the officer to whom the complaint first is made personally to write the petition Petitions must contain the full addresses of the parties concerned including fathers' name of all persons mentioned (husbands name in the case of married females)

12 Lately the number of petitions submitted by Indian Ranks has increased enormously and if the whole welfare machinery is not to become clogged and break down completely it is essential that C Os do everything within their power to detect and reject false and frivolous complaints at the outset To help C Os to distinguish the true from the false 'petition committees' must be formed in all units (vide I A O 1180/44) "Petition Committee" of V C Os and senior unit welfare officer All petitions submitted by such a committee whose members come from the same district as the petitioner The Committee should then recommend to the C O whether the petition should be forwarded (bearing the certificate required by para 14 below) or NOT

13 The following questions should usually elucidate the truth as to whether a petition is a genuine one or not and should be put to the soldier by his Commanding Officer (and/or "Petition Committee") —

(a) Are you sure that this is a genuine and true case for, if it is found on examination not to be so, you render yourself liable to severe disciplinary action If the answer to (a) is in the affirmative the following questions should also be put

(b) Have you no one at home who can do this business for you? grown up male relations have you at home?

(c) Has this case or any point connected with it, ever before been in a law court civil or criminal or revenue? If so has it been decided and with what result? When? If not, is it still under trial?

(d) What relation to you is the complainant or injured person? Why can he/she not look after his/her own business? What grown up male relations has he/she at home?

14 After a C.O. has thoroughly examined the petition put up to him, (or has had it examined by a 'Petition Committee') and has satisfied himself that to the best of his ability regarding its bonafides, he will attach to the petition a certificate in the following form—

"This petition is not debarred by R.A.I. Inst 397. The questionnaire contained in para 13 of APPN. A" to the Pamphlet "Family Welfare-1" has been put to the petitioner and I am satisfied that the case should go forward."

Action on petitions coming from units without this certificate is liable to be considerably delayed.

15 Forwarding of petitions. Having satisfied himself regarding the petition and attached the certificate required by para 14 above the C.O. will ensure that the petition is forwarded to the correct authority. This is if the petitioner is a resident of British India to the D.C. Collector concerned and, if the petitioner is a State subject, to the C.L.O. concerned (see Ch III). If the petition concerns the non-payment of a Family allotment Money Order it will, in the first instance, be forwarded to the Depot/Record Office concerned (vide Ch. IV para. 3). Each petition will be addressed to one authority only.

APPENDIX "B"

R. A. I. Instruction 397.

"397. Petitions to Civil authorities:—

Petitions addressed to civil authorities from Indian ranks, which are forwarded regimentally, will be forwarded by the O.C. unit himself who will satisfy himself that the petition does not contain a request for a grant of land, or concern—

(i) the grievances of anyone except the petitioner, his wife or minor children or any near relative who is unable suitably to represent his own case.

(ii) a case pending before a civil or criminal court except queries for its expedition.

(iii) the re-opening of a case already decided by a civil or

magistrate.
The above

APPENDIX C

List of Charitable Funds Controlled by the Indian Sailors, Soldiers and Airmen's Board

Serial No.	Name of Fund.	Persons eligible for relief	Normal scale of relief	Particulars	Remarks
1.	Indian Defence Services Benevolent Fund.	Indian ex combatants & non combatants of the Indian Defence Services and the dependants of such personnel deceased who are ineligible for assistance from any other military relief fund.	Monthly pension of Rs. 3, 4 or 5* for a period of two years	See Appendix "D"	* These sums have temporarily been increased to Rs. 68 and 10 subject to periodic review. Fresh application for relief necessary after two years from first grant. Grants are considered twice yearly—January and July.
2.	Defence Forces Relief Fund (old title: "India & Burma War & Marine Relief Fund").	(a) Indian combatants and non combatants of the Indian Defence Services disabled as a result of Active Service. (b) The dependants of personnel mentioned in (a) above, who have lost their lives as a result of Active Service.	Monthly pensions of Rs. 3 4 & 5† for a period of two years	See Appendix "C"	† Do Do Do Grants are considered twice yearly—April and October
3.	V.C.Os' and L.W.Os. Benevolent Fund	Dependants of Warrant Officers and Chief Petty Officers of the Royal Indian Navy, Viceroy's Commissioned and Indian War Rant Officers, and Warrant Officers & Flight Sergeants of the Indian Air Force, who, by reason of the fact that the death of such personnel cannot be attributed to military service are ineligible for pension.	Monthly pensions of Rs. 8 to 16 for a period of two years. In exceptional circumstances a single lump sum grant of up to Rs. 300 may be made	See Appendix "H"	Fresh application for relief necessary after two years from first grant. Grants are considered twice yearly—January and July.

Serial No.	Name of Fund.	Persons eligible for relief.	Normal scale of relief.	Remarks.
1	Victim's Personal Fund.	Indians or persons of all arms of the Defense Services who have lost a limb or the use of a limb on active service or on duty in prison.	Grant of loan to restore the earning capacity of the person.	See Appendix "j"
2	Fund on Prison Medical and Sundry Cases.	All Indian combatant ranks and non-combatant personnel of the Army in India and of the Royal Indian Navy and the Air Force in India who participated in the present war personnel of the I.S.P. serving with H.M. Forces.	Monthly allowance according to the merit of the case or a lump sum grant.	See Appendix "h"

* The Fund is administered by the Medical Committee of the Indian Red Cross Society with which Secy I S S A. B. and Hon'y Treasurer, Indian Red Cross Society are associated

Notes.—All I S S A. B. persons serving under the Crown are eligible for relief from funds administered by the I S S A. B.

APPENDIX D "

Rules for the Administration of the Indian Defence Services
Benevolent Fund

1 The Indian Sailors', Soldiers and Armenians Board will consider recommendations for assistance from the fund twice yearly in January and in July

2 Officers Commanding Units, and for Gurkha personnel who have severed their regimental connexion and are permanently resident in Nepal the Recruiting Officer for Gurkhas will forward their recommendations direct to the Board on the prescribed form (vide Appendix E')

Each recommendation should be forwarded as it has been fully investigated by all concerned

Recommendations in respect of personnel of the Royal Indian Navy and Indian Air Force will be submitted through their respective Benevolent Associations

Recommendations for the January distribution must reach the Board by the 1st December and for the July distribution by the 1st June at the latest

3 A unit commander or the equivalent administrative Officer, initiating a claim will first request the appropriate District Sailors', Soldiers' and Armenians Board or the Civil District Officer where no Board exists, to investigate and report on the home circumstances of the person for whom relief is desired

In submitting the claim to the Board the unit commander will state on the form prescribed for the purpose, the rank and length of service of the person in respect of whom the claim is made, and will at the same time certify that the case is eligible for assistance from the Defence Forces Relief Fund

4 When a DSSAB or a Civil District Officer desires to initiate a claim, they, or he, should forward the application, on the prescribed form, with details regarding the home circumstances of the claimant, to the officer who has the custody of the records which contain particulars of the service rendered in the Defence Services by the person on behalf of whom the claim is made. That officer will take all further necessary action in the matter

5 Relief sanctioned by the Board will normally take the form temporary pensions of Rs 2 10 0 or 5 10 0 per annum for a period

years or, in certain circumstances, of a lump sum grant. As a temporary measure these pensions have been increased to Rs 6, 8 and 10 per mensem subject to periodic review.

6 In no circumstances will the recipient of a grant be considered for further assistance until a period of two years has elapsed from the date of the previous grant.

7 The form published as Appendix "E" will be used in all applications for grants from the Fund. The rules for the completion of the form are contained in Appendix "F".

APPENDIX "E"

Form of Application for a Charitable Grant From the Indian Defence Services Benevolent Fund (Form D D 40).

A Particulars of individual on whose behalf the recommendation is made

1 Roll No	Rank	Name	
2 Village	P O	Tehsil Taluk	District Indian State

3 Unit in which served

4 Length of service since Years Months Days

5 Detail of any foreign service and unit with which served

6 Date and cause of discharge

7 Date, Place and cause of death (If alive, state "alive")

men's Board or Civil authorities of the District in which he or she resides, *e g*—

	To be filled in by DSSAB	To be filled in by unit.
(a) Amount of Pension if any (state whether service family or disability, and in the case of the last named whether the disability was due to war or		
(c)		
2 Unirrigated		
3 As zamindar tenant sub tenant		
(ii) Estimated yearly income from land.		
(iii) Estimated yearly income from any other source		
(d) Amount of debts, if any		
(e) I		
dual served)		
(f) Whether the applicant is able bodied, and able to		
(g)		
than 15 years of age, unmarried daughters less than 18 years of age, widowed mother, mother and father if the latter is infirm and unable to support himself, grand children) Number of sons over 18, together with the age of each, should be stated		
(h) Are you satisfied that there is no hope of obtaining assistance from near relatives of the applicant who are in a financial position to render such assistance and might be induced to do so? State the circumstances.		

APPENDIX " F ".

Rules for the Completion of the Form of Application for a Grant from the Indian Defence Services Benevolent Fund.

The form will be used for recommendations for grants from the fund named above

2 (1) When the recommendation is initiated by a unit commander, an officer in charge of records, the Recruiting Officer for Gurkhas, the Flag Officer Commanding, Royal Indian Navy, or the Air Officer Commanding India Command that officer will first complete the form with the details of service of the person on whose behalf the recommendation is made and with any other relevant information about him. He will then forward the form to the District Sailors', Soldiers' and Airmen's Board, or if none exists, the civil officer of the district in which the person (if still alive) or his dependant for whom a grant is recommended, resides. The Board, or civil officer, will investigate the home circumstances of the proposed grantee, and will, if he or she is found deserving of relief, complete the remainder of the form, including the recommendation as to the size and nature of the grant.

(11) When the recommendation is initiated by a District Sailors', soldiers' and Airmen's Board or Civil Officer, the Board or the officer will first verify the details of service, etc., of the person on whose behalf the recommendation is made by reference to the unit commander, the officer in charge of records, the Flag Officer Commanding, Royal Indian Navy, or the Air Officer Commanding, India Command, as the case may be. (When there is any doubt as to who the correct officer is, a reference should be made to the Indian Sailors', Soldiers' and Airmen's Board). That officer will return the form completed as far as he is able to the Board or civil officer, after which the procedure will be as laid down in (1) above.

3 As soon as a recommendation has been completed in all respects by the Board or civil officer, the latter will forward it to the officer commanding the unit in which the soldier last served, the officer in charge of records, the Recruiting Officer for Gurkhas, the Flag Officer Commanding, Royal Indian Navy, or the Air Officer Commanding, India Command as the case may be. When he considers that it will serve a useful purpose, this officer will summon a committee of Indian officers, who will investigate the case by any means in their power and record their recommendations against those of the civil authority in the column provided for the purpose. The unit commander or other officer will then forward the application direct to the Secretary, Indian Sailors', Soldiers' and Airmen's

Board, New Delhi, who will lay it before the Board at the next distribution of relief from the Indian Defence Services Benevolent Fund

APPENDIX "G".

Rules for the Administration of the Defence Forces Relief Fund.

1 The Indian Sailors', Soldiers' and Airmen's Board will consider recommendations for assistance from the fund twice yearly in April and in October

2 Relief from the fund may be granted only to Indian combatant ranks and non combatant personnel of the Army in India and of the Royal Indian Navy and the Air Forces in India who were disabled, and the dependents of the same categories who lost their lives, as a result of the Great War (1914-18) or of overseas or frontier service or other active service operations in India.

3 Applications for relief will emanate from one of the four sources —

(a) (i) Unit Commander, or in the case of a disbanded unit, Officer in Charge of the records of the unit, or

(ii) the Flag Officer Commanding, Royal Indian Navy or the Air Officer Commanding, India Command

(b) A Civil Officer or a District Sailors', Soldiers' and Airmen's Board

(c) An Officer of the Civil Liaison Officer Organisation.

(d) The individual him- or herself

4 (a) (i) Officers Commanding units, and for Gurkha personnel who have severed their regimental connexion and are permanently resident in Nepal the Recruiting Officer for Gurkhas, will forward their recommendation direct to the Board, on the prescribed form (D.D. 40).

Each recommendation should be forwarded as soon as it has been fully investigated by all concerned, but to admit of their being considered for the April and October distribution they must reach the Board by the 15th February and 15th August, respectively, at the latest

Before, however, submitting the claim, the unit commander or in the case of a disbanded unit, the officer in charge of the unit, who takes the initial action in the matter —

the District Sailors', Soldiers' and Airmen's Board concerned, or the civil officer of the district where no board is in existence, to investigate the home circumstances of the claimant. The general financial position of the claimant, the adequacy of the pension, if any already granted, the number of minor children, the services rendered by the family, as also any special circumstances of hardship, may be cited as suitable matter for local enquiry.

(a) (1) The Flag Officer Commanding Royal Indian Navy, and the Air Officer Commanding, India Command will submit recommendations direct to the Secretary, Indian Sailors', Soldiers' and Airmen's Board but before doing so he should request the civil district officer concerned to investigate the home circumstances of the claimant.

(b) When a civil officer, an officer of the Civil Liaison Officer Organisation or a District Sailors', Soldiers' and Airmen's Board desire to put forward a claim, he or they should, in the first instance, verify, from the unit commander or, in the case of a disbanded unit, the officer in charge of the records of that unit who has the custody of the records, the nature of the services rendered by the soldier or ex soldier concerned and any other relevant particulars. Length of service, war service and conduct while serving may be cited as suitable matter for enquiry. If after verification the civil officer or the District Sailors', Soldiers', and Airmen's Board consider the case to be deserving of assistance he or they should forward the recommendation to the unit commander or, in the case of a disbanded unit, the Officer in Charge of the records of that unit.

(c) Where the Indian Sailors', Soldiers' and Airmen's Board receive an application direct from a person desiring relief, they will refer it to the District Sailors', Soldiers' and Airmen's Board* concerned for action indicated in (b) above.

and (b)
sources of
to meet

the payment of a lump sum, the redeeming of a mortgage, the purchase of a post office annuity, the grant of an educational annuity for a certain number of years.

In each case the amount recommended should also be stated.

6 Except in the case of serving soldiers and serving personnel of the Royal Indian Navy, disbursements will be made through the District Sailors', Soldiers' and Airmen's Board† who should fill the role of executors and ensure, so far as may be practicable, that the money is applied to the purpose and in the manner prescribed by the managers of the fund.

* Civil Officer of the District where no Board is in existence

† Civil Officers of Districts where Boards are not in existence

In the case of serving soldiers and airmen these duties will devolve on the officer commanding the unit to which the man belongs

In the case of serving personnel of the Royal Indian Navy, these duties will devolve on the Flag Officer Commanding

7. Relief sanctioned by the Board will normally take the form of temporary pensions of Rs 3, 4 or 5 per mensem for a period of 2 years or in certain circumstances of a lump sum grant. As a temporary measure these pensions have been increased to Rs 6, 8 and 10 per mensem subject to periodic review.

8 In no circumstances will the recipient of a grant be considered for further assistance until a period of two years has elapsed from the date of the previous grant

9 The application form to be used for grants from this fund and the rules for completion thereof will be the same as in Appendices E and F respectively

APPENDIX "H".

Rules for the Administration of the Viceroy's Commissioned and Indian Warrant Officers Benevolent Fund

The object of the Fund is to alleviate cases of special hardship among the dependants of Warrant Officers and Chief Petty Officers of the Royal Indian Navy Viceroy's Commissioned and Indian Warrant Officers and Warrant Officers and Flight Sergeants of the Indian Air Force, who, by reason of the fact that the death of such personnel cannot be attributed to military service, are ineligible for pension

or grants for the benefit of disabled Indian ex-personnel of all arms of the Defence Services

2 The Board accepted the offer and have created for the purpose a fund known as the "Sir Victor Sassoon Fund". Only those ex-servicemen who have lost a limb or limbs or the use of a limb or limbs on active service or on duty in peace will be eligible for assistance from the Fund

3 The fund will be administered in conjunction with the Defence Forces Relief Fund and the Indian Defence Services Benevolent Fund and authorities initiating recommendations for relief from either of these Funds will, in forwarding them to higher authority, especially bring to notice cases of individuals who are eligible for relief from the "Sir Victor Sassoon Fund" (vide preceding paragraph).

4 As the object of this Fund is, where possible, to restore the earning capacity of the disabled ex-serviceman, each recommendation on behalf of a man who is eligible for relief from it should, in addition to the information normally required, specify clearly :—

(a) the extent of the disability,

(b) whether it is possible to restore the man's earning capacity by loan or grant for some definite object, e.g., for the opening of a shop, the purchase of a sewing machine, etc

(c) whether the man has had training in any trade at one of the schools for Disabled Soldiers or is awaiting training at such a school

5 The application form to be used for grants from this Fund and the rules for completion thereof will be the same as in Appendices "F" and "I" respectively

APPENDIX "K"

2 The Fund will be administered by the Medical Committee of the Indian Red Cross Society with which will be associated —

(1) The Secretary, Indian Sailors' Soldiers' and Airmen's Board and

(11) The Honorary Treasurer Indian Red Cross Society

The Secretary, Indian Red Cross Society will act as Secretary to this Committee and the Honorary Treasurer of the Indian Red Cross Society will be the Honorary Treasurer of the Fund

The persons for the time being entitled to administer the Funds as aforesaid are hereinafter together referred to as the Committee and should any difference of opinion at any time arise between the Members of the Committee for the time being the opinion of the majority of the members shall prevail

3 The Committee will ordinarily consider recommendations for assistance from the Fund quarterly each year, but emergent cases may be considered at any time

4 Relief from the Fund will be granted only to ex Indian combatant ranks and non combatant personnel of the Army in India and of the Royal Indian Navy and the Air Forces in India who have participated in the present war. The personnel of the Indian State Forces serving in His Majesty's Forces will also be eligible for relief from the Fund.

5 Applications for relief will be received by —

(a) The District Sailors' Soldiers' & Airmen's Board, or

(b) The Civil or Political Officer where no District Sailors', Soldiers' or Airmen's Board exists

6 Applications must be made in the prescribed form and should have the following particulars inter alia —

(a) Documentary proof that the applicant has served in the Army in India (or Indian State Forces) the Royal Indian Navy or the Air Forces in India during the present War,

(b) The pecuniary circumstances of the applicant, and

(c) The nature of the disability, sickness or ailment

7 Applications will on receipt by any of the authorities mentioned in paragraph 5 be examined and the particulars referred to in clauses (a) and (b) of para 6 verified by such authorities. The applications will then be forwarded to the local branch of the Indian Red Cross Society which will submit these applications for grants to the Secretary of the Central Committee, with their recommendations as to the form, and extent of the relief to be given, based on such verification of the disability sickness or ailment, as may be considered necessary

8 Each recommendation should be forwarded as soon as it has been fully investigated by all concerned but to admit of its being considered for the next quarterly distribution, it must reach the Committee by the 15th of the month preceding that in which the distribution is to be made

9. Relief from the Fund will normally take the form of a monthly grant, the amount of which will be determined according to the merits of the case

10 When, however, the recommending authority, after careful investigation of a case, considers that a lump sum is the most suitable form of relief, the Committee will be prepared to make a single payment. No lump sum grant will be considered unless special reasons are adduced

11 Relief from the Fund will be granted for medical after-care and cognate purposes such as —

(a) Maintenance and treatment for tuberculosis, leprosy or other diseases in Sanatoria or Asylums

(b) Special treatment for chronic diseases or ailments

(c) After-care at home or in hospital, or at a medical institute.

(d) Provision of artificial limbs etc. if not admissible from public funds

(e) Provision of spectacles dentures, etc., and examination by qualified medical practitioners in connection therewith

12 Relief cannot be claimed as a right, and will not be granted unless the applicant is deserving and his pecuniary circumstances justify a grant

13 Without prejudice to the general powers conferred on the Committee it is expressly declared that the Committee shall have the following powers —

(f) To regulate its own procedure and in particular to co-opt Members to the Committee accept the resignation of Members and make appointments to any vacancy in its body

(g) To delegate its powers except powers under sub clause (h) and (i) below

(h) With the approval of His Excellency the Viceroy to alter or amend these rules

(i) With the approval of His Excellency the Viceroy to add to or alter the objects of the Fund or to transfer the assets of the Fund or any part thereof when the same in the opinion of His Excellency the Viceroy are not required for the objects for the time being of the Fund to any other person or Association having in the opinion of His Excellency the Viceroy, objects likely to benefit servicemen

(j) Generally to do such things as the Committee may consider necessary or expedient for the purpose of carrying out the object of the Fund

APPENDIX ' L '

A Note on Fauji Sevadarnis

1 Sevadarnis, Head Sevadarnis and Inspectresses are members of the C L O Organisation and function on the following levels—

Sevadarnis	On a Village level
Head Sevadarnis	On a Tehsil level
Inspectresses	On a D S S A B level

They are honorary welfare workers and are paid only out of pocket expenses

2 Duties of Sevadarnis.—It is the duty of a Sevadarni to do all within her power to promote the well being and to redress the complaints of the families of serving men. As such her duties are impossible to define specifically but the following are amongst the most important—

Complaints—(a) To explain to families that they should refer all complaints to an Officer of the C L O Organisation or the D S S A B and NOT to the serving soldier who can do little to help them

Postal—(b) To impress upon families the need to write frequent and cheerful letters to their serving menfolk and to refrain from making complaints or retelling depressing news

(c) To advise families regarding the correct way to address serving soldiers and P W

(d) To arrange for voluntary reliable letter readers and letter writers to assist Military families to maintain the above correspondence

Family Allotments—(e) To see that Family allotments are being utilized by the allottees and are NOT misappropriated by male relatives

Propaganda—(f) To spread accurate information regarding current affairs and to counteract false rumours

(g) To distribute war newspapers to those who can read

Welfare—(h) To see that the minor children of soldiers are being properly educated

(i) To see that the marriageable daughters of soldiers are not given in marriage to undesirables, but, as far as possible, their marriages are postponed until after the war

(j) To arrange for the medical treatment of soldiers' relative where necessary

Economic—(k) To infuse a spirit of economy amongst the members of military families to encourage thrift and the purchase of Defence Savings Certificates.

In addition to the above a Sevalarni must be prepared to carry out all duties assigned to her by the Head Sevalarni.

3 Duties of Head Sevalarni—(a) To give effect to all instructions issued by Inspectresses.

(b) To visit each Sevalarni in their own areas at least once a month

(e) To maintain a register, with the help of the D S S & B, of the names of service families in her area (more particularly those of Prisoners of War) and to keep the "Sevadarnis" concerned informed accordingly

5 At present the Fauji Sevadarni Scheme is operating in the following Districts —

PUNJAB

Lahore	Ferozepore
Amritsar	Ludhiana.
Sialkot.	Rohtak
Gurdaspur	Hissar
Gujranwala	
Sheikhupura	
Jallpur	
Montgomery	
Multan	
Jullundur	
Hoshiarpore	

U P

Meerut.
Etah
Bulandshahr
Fyzabad
Shahjahanpur
Basti

BOMBAY.

Satara.
Ratnagiri

MADRAS.

Madras	Malabar
Salem	Vizagapatam.
Coimbatore	Guntur
North Arcot	East Godavari
Tinnevely	Chittoor
Madura	
Ramnad	
Trichinopoly	
Tanjore	

Extension of the scheme to other Districts is under consideration

APPENDIX " Z "

Copies of important I A Os and A Is (I) concerning Family Welfare matters and certain letters issued by G H Q (I)

1 INDIA ARMY ORDERS

I A. O 150/42 Special Pension Indian Soldiers Blinded during Present War —

Every Indian soldier who is precluded from earning his livelihood on account of total or partial blindness caused as a result of his service during the present war will be awarded a special pension of

Rs. 5 p. m. This special pension will be administered by the Indian Sailors', Soldiers' and Airmen's Board on the merits of each case, and will be payable in addition to a disability pension or any other pension admissible under the ordinary pension rules.

2. Officers Commanding depots, etc., will report all such cases to the Secretary, Indian Sailors', Soldiers' and Airmen's Board, supported by a copy of the proceedings of the invaliding medical board, and a copy of letter from the Controller of Military Accounts and Pensions, Lahore, showing that the blindness of the soldier has been accepted as attributable to military service. In such of these cases where the blindness is temporary, and the soldier concerned is to be brought before a resurvey medical board, the officer commanding will forward a copy of the proceedings of such board to the Secretary, I S S & A B for review of the special pension already granted.

L. A. O. 870/42 Letters to Prisoners of War. (Amended by Corr. List No. 322, dated 30th April 1943) —

Delivery of letters written in Urdu, Hindi, etc., to Indian ranks who are prisoners of war in German, Italian and Japanese hands is being held up because of the difficulty experienced by the mails in effecting the required censorship. It is desirable, therefore, that such letters should, as far as possible, be written in English.

2. Vide Defence Department letter No. 11862/1 A.G. 13 (b), dated the 25th March 1942, as amended by Defence Department Corrigendum No. 11862/4 A.G. 11 (b), dated the 14th July 1942, which is republished as an annexure to this order, depots will undertake the translation into English of letters for the Indian ranks in question.

3. It is essential also that the prisoner of war number at the camp, and the camp at which the prisoner is detained is inscribed clearly on the envelope.

(iii) The submission of petitions and complaints "

It has been observed that in following these rules it has become a common practice for petitioners to repeat their petitions to several persons, i.e., the Secretary, District Sailors, Soldiers' and Airmen's Board, the Deputy Commissioner of the soldiers' district, the Civil Liaison Officer and even General Headquarters. This practice only leads to duplication of work, complications and delay. A case should only be sent to one addressee unless there are very special reasons for doing otherwise.

I A O 1053/42 Family Allotments—Indian Military Personnel—

With a view to obviating complaints relating to non receipt, or delay in payment, of family allotments from the dependants of Indian military personnel serving overseas, it is imperative —

(a) that record offices, training centres, etc., should ensure that complete addresses of the payees giving correct and full name of village, post office, thum, patti, tehsil, district, etc., as the case may be, and relationship of the allottee are invariably and legibly written on the blue money order forms

(b) that officers commanding units and formations etc., should, before proceeding overseas, ensure that the family allotment rolls (I A F F 1000) are correctly prepared and that entries of all the necessary particulars as indicated in (a) above are made in the allotment rolls after verification from the individual making the allotment. The details should not be at variance with the particulars given in individuals' sheet rolls

2 Family allotments are primarily intended for the benefit of a soldier's family—those legally dependant upon him—and the soldier should be urged to provide for them, his wife and children ranking first in the order of priority, as cases have come to notice where allotments have been made in favour of persons having no claim on the soldier's earnings leaving the legal dependants in a state of serious financial difficulty. This state of affairs is to be deprecated and commanding officers should, therefore, impress upon individuals the responsibility they bear for the proper maintenance of their wives and children and/or dependants, and endeavour, to induce an allotment being made in their favour

I A O 1397/42. Welfare.—

Officers Commanding units serving will impress upon their men the necessity of their writing home regularly. Soldiers should also be asked to make use of Army Form A 2012 (Field Service Post Card) which is available in the main languages of India.

Full addresses will always be given on letters and post cards.

I A O 2503'42. Demand for Illegal Gratification by Postmen.
Complaints regarding.—

General complaints are made regarding the demand of illegal gratification by postmen in connection with the payment of money orders to the families of serving soldiers.

Officers Commanding, Depots, Record Offices, etc., concerned will ensure that when forwarding complaints of this nature, full details of the Post Office, the date and approximate time, the names of the parties concerned and names of any witnesses, are furnished to the authorities concerned to facilitate investigation.

I A O 2858'42 Relief for Indian Soldiers and their Families from the U P War Purposes Fund. (Amended by Corrigendum No 57(44) —

A relief scheme for Indian soldiers and their dependants belonging to the U P has been instituted by His Excellency the Governor of the U P. Under this scheme relief will be afforded from the U P War Purposes Fund to —

(i) Indian soldiers and enrolled non combatants who are invalided out of service suffering from diseases which were contracted in India, and which have been held to be not attributable to military service.

(ii) Families of Indian soldiers and enrolled non combatants whose deaths occur in service in India through diseases which can not be attributed to military service.

Applications for relief will be made on Army Form No DD-40 (application for a charitable grant) by the Sailors' Soldiers' & Airmen's Board of the district in the U P in whose jurisdiction claimants reside.

Petitions submitted by serving soldiers will, therefore, in future, either be written in English or if written in the vernacular will be accompanied by an English translation. In either case the English version will be signed by the Commanding Officer or Second in Command of the unit in which the petitioner is serving.

Commanding officers are responsible for ensuring that patently frivolous or unfounded petitions are not forwarded.

This order supersedes I A O 1012 of 1941.

I A O 313/43 Correspondence from service personnel to prisoners of war —

1 In future, British service personnel when writing to prisoners of war in enemy hands will adopt the following procedure —

(a) The envelope containing the first letter intended for a prisoner of war in enemy hands will be enclosed in an outer cover addressed to Officer Commanding, Prisoner of War Censor Station Bombay. In this outer cover, senders will enclose a slip on which will be written their regimental number (other ranks only) rank, name, unit and full address.

(b) On receipt of the first letter, Officer Commanding, Prisoner of War Censor Station, Bombay, will allot a serial number to the sender and will advise him accordingly.

(c) Subsequent letters intended for prisoners of war in enemy hands will be addressed to the prisoner of war concerned in the usual manner and senders will give their address on the reverse of the envelope as shown below —

(1) Number (i.e., number allotted by O C, P O W Censor Station, Bombay)

(2) Rank and name

(3) C/o P O W Censor Station Bombay

2 Indian service personnel will continue to observe the existing procedure, i.e., they will give as their address that of a civilian friend or relative.

3 Unit censors will not stamp letters intended for prisoners of war in enemy hands with unit censor stamps.

(Attention will be drawn to this I A O in the orders of such subordinate formations as are necessary and it will be re-published in unit orders.)

I A O 983/43 Relief for Indian soldiers and non combatants (enrolled) and their families from N-W. F. P. War Purposes Fund (Amended by Corr No 58/44) —

A relief scheme for Indian Troops and non combatants (enrolled) and their dependants belonging to the N W F. P., has been insti-

led by H E the Governor of the N W F P Under this scheme, relief will be given from the N W F P War Purposes Fund to —

(i) Indian soldiers and enrolled non combatants who are invalided out of the service as a result of injuries sustained or diseases contracted in India or outside India and which have been held to be not attributable to military service

(ii) Families of Indian soldiers and enrolled non-combatants whose deaths occur in service in India or outside India as a result of injury or disease which is not attributable to military service

2. Applications for relief will be made on Army Form No DD-40 (Application for a charitable grant) by the Sailors', Soldiers' and Airmen's Board of the District in N W F P in whose jurisdiction the claimants reside direct to the Secretary to H E the Governor, N-W-F-P

3 In order to ensure the speedy grant of relief, particularly in cases referred to in (ii) above, officers commanding units, depots etc will as soon as they know of decisions that the deaths or disablement of soldiers is not due to military service intimate the fact to the next-of-kin to District Sailors' Soldiers' and Airmen's Boards, and to the Assistant Civil Liaison Officers of the areas concerned

4 The above concession is also admissible to Indian personnel and their families of the Royal Indian Navy and Indian Air Force

I A O 1117/43 Family Allowments—Indian Military Personnel (Amended by Corr List No 46, dated 6th August 1943) —

Reference I A O 1033/42.

I A O 1423/43 Translation by Depots of Letters to Imperial Prisoners of War —

Reference I A O 870/42.

The following rules will be strictly observed —

(a) No alterations may be made and translations should be as literal as possible. Censorship is NOT a unit concern but the sole responsibility of the Prisoner of War Censor Station.

(b) Translations will NOT be made on the back of the original letter.

(c) The backs of old Army Forms, etc., will NOT be used unless paper shortage makes this unavoidable, in which case the greatest care will be exercised to ensure that nothing is used which could be of any value to the enemy.

I A O 1458/43 Relief for Indian Soldiers and their Dependents belonging to the Punjab (Amended by Corr No 59/44) —

A relief scheme for disabled soldiers and enrolled non combatants and their families belonging to the Punjab has been instituted by H E the Governor of the Punjab. Under this scheme relief will be given to —

(i) Indian soldiers and enrolled non combatants and their dependents who are in real distress owing to the fact that they are not entitled to relief from Government or other charitable funds.

(ii) Cases of hardship arising from delay in settlement of pension claims, involving references to the Government of India.

Any assistance given under the scheme will be of a temporary nature and is designed to support life reasonably and to obviate real hardship. Relief will not be given for payment of debts, marriage of daughters, etc.

Application for relief will be made to the Civil Liaison Officer of the area concerned.

2 The above concession is also admissible to Indian personnel and their families of the Royal Indian Navy and Indian Air Force.

I A O 1723/43 Submission of complaints regarding payment of family allotment money orders —

Petitions from I O Rs serving overseas or in concessional areas regarding non payment or delay in payment of family allotment money orders should be forwarded to depots or record offices for onward transmission to the authorities intimated in I A O *1035/43.

*Read I A O 890/44.

as these establishments are in a position to know whether money orders have or have not actually been despatched or paid to payees. Depots, etc., before forwarding the petition to the investigating authority will —

(i) endorse on it the number and date of the acknowledgment receipt of the relevant family allotment money order, if it has been received back duly signed or with the thumb impression of the allottee, or,

(ii) indicate on it the date on which the family allotment money order was despatched and state that the acknowledgment receipt has not been received by them

I A O 2145/43 Relative Precedence Civil/Military Officers.—

It is apparent from reports received at G H Q (I), that there is a lamentable ignorance on the part of junior officers, especially amongst those newly arrived in this country, of the status of officers of the civil administration. This often results in unintentional lack of courtesy and respect for these officers especially as regards the correct methods of addressing them in correspondence

The following is the order of precedence of Commissioners, Deputy Commissioners Collectors vis a vis military officers —

Commissioners of Civil Divisions

Colonels

Collectors and District Magistrates

Deputy Commissioners

Lieut Colonels

Commanding Officers will ensure that all junior officers are fully instructed in this matter

I A O 2211/43 Relief for Indian Soldiers and Non Combatants (Enrolled) and their Families from the Tajrudana War Purposes Fund —

2 Preference will be given to cases which are waiting disposal by the Indian Army Benevolent Fund, or Defence Forces Relief Fund, and to those cases which fail by a narrow margin to secure the necessary number of marks to obtain a grant from those funds

3 As soon as intimation is received that the death or disability of any soldier has been attributed to causes other than military service, the unit or depot commander concerned should forward his recommendation for temporary relief direct to the Secretary, Rajputana Indian Soldiers' Board, Abu, on DD 40 (Application for a charitable grant), completed as far as possible. These recommendations will then be forwarded to State Sailors', Soldiers' and Airmen's Boards for investigation in the usual manner, and temporary grants will be made in those cases which in the opinion of the Resident for Rajputana, are deserving of immediate relief

I A O 2387/43 Addressing of Correspondence to Indian Soldiers by the Families/Dependants at Home —

Numerous complaints have been received regarding non receipt by I O Rs particularly those in operational areas, of letters addressed to them by their families/dependants at home. Investigations show that in a great number of cases this is due to letters being incorrectly and/or illegibly addressed by the families

To remedy this it is suggested that one of the following measures be adopted by all units with I O Rs on their establishment

(a) That small printed slips (gummed if possible), bearing the correct postal address of the unit in English and space for entering number, rank, name, and Battery/Coy in manuscript, be supplied to the men for enclosing them in their letters (Not air mail letter cards) to their families, etc., with instructions to the addressees that the slips are to be pasted on the covers of their replies

(b) That a rubber stamp be supplied to the franking officer for stamping the unit address on all outgoing letters. This might be so constructed that the Advance Base P O number could be altered at will. For security reasons it is essential that care be taken that the unit address is NOT stamped on the outer cover—or on an open card

Any expenditure incurred in connection with the above measures will be met from unit resources

I A O 18/44 Training of Blinded Service Men —

A St. Dunstan's Hostel for Indian War Blinded has been established at Dehra Dun for the benefit of blinded personnel of the Defence Services, including units of the Auxiliary Force India (when embodied) whether the blindness is attributable to military service or NOT.

2 Blinded men who have not already been discharged from the army and who are considered suitable by the Indian St Dunstan's Committee to receive training, will be transferred to the hostel as serving soldiers and will continue to remain in the army for the first four months of their training. Blinded service men who have already been discharged are in no way debarred from admission to St Dunstan's Hostel and are eligible for all the privileges enjoyed by non-discharged men with the exception of pay.

3 The main objects of the course are explained in the annexure to this order which also gives details of the privileges which will be extended by St Dunstan's to Indian personnel undergoing training at Dehra Dun.

4 Whilst it is NOT intended to compel those who are in every way opposed to the scheme all pressure short of actual compulsion will be exerted on men not yet discharged to attend as if detailed for any other course of training. There is no objection to a man being sent on leave to his village before attending a course.

5 Indian personnel undergoing training at Dehra Dun will be entitled to the following privileges —

(a) Pay and allowances under the rules applicable to serving soldiers (in the case of men NOT discharged) will be continued during the first four months of training and thereafter whatever pension is sanctioned in each particular case will be drawn. Men already discharged will continue to receive whatever pension they are drawing.

(b) Free rations or ration allowance will be drawn in the normal way for men not discharged. With regard to men who have been discharged, see para. 3 (c) of the annexure.

(c) Warrants for men and their families from their homes to Dehra Dun and back will be issued on the authority of G. H. Q. (I) letter No. 8807, A. G. M. (I), dated 7th May 1943. (See Annexure to this order, subpara 3 (b) for definition of "far &" in this

ity concerned (vide I A O 1867/43) and their Army pay, etc, disbursed in accordance with the procedure laid down in I A. O 92/43

8 On admission to a military hospital of a blinded men or any case of serious eye disease or injury likely to lead to blindness or grave loss of vision, the name and full particulars of the patient will be sent at once by O C Hospital to St Dunstan's Hostel for Indian War Blinded, 54 Rajpur Road, Dehra Dun, U P, with copies of the letter to A G's Branch, A G 17 G H Q (I), Simla, Medical Directorate, G H Q (I), New Delhi and to the Officer Commanding Record Office of the individuals' unit [This cancels Z 26258] DMS 5 (c), dated 20th April 1943]

9 As soon as patients are fit to travel British cases will be sent to the British General Hospital, Dehra Dun, and Indian cases to the Indian Military Hospital, Dehra Dun

10 Cases sent to Dehra Dun for training at St Dunstan's Hostel for Indian War Blinded will be examined on arrival by the Ophthalmic Specialist at Base General Hospital Dehra Dun They should be such that, in his opinion, they are unable to perform work for which eyesight is essential

11 Medical boards on patients resident in India will be carried out towards the termination of the 4 months training so that discharge from the service can be effected in accordance with War Dept letter No 26258] DMS 5c, dated 21st June 1943 In this connection attention is drawn to India Army Order 150/42.

12 Medical boards on patients who are to be evacuated to the United Kingdom will be carried out as soon after arrival at Dehra Dun as possible After approval, the proceedings will be submitted with passage applications to the Medical Directorate, G H Q (I), New Delhi, so that the name may be noted for a passage without delay Such personnel will NOT be eligible for the concessions given in para 5 above and the privileges extended by St Dunstan's vide the annexure, but they will receive training whilst awaiting repatriation They will of course, NOT be discharged in India and so will continue to receive pay

13 Cases diagnosed while in hospital as suffering from hysterical blindness will be referred for examination and treatment by a Psychiatric Specialist They will NOT be transferred to St Dunstan's

14 All cases mentioned in paragraphs 11 and 12 above will be excused appearing before Standing Medical Review Board, Poona

(N.B.—Annexure is not reproduced. it will be found in the India Army Order)

I A O 143/44. Pensions—Indian.—

Reference I A O 1754/43 All family pension claims, whether considered attributable or not attributable to military service, will, in the first instance be sent by local military commanders to the C. M. A. & P., Lahore, with their recommendations. Only when the C. M. A. & P. has decided that a case is attributable, will it be sent to the local civil authorities for investigation as to the eligibility of the heirs. Cases which the C. M. A. & P. considers not attributable, will be sent to G. H. Q. (I) for consideration.

I A O 182/44 Mail for Imperial Prisoners of War in Enemy Hands—

All civil touring officers and District Sailors', Soldiers' & Airmen's Boards have been asked to encourage relatives to write letters to Indian prisoners of war in enemy hands and to assist and advise them in this matter.

2 In order to implement this proposal it will be necessary for civil officials and District Sailors', Soldiers' and Airmen's Boards to have lists of prisoners coming from their districts.

3 All training centres and depots will, therefore, forward as soon as possible lists of prisoners of war by tehsils, showing the names and full address of their next-of-kin as under—

(a) In the case of British India—

to A C L O. concerned	..	..	1 copy.
to D S S. A. B. concerned	..	..	2 copies.

Where D S S. A. B. does not exist 2 copies will be sent to the D. C. or Collector concerned.

(b) In the case of Indian States—

to C L O concerned	..	..	2 copies.
to States Sailors', Soldiers' & Airmen's Boards concerned	..	..	2 copies.

Where no D S S. A. B. exists all copies will be sent to the appropriate C. L. O. who will forward one copy to the Political authorities and one copy to the State official concerned.

When a list contains several names is submitted to any of the authorities mentioned above the names contained in the list will be grouped by tehsils and districts.

4 I A O 1754/43 is hereby cancelled.

rity concerned (vide I. A. O 1867/43) and their Army pay, etc., disbursed in accordance with the procedure laid down in I. A. O 92/43

8 On admission to a military hospital of a blinded men or any case of serious eye disease or injury likely to lead to blindness or grave loss of vision, the name and full particulars of the patient will be sent at once by O C Hospital to St Dunstan's Hostel for Indian War Blinded, 54, Rappur Road, Dehra Dun, U P, with copies of the letter to A G's Branch, A G 17, G H Q (I), Simla; Medical Directorate, G H Q (I), New Delhi, and to the Officer Commanding Record Office of the individuals' unit [This cancels Z-26238/DMS 5 (c), dated 20th April 1943]

9 As soon as patients are fit to travel British cases will be sent to the British General Hospital, Dehra Dun, and Indian cases to the Indian Military Hospital Dehra Dun

10 Cases sent to Dehra Dun for training at St Dunstan's Hostel for Indian War Blinded will be examined on arrival by the Ophthalmic Specialist at Base General Hospital, Dehra Dun They should be such that, in his opinion, they are unable to perform work for which eyesight is essential

11 Medical boards on patients resident in India will be carried out towards the termination of the 4 months training so that discharge from the service can be effected in accordance with War Dept letter No 26238/DMS-5c, dated 21st June 1943 In this connection attention is drawn to India Army Order 150/42.

12. Medical boards on patients who are to be evacuated to the United Kingdom will be carried out as soon after arrival at Dehra Dun as possible After approval, the proceedings will be submitted with passage applications to the Medical Directorate, G H Q (I), New Delhi, so that the name may be noted for a passage without delay Such personnel will NOT be eligible for the concessions given in para 5 above and the privileges extended by St Dunstan's vide the annexure, but they will receive training whilst awaiting repatriation They will, of course, NOT be discharged in India and so will continue to receive pay

13 Cases diagnosed while in hospital as suffering from hysterical blindness will be referred for examination and treatment by a Psychiatric Specialist They will NOT be transferred to St Dunstan's

14 All cases mentioned in paragraphs 11 and 13 above will be executed appearing before Standing Medical Review Board, Poona

(N.B.—Annexure is not reproduced. it will be found in the Army Order.)

J. C. Os and senior N. C. Os and presided over by the unit welfare officer. All petitions from Indian other ranks are examined by such a committee whose members come from the same district as the petitioner. The committee then recommends to the commanding officer whether the petition should be forwarded (bearing the certificate required by I. A. O. 179443)* or NOT.

In any case disciplinary action should invariably be taken against petitioners whose petitions are found on investigation not to be genuine.

I. A. O. 236441 Complaints regarding Welfare Workers.—

It has been brought to notice that an increasing number of complaints are being forwarded by units to civil and military authorities containing allegations against Welfare workers for corruption and/or prejudice. The form that these allegations take clearly indicate that some unit commanders have very little idea of the realities of the situation.

2. It is manifest that if a Welfare Worker carries out his duties with integrity he will, particularly in so far as investigations about leave or discharge on compassionate grounds are concerned, be bound to incur considerable enmity. This enmity will probably take the form of false reports against him. In this connection it is significant that the vast majority of such reports received are in the most vague and general terms. It must also be borne in mind that experience has shown that 70-75 per cent of petitions arriving at D. S. S. A. B's offices are found on investigation to be unfounded, false or frivolous. (These figures have been estimated by experienced I. A. officers attached to the C. I. Organization).

I A. O 192/11 Petitions—Indian Ranks.—

The number of petitions submitted by Indian ranks concerning family affairs continues to increase and there is a real danger that the whole machinery for investigating these petitions may become clogged and break down completely. In addition, there is an increasing tendency NOT to accept the result of a petition but to submit another petition protesting against the decision given on the first one.

2 It appears that the sepoy in general is in danger of becoming petition minded and is taking to representing through his commanding officer matters which could be more easily and expeditiously settled by the family putting the case direct to the local civil officials, District Sailors', Soldiers' & Airmen's Board or a welfare worker. The Sailors', Soldiers' & Airmen's Board and Civil Liaison Organizations exist to secure the welfare of soldiers and their families in their civil capacity and the ideal is that complaints should be represented direct by the relatives of soldiers to officers of these organizations. Petitions sent from units are in any case based only upon information supplied by these relatives.

3 Unit commanders can help to reduce the present spate of petitions by instilling confidence into their men that the District Sailors', Soldiers' and Airmen's Board and Civil Liaison Organization are watching the legitimate interests of their families. They should be persuaded to advise their relatives to adopt the "direct approach" method suggested above. It can be emphasised that genuine petitions have far more chance of being quickly and satisfactorily settled if they are put forward in this way than if they are sent through roundabout channels to arrive eventually at the bottom of a pile of outstanding petitions in some office. An added advantage of using this method is that the morale of the serving soldier is not undermined by the constant receipt of news of domestic troubles.

4 In addition, it is most desirable that every effort be made to eliminate false and frivolous complaints at the outset. Every frivolous complaint delays the investigation of a genuine one. Experienced Indian Army officers of the Civil Liaison Organization who have the real interests of the Indian other rank at heart, estimate that 70-75 per cent of petitions arriving at District Sailors', Soldiers' & Airmen's Boards from units are for ga-
tion to be unfounded, frivolous or false.

To help commanding officers and the false it is suggested "mittees". These have been considered to be a success.

...the punishment should be given to the soldier who is found guilty of such offences and should be warned in the same way as the soldier who is found guilty of such offences.

(Attention will be drawn to the fact that the order of such subordinate formations as are necessary and will be reported in the same order.)

I A O 2841 Welfare Tours Officers—

Tours by regimental officers are authorized in areas from which their men are recruited for purposes of maintaining touch with the men in their villages in the interests of morale, subject to the following conditions.

(a) The O C unit concerned will submit an application for sanction to the brigade commander, who will satisfy himself that the tour is desirable in the interests of morale. The application will be accompanied by a detailed tour programme and a certificate (signed by the O C) that the touring officer is fully capable of understanding, and making himself understood in, the language of the area covered by the tour programme.

(b) On completion of the tour, the officer will submit a detailed tour report through his O C to the brigade commander.

(c) A quarterly return giving full details of tours carried out will be submitted by brigade commanders through the intermediate formations to reach G II Q (I), on 1st May, 1st August, 1st November and 1st February, i.e., the report for the quarter ending 31st March 1944 is required to be submitted by 1st May 1944.

(d) For the purposes of travelling and daily allowances, the officer carrying out the tour will be governed by the normal rules in Passage Regulations, India, vide Defence Department letter No 78249/A G 17 (a), dated the 31st Jan 1944.

I A O 283/41 Indian Soldiers (Litigation) Act 1925—Preemption Suits—Period of Limitation—

1 Under Indian law there is a valuable right enjoyed in certain circumstances by Indian villagers, known as a "right of preemption". The effect of such a right is that before some particular plot of land is sold to a third party, the person having the right must first be given an opportunity of buying it.

Such a right can be created by agreement, but usually the law recognises such a right in favour of co-sharers, neighbours, relations and landlords, without special agreement.

2 Very often, however, sales of such land are effected, some by accident and sometimes deliberately, without the person thus right of first refusal, being given an opportunity to

buy the land. If this happens he can take legal proceedings to have the sale to the purchaser set aside by a court of law. Such proceedings are known as 'pre-emption suits'.

At the present time all Indian ranks set great store by the Indian Soldiers' (Litigation) Act, which protects their legal interests in many ways. It is, however, important that it should be explained to all V C Os and I O Rs that in spite of the Indian Soldiers' (Litigation) Act a soldier wishing to bring a pre-emption suit must still do so within ONE YEAR from the date the purchaser takes possession of the land even though the soldier may be serving overseas or under "special conditions"—e.g., on field service. If he does not do so, he will lose his right to buy the land.

4 Any V C O or I O R having such a right of pre-emption, and who wishes to commence legal proceedings, but who is unable to attend the court personally, should authorise some friend or relative to act for him by giving a power of attorney in the form given in R A I, Rule 371, which is exempt from court fees.

5 Os C units will ensure that the above information is brought to the notice of all Indian ranks and carefully explained to them.

I A O 360/44 Abduction of Indian Soldiers' Wives—Punishment of Offenders—

1 Considerable difficulty has existed in the past in —

(a) Preventing Indian soldiers' wives going through a ceremony of marriage with another man, often under compulsion,

(b) in punishing persons guilty of committing adultery with, or abducting Indian soldiers' wives,

especially where the soldier concerned was serving overseas or in an operational area.

Although such acts are criminal offences under the Indian Penal Code, the courts were formerly unable to try such offences except on a complaint filed in the court by the husband, or, in the latter class of case, by the person having the care of the soldier's wife, who was sometimes found to be acting in league with the principal offender.

2 This position has now been rectified by the Code of Criminal Procedure (Second Amendment) Act, 1943, which is set out below.

3 The effect of this Act is that it enables a court to try specified offences under the Indian Penal Code concerning the respect of wives of serving soldiers on receiving a complaint from any person duly authorized by the husband in which the husband is serving under conditions which pre-

making a complaint personally and, in cases falling under (b) and (c) of para 4 below, where for any reason no complaint has been made by the person having the care of the soldier's wife

4. The offences specified and the relevant sections of the Indian Penal Code are as follows —

(a) Bigamy committed by a wife (Section 494, I P C)

Note—Although amongst Hindus and Mohammedans, a man may lawfully marry more than one wife, this does not apply to women who are accordingly guilty of bigamy if they marry again whilst already married. The individual knowingly marrying such a woman, would be an abettor of her offence

(b) Adultery committed by a man with a soldier's wife whom he knows or believes to be married (Section 497, I P C)

(c) Enticing or taking away or detaining with criminal intent a soldier's wife by any person knowing or having reason to believe that she is married (Section 498, I P C)

5 Where a soldier receives information that his wife has gone through a ceremony of marriage with another man, or that another person has committed adultery with, or abducted, his wife, and he wishes to take action but is unable to do so personally owing to the nature of his service in the Army, he should inform his commanding officer of the circumstances and of the name of the person whom he wishes to institute proceedings on his behalf in order that proper authority may be furnished in accordance with Section 4 of the Act

6 Os C units will ensure that the above information is brought to the notice of all Indian ranks and carefully explained to them

Act No XXVIII of 1943

An Act further to amend the Code of Criminal Procedure, 1898

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898 (V of 1898) for the purpose hereinafter appearing ;

It is hereby enacted as follows —

1 Short title—This Act may be called the Code of Criminal Procedure (Second Amendment) Act, 1943

2 Amendment of section 198, Act V of 1898—To section 198 of the Code of Criminal Procedure, 1898 (V of 1898) (hereinafter referred to as the said Code), the following further proviso shall be added, namely —

“Provided further that where the husband aggrieved by an offence under section 494 of the said Code is serving in any of His

Majesty's armed forces under conditions which are certified by his commanding officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub section (1) of section 199B may, with the leave of the Court, make a complaint on his behalf "

3 Amendment of Section 199 Act V of 1898—To section 199 of the said Code the following further proviso shall be added, namely —

" Provided further that where such husband is serving in any of His Majesty's armed forces under conditions which are certified by his Commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, and where for any reason no complaint has been made by a person having care of the woman as aforesaid, some other person authorised by the husband in accordance with the provisions of sub section (1) of section 199B may, with the leave of the Court, make a complaint on his behalf "

4 Insertion of new section 199B in Act V of 1898—After section 199A of the said code, the following section shall be inserted in Chapter XV, namely —

" 199B Form of authorisation under second proviso to section 198 or 199 —

(1) The authorisation of a husband given to another person to make a complaint on his behalf under the second proviso to section 198 or the second proviso to section 199 shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be countersigned by the Officer referred to in the said provisos, and shall be accompanied by a certificate signed by that Officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband

(2) Any document purporting to be such an authorisation and complying with the provisions of sub-section (1), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine, and shall be received in evidence

I A O 396/44. Notification of Safe Arrival Overseas of Personnel Despatched from India.—

I. A. O 1057/42 is hereby cancelled and the following procedure will be adopted in respect of personnel India to overseas theatres —

(a) In the case of a unit or draft group

for a particular officer commanding

I. A. O. 793/44 Family Allotments—Indian Ranks —
Reference I. A. O. 2267/43

1 In addition to reducing family allotments or changing allottees where requested to do so by the soldier, officers commanding depots, training centres, etc., also have to reduce or stop allotments after a soldier has been "missing" for a specified period or has died

It must be clear, therefore, to all concerned that any change in the allotment is likely to cause uneasiness in the mind of the allottee.

2 In order to prevent unnecessary fears for the safety of the soldiers officers commanding, depots, training centres, etc., must ensure that when any change whatsoever is made regarding an allotment the reasons for the change are immediately sent to the allottee

I. A. O. 859/44. Postal—Carriage of Private Letters to Nepal by Leave Parties of Gurkha Units serving overseas and within India.—

Letters for addressees in Nepalese territory from Gurkha personnel of units serving overseas or within India can be carried by parties of these units proceeding on leave to Nepal, provided —

(i) that such letters have been censored by the appropriate authority in the unit concerned,

(ii) that such letters are for delivery to places within Nepalese territory, and

(iii) that in respect of overseas letters they are submitted to the appropriate officer for examination and approval at the port of entry into India and the place of departure from British India, if he so requires

2 Each person carrying such letters will carry a certificate signed by an officer stating that he is authorised to carry them under the terms of this I. A. O.

3 I. A. O. 605/44 is hereby cancelled

I. A. O. 899/44 Submission of Petitions —

It has been brought to notice that considerable doubt still exists regarding the correct channels for submission of complaints petitions and enquiries regarding the home affairs of Indian ranks

2 In the case of residents in British India such petitions, etc., will be submitted to the Deputy Commissioner/Collector of the district (In this connection attention is called to I. A. O. 2145/43) In the case of residents in Indian States they will be forwarded to the C. L. O. concerned for disposal and NOT to any State official Appendix to I. A. O. 1951/43 shows which C. L. O. is concerned with

which State Addresses of officers of the Civil Liaison Officer Organization are published in an Appendix* to this order (this supersedes Appendix A to I A O 1035/43) In exceptional cases C I O will deal also with complaints regarding the affairs of residents in British India and matters of general policy as opposed to individual complaints should invariably be referred to them and NOT to D Cs/Collectors

3 In the interests of simplicity it has been decided that verification of applications for discharge or leave on compassionate grounds and investigation of family pension claims will also be dealt with in exactly the same way as ordinary petitions and complaints Action in such cases will therefore be taken as in para 2

4 In the case of applications for leave on extreme compassionate grounds the authority competent to grant such leave will be the man's commanding officer Extension of leave on extreme compassionate grounds may be granted by the T C/Depot/Record Office concerned

5 Where claimants for family pensions are residents in Indian States the C L O will take action to have the claims investigated by the State Officials concerned and on completion will return them to the O C who initiated the claim

6 Complaints regarding payment of family allotment money orders will be dealt with in accordance with I A O 1723/43 and NOT in accordance with para 2

7 In ALL cases it is essential that full addresses and particulars be included in the first instance It is particularly important that enquiries etc regarding Indian soldiers should invariably state the name of the man's father

I A Os 1114/43 1943/43 and Annexure "A" to I A O 1035/43 are cancelled

I A O 979/44. Training of Blinded Service Men.—

Attention is drawn to paragraphs 8, 9, 10 and 13 of I A O 1844 in which the procedure to be observed when sending blinded service men to the St Dunstan's Hostel for the War Blinded Dehra Dun, is laid down There have been occasions when the non-observance of the procedure laid down has resulted in inconvenience to the St Dunstan's Staff and also to the men concerned. In future officers commanding training centres will see that the procedure as laid down is strictly observed

I A O 1021/44. Postal—Free Issue of a Post Card to each new recruit.—

A stamped inland post card will be issued free to each new recruit on arrival at a training centre/recruits reception camp to enable

*A.B.—Appendix is NOT published here. Addresses will be in Chapter III.

to communicate his address to his next of kin. It is most important that the address communicated be plainly and legibly written, preferably in Block Capitals.

2 These post cards will be written under unit arrangements and, in the cases of illiterate men will be written for them.

3 Commanding officers will ensure that the address furnished is correct and that the following is entered on the post card with the blanks correctly filed in —

"Be assured that your welfare will receive official care and attention. If you have any genuine grievance you should approach the Civil Liaison Officer whose address is

.... or the Secretary District Sailors', Soldiers & Airmen's Board or write to the Officer Commanding Depot "

4 The post cards will be purchased from the post office out of the imprest and a separate account will be maintained of the expenditure incurred.

5 The expenditure is debitable to 7 D Misc of the Defence Services Estimates (authority—War Department letter No 74160/Q 12 (a), dated 23 Aug 1943)

G. I. A. O 2152/43 is cancelled

I A O 1096/44. Insurance Policies—Indian Ranks.—

Cases have come to light of difficulty experienced by Indian ranks in getting their claims settled by insurance companies

In order to safeguard them will in future be reported units to the Chief Civil Liaison Officer (C L O) of the located. Addresses of C C L Os and C L Os are given in the Annexure to I A O 809/44

C Os negotiating settlement of claims on behalf of their men should not "come to terms" with insurance companies without obtaining the expert advice available through C C L Os and C L Os

Os C units will arrange for the contents of this order to be explained to their men

I A O 1180/44 Petition Committees —

The formation of "Petition Committees" to assist commanding officers to distinguish between genuine and false petitions, was suggested in I A O 102/44

2 These committees have been formed in a number of units and have been instrumental in reducing very considerably the number of false petitions submitted by I O Rs concerning their home affairs

3 In future Petition Committees on the lines suggested in I A O 102/44 will be formed in all major units which have Indian ranks on their strength and in small units where the numbers of V C Os and N C Os and the class composition of the unit permit

I A O 1219/44. Welfare—Indian Army—Nominal rolls of men whose accounts are maintained on the war system —

In order that District and State Sailors', Soldiers' and Airmen's Boards and the Civil Liaison Officer Organization may safeguard the interests of families of I Rs on active service and maintain a check on the payment of family allotment money orders Officers Commanding depots/record offices will complete and forward I A F N 2595 as under in respect of all personnel who are on the war system of accounting whether they are making family allotments or not —

(a) In the case of British India to —

The A C L O concerned 2 copies

*The D S S A B concerned 2 copies

*Where no D S S A B exists 2 copies will be sent to the D C Collector concerned

(b) In the case of Indian States to —

The C L O concerned 2 copies

**The S S S A B concerned 2 copies

**Where S S S A Bs do not exist all copies will be sent to the appropriate C L O who will forward one copy to the political authority and one copy to the state official concerned

Annexure to this order gives guidance as to the addressing of officers concerned

(c) In the case of Gurkhas, I A F N 2595 will be sent as under —

(i) 1 copy to the Recruiting Officer for Gurkhas Kurnaghat (Gorkhapat) for Gurkhas resident in Western Nepal

(ii) 3 copies to the Assistant Recruiting Officer at Ghoom, Gurkhas resident in Eastern Nepal Darjeeling District (incl Kurseong and Kalimpong Sub-divisions), Sikkim and B

(iii) 1 copy to the British Minister, Nepal, in the case of Gurkhas resident in Western Nepal or Eastern Nepal

When a list containing several names is submitted to any of the authorities mentioned above the names contained in the list will be grouped by tehsils and districts/states

2 Where there is a change in the amount of family allotment, copies of the notification to the family will be endorsed as in para 1 above I A F N 2595 in respect of Indian ranks who may proceed overseas in the future will NOT be furnished until four day subsequent to the known date of sailing of the unit or draft for overseas. On no account will the overseas stations be shown in the case of troops overseas

3 Depots and record offices will ensure that the lists are kept up to date

4 Notification of casualties will also be furnished to the authorities mentioned in para 1, as they occur

5 When I A F N 2595 is used for less than six names, the unused portion of the form will be cut off and used for the submission of further nominal rolls as a continuation sheet

I A Os 1475/42 as amended by Corrigendum List No 93 of 25th Dec 1912 and 1952/43 are cancelled

I A. O 1225/44 Postal—Addressing of correspondence, Indian troops—

1 In spite of repeated instructions on the subject, a large number of Indian troops are not communicating their correct postal addresses to relatives. This accounts for a large proportion of their complaints of non receipt of mail from home

2 The Civil Liaison Officer Organisation and District Sailors', Soldiers' and Airmen's Boards are doing valuable work in the villages in organising free letter writers for illiterate relatives, but their efforts are to some extent being nullified by the neglect of units to ensure that soldiers inform their relatives of their correct address in legible form. On recent tours officers have come across relatives whose only information of the addresses of their serving next of kin has been a jumble of completely unintelligible words written by the soldiers themselves

3 In the interests of morale it is imperative that commanding officers adopt one of the measures suggested in I A O 2387/43 and instruct unit censors to ensure that the correct address of the writer is legibly indicated at the head of all letters from Indian soldiers. In the case of letters to be despatched in green envelopes men should be

encouraged to produce their writing paper for stamping with the unit address either before the letters are written or before they are enclosed in the envelopes

4 When possible envelopes for letters from their relatives with the correct unit address printed on them, will be distributed to men whose correspondence arrives badly addressed. Any expenditure incurred on this account will be met from unit resources

5 The correct address of the unit for correspondents in India and outside India will be exhibited prominently in the Orderly room and published once a week in Part I orders in the form given below

YOUR CORRECT ADDRESS IS

For letters from outside India
No, Rank and Name

For letters from within India
No Rank and Name

3/2 Chandab Regt
INDIA COMMAND

3/2 Chandab Regt ,
c/o No 100 Adv B P O

6 It has been reported that, in some units clerks (or others) detailed to write for illiterates the free post card sanctioned in I A O 2152/43* do so in a most slovenly and illegible manner. Unit commanders will give this matter their personal attention

7 Army Postal Officers will examine incoming mail periodically and visit and advise units with a low standard of addressing

I A O 1306/44 Telegraphic addresses of the officers of C L O organization—

Reference Appendices to I A O 899 and 1219 of 1944

The following telegraphic addresses have been registered in respect of officers of the C L O Organization in their respective stations.

Chief Civil Liaison Officer—"CCLO"

Civil Liaison Officer—"CLO"

Assistant Civil Liaison Officer—"ACLO"

It is necessary in each case to follow the group CCLO|CLO|ACLO by the name of the town in which the office of the officer concerned is located. For example the telegraphic address of the CLO Rajputana and Ajmer Merwara is "CLO Ajmer". Addresses of all officers of the C L O Organization will be found in the appendices to the I A Os quoted above

2 Telegraphic addresses have NOT been registered in respect of the following A C L Os who are located in the same office as the C L Os—

Assistant Civil Liaison Officer A W F P, Peshawar

*Read "I A O 1021/44".

Assistant Civil Liaison Officer, Rawalpindi Area, C/o Headquarters, Rawalpindi District, Rawalpindi

Assistant Civil Liaison Officer, Lahore Area, 28, Davis, Lahore

Assistant Civil Liaison Officer Jullundur Area C/o the C L O , Jullundur-Ambala, Delhi Area Jullundur

Assistant Civil Liaison Officer, Bombay Area, Chimo Road, Poona

Assistant Civil Liaison Officer Northern Madras Area, Cornwallis Barracks Bangalore

Assistant Civil Liaison Officer Southern Madras Area, Cornwallis Barracks, Bangalore

Assistant Civil Liaison Officer, Rajputana and Ajmer Merwara, Ajmer

Telegrams for them should be addressed to their C L Os

I A O 1307/44. Welfare—Indian Army—Notification of men invalided from the service or discharged on account of wounds—

1 In order to safeguard the interest of men of the above categories after return to their homes officers commanding depots and record offices (officers commanding units in the case of units on the place system of pay and accounting) will forward immediately on discharge the particulars given in para 2 in respect of all V C Os , I O Rs , and non combatants (enrolled) so discharged to the authorities shown below —

(a) In the case of British India to —

The A C L O concerned 2 copies

*The D S S A B concerned 2 copies

The Directorate of Resettlement, G H Q (I)

Simla 1 copy

*Where no D S S A B exists 2 copies will be sent to the D C or Collector concerned

(b) In the case of Indian States to —

The C L O concerned 2 copies

†The State S S A B concerned 2 copies

The Directorate of Resettlement, G H Q (I)

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†Where no S S S A B exist all copies will be sent to the appropriate C L O who will forward one copy to the Political Authority and one copy to the State Official concerned

3 This Instruction has effect from those payments which would normally be made to families on the 1st December 1943

A I (I) 15/44 Temporary increases in the Pensions of Indian Military Pensioners —

Service, disability and family pensions (including children's allowances) in respect of V C Os, I O Rs, etc that have been or may be sanctioned *ex gratia* or under the rules in Chapter VII of the Pension Regulations for the Army in India Part II, will be increased at the following scale —

Increases

- | | | |
|--|----|---|
| (i) For pensions not exceeding Rs 20 p m | .. | Rs 3 p m |
| (ii) For pensions exceeding Rs 20 p m but not exceeding Rs 40 p m | | Rs 4 p m. |
| (iii) For pensions exceeding Rs 40 p m but not exceeding Rs 44 p m | | An amount which will bring the pension up to Rs 44 p m. |

2. These increases will have effect from the 1st November, 1943, on the pensions due in December 1943, and will be in operation for one year

NOTE 1—Children's allowances are regarded as part of family pension and do not separately earn any increases under the above rule

NOTE 2—These increases will not apply in cases of service pensioners re-employed during the present emergency for so long as they remain re-employed

A I (I) 43/44 Pensions—Entitlement Rules for Disability and Family Pensions, Children's Allowances and Death Gratuities in respect of I. C Os V C Os, Indian Other Ranks and Non-Combatants etc., during the present war—

With effect from the 3rd September 1939 and for the duration of the present war, the following paragraphs will, in supersession of all previous orders on the subject, govern the question of entitlement to disability or family pensions, etc, in respect of I. C Os, V C Os Indian other ranks and non combatants, etc, of the I. A. who, in the matter of such pension are governed by military rules. All claims accepted thereunder will receive payment with effect

from 15th August 1943 or from the date following that of the claim whichever is later

2. (1) Disablement or death shall be accepted as due to war service provided it is certified that—

(a) the disablement is due to a wound, injury or disease which—

(i) is attributable to war service, or

(ii) existed before or arose during war service and has been and remains aggravated thereby

(b) the death was due to or hastened by—

(i) a wound, injury or disease which was attributable to war service, or

(ii) the aggravation by war service of a wound, injury or disease which existed before or arose during war service

(2) In no case shall there be an onus on any claimant to prove the fulfilment of the conditions set out in clause (1) and the benefit of any reasonable doubt shall be given to the claimant

(3) Where an injury or disease which has led to discharge or death during war service was not noted in a medical report made on the individual on the commencement of his war service, a certificate under clause (1) shall be given unless the evidence shows that the conditions set out in that clause are not fulfilled

(4) Where there is no note in contemporary official records of a material fact on which the claim is based, other reliable corroborative evidence of that fact may be accepted

A.B.—“War service” means military service during the present war whether rendered at a peace station or in a field service area.

3. These rules will be applied in accordance with directions which will be separately published. These directions will be based on the directions affecting “entitlement” contained in the Ministry of Pensions Manuals, 1939, as amended from time to time, incorporating the changes embodied in the Command Paper published as an Appendix to A. I. (I) 355 of 1943, and as modified for application to suit Indian conditions.

A. I. (I) 100/44. Conveyance for relations visiting officer cadets and British and Indian other ranks dangerously ill.—

Free conveyance will be granted to not more than two persons, one of whom must be a relative, to visit an officer cadet or a British or Indian other rank reported as dangerously ill in a military hospital in India.

The cost of conveyance to and from the station at which the patient is in hospital, will be paid after the arrival of the visitors at the hospital. The visitors will be entitled to the same class of conveyance as the patient visited.

3

G H Q (1) LETTERS

No B-74569/1A G 13(b)
GOVERNMENT OF INDIA
DEFENCE DEPARTMENT
(ARMY BRANCH)
Simla, the 6th August 1941

To

The Adjutant General in India (with 300 spare copies)

SUBJECT — *Issue of addressed envelopes to next of kin of Indian commissioned officers Viceroy's commissioned officers and men who are prisoners of war*

Sir,

I am directed to convey the sanction of the Governor General in Council to the free issue of addressed envelopes to the next of kin of Indian commissioned officers Viceroy's commissioned officers and men, who are prisoners of war

2 The standard items in the addresses to be inserted on the envelopes may be printed locally and the expenditure involved in connection with the grant of this concession will be met from the office allowance or the allotment for contingent and miscellaneous expenses, whichever may be admissible for the Depots Record Offices etc

I am, Sir,

Your most obedient servant,

Sd M STAGGS,

Asst Secretary to the Government of India

No B/74569/2/A G 13(b)

GENERAL HEADQUARTER, INDIA

ADJUTANT GENERAL'S BRANCH

Simla, the 14th August 1941

From

The Adjutant General in India

To

All Training Centres|Depots|Records Offices
Forwarded.

Sd DINA NATH,
for Adjutant General in India

No B/74569/3/A G 13(b)

GENERAL HEADQUARTER, INDIA

ADJUTANT GENERAL'S BRANCH

New Delhi, the 18th December 1941

From

The Adjutant General in India

To

All Training Centres|Depots|Record Offices.

SUBJECT — *Issue of addressed envelopes to next of kin of Indian commissioned officers, Viceroy's commissioned officers and men who are prisoners of war*

Reference General Headquarters No B/74569/2/A.G.13(b), dated the 14th August, 1941, on the above subject.

1 The issue of free addressed envelopes will, as a general rule be limited to three per each next of kin of a prisoner of war, but this number may be increased in special cases at your discretion. It is suggested that you issue advance supplies on this basis for 3 months at a time with an explanation that—

(a) 3 free addressed letters are authorised for each month

(b) Further issues of free addressed envelopes will be made every 2 months.

(c) Private envelopes may be issued over and above the 3 free addressed envelopes issued for each month.

2 Envelopes will be printed in accordance with para. 3 of the enclosed instructions regarding communication with prisoners of war interned abroad.

Sd DINA N

for Adjutant

No 13926'P W 2

GENERAL HEADQUARTER, INDIA

ADJUTANT GENERAL'S BRANCH,

Simla, the 5th April 1944

From

The Adjutant General in India

To

All Officers Commanding, All Training Centres, Depots and
Record OfficesSUBJECT — *Next of kin correspondence with prisoners of war in
enemy hands*

1 General — Complaints are frequently being received from Indian Prisoners of War that they do not receive letters from home. In addition to the lack of letters there is ample evidence that Depots, etc., are not in every case carrying out the instructions with regard to correspondence with next-of kin. At present only a small percentage are writing regularly to Europe and an even smaller number to the Far East.

All civil touring officers and District Soldiers Boards have been asked to assist in this matter and should be in possession of lists of next of kin in their districts (vide I A O No 182/44).

2 The Issue of addressed envelopes — Three addressed envelopes may be issued free for the next-of kin of prisoners of War each month [vide Defence Department letter No B/74569/A G 13(b) dated the 6th August, 1941].

3 The translation of letters — A grant of Rupees 15 is sanctioned for the translation into English of every 200 letters written in Indian scripts from the families of next of kin of Indian Prisoners of War (vide I A O 870/42 and corrigendum No 2 List No 32 of April 1943).

Instructions regarding the translation of letters are given in I A O 1423/43.

4 The procedure for the transmission of letters from next-of kin — Next of kin should be sent envelopes addressed to the Regimental Depots, etc., with the words "Letters to Prisoners of War" written in the top left-hand corner. They should be instructed to send letters each month in these envelopes to the Depot for translation. At the Depot all letters should be translated into English and despatched post free by Prisoners of War Mail in addressed envelope.

(vide para 2) In this way all letters to Prisoners of War, other than those privately initiated should pass through the Regimental Depots. A register of next of kin who are not forwarding letters should be maintained so that the A C L O and D S B concerned may be informed.

5 Method of address—Instructions regarding the method of address are contained in I A O 168443 the pamphlet "Matters of Interest to Indian Soldiers and their Families" and in the pamphlet "Letters to Prisoners of War and Civilian Internees in Japanese Hands".

Sd H G A PEARSON, *Colonel*
for *Adjutant General in India*

No 84059/A G 17(c) (u)

DIRECTORATE OF WELFARE & AMENITIES

A G's BRANCH G H. Q (1)

Simla the 5th May 1944.

To

All Training Centres|Depots|Record Offices.

SUBJECT —Writing to Prisoners of War.

Complaints from P. W. regarding non receipt of letters from their relatives continue to increase in spite of every facility being provided to enable relatives and friends to write to Prisoners of War. It is apparent that some relatives do not realise their moral duty towards their menfolk in captivity and do not bother to write unless they have a grievance to ventilate. Propaganda to encourage and assist the writing of letters to P. W. is constantly being disseminated in the villages by the Civil Liaison Organisation and D S B Welfare Workers but the response has, so far, been disappointing.

2. It is proposed to make a more direct approach to the next of kin and to send to each one a letter pointing out the duty of living in security at home to write to those of their relatives who have been less fortunate and are languishing in captivity. A suggested draft on these lines is attached.

3 It is suggested that these letters which will necessarily have to be translated and transliterated as may be appropriate, be forwarded to next of kin when the supply of free addressed envelopes are forwarded in accordance with the instructions contained in this H Q letter No 13926/P W 2 dated the 5th April 1944

4 You will please take the necessary steps to implement the above proposal

Sd N G R COATS *Colonel,*
for *Adjutant General in India*

Suggested draft of a letter to be sent to the next-of kin of P W
Training Centre/Depots

To

H E the Commander-in Chief, who takes a very keen interest in the affairs of all serving men (whether they are prisoners of war or not) has been grieved to note that many relatives are NOT writing regularly to their menfolk who are prisoners in enemy hands. Some relatives say that they never receive letters and consequently do NOT see why they should write. This is a selfish attitude, the enemy sometimes stops Prisoners of War mail in order to discourage relatives from writing. Do not play the enemy's game. Write regularly even if you never hear. It is up to you to bring some cheer to those that have been less fortunate than your self. Remember that you too can help in the war effort by performing this very elementary duty.

The Commander in Chief is watching the situation and hopes that as a result of this letter many more letters will be sent to Prisoners of War. If you have been writing regularly be sure to keep it up. If you have NOT been writing show your loyalty by doing so at once. All you have to do is to write what you wish (as cheerfully as possible) in any language or script and place your letter in one of the enclosed envelopes. No stamp is required.

Write at once write regularly

3 Ind. Ca. 409; 2 C. P. L. R. 73—See 40 C. 849, where 22 C. 596 is distinguished. If a warrant is returned two days prior to the date fixed for its return it cannot be re-issued, and obstruction to the execution of such a warrant illegally re-issued was held not to be an offence under this section. 3 C. W. N. 391. But if the public servant is voluntarily obstructed in the lawful discharge of his duties, mere absence of *mala fides* would not protect the accused, Weir I. 134. On the other hand a mere belief in the public servant, that he is acting in the discharge of his duties is not enough to make obstruction punishable under this section. 1 C. W. N. 74. When certain buffaloes were attached under a defective process of the civil court, their release was held not to constitute an offence under this section. 37 C. 122. See also Ratanlal, 850, 366; 24 C. 320=1 C. W. N. 154 and 26 C. 748; 1905 P. R. (Cr.) 49=1905 P. L. R. 573=3 Cr. L. J. 75. See Part II, Ch. III, § 73, pp 218 to 217, 22 C. 236; 24 C. 320; 13 B. 168; 12 M. C. C. R. 285=10 Cr. L. J. 269; 12 C. W. N. 96=6 Cr. L. J. 393; 6 C. W. N. 120—See *Betts v. Stevens*, L. R. [1910] 1 K. B. 1 for rather a curious case as to what would amount to obstruction. In 1905 P. L. R. 265=2 Cr. L. J. 242, the addressee of a registered article, after taking delivery of the same, tore up the postal receipt, and on its being contended that this act amounted to obstruction of the postal authorities in the discharge of their public functions, by causing delay and loss of time in their work, it was held that this was but a remote and indirect consequence, and the act was not an offence under this section though it would amount to mischief punishable under sec. 426, I. P. C.

187. Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally

Omission to assist public servant when bound by law to give assistance.

omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both; and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot or affray, or of apprehending a person charged with or guilty of an offence, or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Notes.—See as to the word "offence," s. 40, ante p. 17.

As to the persons who are bound by law to assist public servants, see Part II., Ch. III., § 55, at p. 148—as to the scope of the section, see 26 M 419 (F B)

The assistance which a private person is bound to render to a public servant in the execution of his duty must be something definite and specific, which in ordinary circumstances the party assisted could do for himself. An order by the Magistrate in a case to a constable to attend a clue of the case within a certain time to the Police was held to be an order to attend if a person required to attend or search under s. 103, Cr. P. Code, fails to do so, he may be liable under this section 1893 P. J. L B. 406. See also ss. 42, 77 & 128, Cr. P. Code, as to provisions of law which contemplate private persons assisting public servants. In the absence of any such specific provision, a refusal to assist is no offence 22 B. 769. In 6 C. P. L. R. (Cr.) 5, the accused refused to assist a Police Constable in burying a dead body and even threatened to punish anyone who did so. Held this act did not render them liable either under this section or section 186. Even where there is a statutory liability to assist, perhaps it is not every act of refusal that is punishable under this section. If he was called on to assist not out of any reasonable necessity but out of spite on the part of the public servant, with a view to annoy him or if the refusal is due to some physical impossibility or lawful excuse, he may not be liable, *Brown, Car & M* 314, *Sherlock*, 35 L.J (M C.) 92 = L R I. C. C. R 20. A refusal to answer questions put by a Police officer acting under Sec. 161, Cr. P. C., is not punishable under this section. 23 M. 541, 1903 P. R. (Cr.) 27 = 9 Cr. L. J. 103.

188. Whoever, knowing that, by an order promulgated

Disobedience to an order duly promulgated by a public servant

by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both, and if such disobedience causes, or tends to cause, danger to human life, health, or safety, or causes, or tends to cause, a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Disobedience to an order duly promulgated by a public servant shall, if such disobedience causes or tends to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any person lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both, and if such disobedience causes, or tends to cause, danger to human life, health, or safety, or causes, or tends to cause, a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys and that his disobedience produces, or is likely to produce, harm.

Illustration.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in the section.

For commentary, see Part II., Chapter VI, §§ 107—110.

189. Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

Notes.—The injury referred to in the above sections need not necessarily be an illegal injury, and that any threat of harm which is not the lawful result of the act itself is prohibited. For instance, it is perfectly lawful to prosecute a public servant for bribery. But if a suitor were to threaten a Moonsiff with disclosure of an act of bribery, in order to influence his decision in a suit pending before him, this would be a criminal act. If, however, an official were about to perform an illegal act, it would not be criminal to threaten that he should be reported and held up to the displeasure of his superiors. For this would be merely the lawful result of the act which he was committing. Where the threat is verbal only, it is material to establish the precise words that were used, so as to enable the Court to judge whether the threat was one of injury, or only such a threat of making a lawful complaint as would be justifiable under the facts of the case. 9 A. 330. See also Ratanlal 273 & 350; 14 C. W. N. 235.

190. Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against

Threat of injury
to induce any per-
son to refrain

from applying for any injury, to any public servant legally protection to a empowered as such to give such public servant protection or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Note.—See S M. 140, and commentary to s 508, Part II., Chapter XIV.

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

191. WHOEVER, being legally bound on an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.

Explanation 1 —A statement is within the meaning of the section, whether it is made verbally or otherwise

Explanation 2 —A false statement as to the belief of the person attesting is within the meaning of the section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know

Illustrations.

(a) A, in support of a just claim which B has against Z for one thousand rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.

(b) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(c) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is

merely as to his belief and is true as to his belief, and, therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(d) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing anything upon the subject. A gives false evidence *whether Z was at the place on the day named or not.*

(e) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document which he is bound by oath to interpret or translate truly, that which is not, and which he does not believe to be a true interpretation or translation. A has given false evidence.

For commentary on this section, see Part II., Ch. VII, §§ 111—115, pp. 351—365.

192. Whoever causes any circumstances to exist, or

*Fabricating false
evidence*

makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry, or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an *opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."*

Illustrations

(a) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(b) A makes a false entry in his shop-book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(c) A, with the intention of causing Z to be convicted of a criminal conspiracy, writes a letter in imitation of Z's handwriting purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the Police are likely to search. A has fabricated false evidence.

For commentar on this section, see Part II., Ch. VII, § 117.

193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1 —A trial before a Court Martial is a Judicial Proceeding.*

Explanation 2 —An investigation directed by law preliminary to a proceeding before a Court of Justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice

Illustration.

A, in an inquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3 —An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice

Illustration.

A, in an inquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

For commentary on this section, see Part II, Ch. VII., §§ 118 and 119, pp. 372-384.

* The words "or before a Military Court of Request" formerly contained in this explanation were repealed by Act XIII of 1892

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing

Giving or fabricating false evidence with intent to procure conviction of a capital offence

it to be likely that he will thereby cause, any person to be convicted of an offence which is capital *by the law of British India or England* * shall be punished with transportation for life, or with

rigorous imprisonment for a term which may extend

If innocent person be thereby convicted and executed

to ten years, and shall also be liable to fine, and if an innocent person be convicted and executed in consequence of such false evidence, the person who

gives such false evidence shall be punished either with death or the punishment hereinbefore described.

Note.—A man who, on the trial of A for murder, states that the murder was not committed by A, but that it was committed by B, who is not in custody, has not committed an offence under this section as his evidence, so given, cannot cause any person to be convicted of a capital offence. He is only punishable under s. 193 3 B. L. R. (A. Cr.) 35. Again, to render a person liable under this section giving false evidence before the committing magistrate is not enough, as the natural consequence of the false evidence need be nothing graver, than a committal to the Court of Session and not necessarily conviction and it must be presumed the accused intended the natural consequence only. *Ratanlal* 80; 1886 P. R. No 32, 1906 A. L. J. 110n. The Calcutta High Court took a different view in 20 W. R. (Cr.) 41. There false statements were made to the Police and it was held this was within the definition in s. 191, I. P. C., and if the intention was to stick to these statements right up to the Sessions Court, the offence contemplated by this section was made out.

195. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be

Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation or imprisonment.

likely that he will thereby cause, any person to be convicted of an offence which by the law of British India or England is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall

be punished as a person convicted of that offence would be liable to be punished.

* Words in italics were introduced by s. 149 of the Indian Railways Act IX of 1890.

Illustration.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such transportation or imprisonment with or without fine.

Note — Where a man burns his own house and charges another with the act, he should be convicted under s. 211, and not under this section. 8 W R (Cr) 63 See 5 N.W.P.H.C.R. 183; 1 A 379; 6 M. L. T 91; 1912 P. W. R. (Cr) 17=1912 P. L. R. 431=3 Cr. L. J. 252=14 Ind. Cas 604.

196. Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

Using evidence known to be false

For commentary on this section, see Part II., Ch. VII, § 120.

197. Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Issuing or signing a false certificate

198. Whoever corruptly uses, or attempts to use, any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Using as true a certificate known to be false in a material point

199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes, to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

False statement made in any declaration which is by law receivable as evidence

This section deals with voluntary declarations while s. 191, *supra*, deals with compulsory declarations. See 4 M. H. C. R. 185.

200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Using as true any such declaration known to be false

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

For commentary on ss 197–200, see Part. II., Ch. VII, § 121.

201. Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and if the offence is punishable with transportation for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine, and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Causing disappearance of evidence of an offence committed, or giving false information touching it, to screen the offender

If a capital offence

If punishable with transportation

If punishable with less than ten years' imprisonment

Illustration.

Note.—The scope of the section is limited to acts to which ss. 193 to 195 do not extend. 1834 P. R. No. 42 Thus instigation of the complainant and witnesses in a case to make false statements being covered by s. 193 read with s. 109 ought not to be dealt with under s. 509, *infra*, as an attempt to commit an offence under this section, Ratanlal, 236.

202. Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both

Intentional omission to give information of an offence by a person bound to inform

Note.—The offence under this section is by no means minor to the offence dealt with under s. 201, for this section involves as a necessary element the legal duty to give information and this is no part of the offence under s. 201. 5 Sind L. R. 123 = 13 Cr. L. J. 18 = 13 Ind. Cas. 210. This and the next section closely resemble two other groups (a), ss. 118 to 120 and (b), ss. 176, 177 and 182, while this section is confined to cases where offences have been actually committed, Ratanlal 160; 4 W. R. (Cr.) 29; Weir I. 181 and the motive of the person omitting to give information or supplying false information is immaterial. 1 W. R. (Cr.) 18; 9 W. R. (Cr. Let.) 2. The first of the other two groups concern cases where the fact concealed is a design to commit an offence and the motive for concealment is to afford facilities for the commission thereof. The latter group is much wider in scope and is not restricted to offences committed or a design to commit offences and the motive for false information under s. 182 is to mislead a public servant and cause him to use his lawful power to the injury or annoyance of any person.

203. Whoever, knowing or having reason to believe that an offence has been committed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Giving false information respecting an offence committed.

* *Explanation.*—In sections 201 and 202 and in this section the word "offence" includes any act committed

* The explanation was added by s. 6 of Act III of 1894.

200. Whoever corruptly uses or attempts to use as true any such declaration, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Using as true any such declaration known to be false.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

For commentary on ss 197—200, see Part II., Ch. VII, § 121.

201. Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and if the offence is punishable with transportation for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine, and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both

Causing disappearance of evidence of an offence committed, or giving false information touching it, to screen the offender

If a capital offence

If punishable with transportation

If punishable with less than ten years' imprisonment

Illustration.

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

Note—The scope of the section is limited to acts to which ss 193 to 195 do not extend. 1834 P. R. No. 42 Thus instigation of the complainant and witnesses in a case to make false statements being covered by s. 193 read with s. 109 ought not to be dealt with under s. 509, *infra*, as an attempt to commit an offence under this section, Ratanlal, 236.

202. Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Note—The offence under this section is by no means minor to the offence dealt with under s. 201, for this section involves as a necessary element the legal duty to give information and this is no part of the offence under s. 201 5 Sind L. R. 123=13 Cr. L. J. 18=13 Ind. Cas. 210. This and the next section closely resemble two other groups (a), ss 118 to 120 and (b), ss 176, 177 and 182, while this section is confined to cases where offences have been actually committed, Ratanlal 160; 4 W. R. (Cr.) 29; Weir L. 181 and the motive of the person omitting to give information or supplying false information is immaterial 1 W. R. (Cr.) 18; 9 W. R. (Cr. Let.) 2. The first of the other two groups concern cases where the fact concealed is a design to commit an offence and the motive for concealment is to afford facilities for the commission thereof The latter group is much wider in scope and is not restricted to offences committed or a design to commit offences and the motive for false information under s. 182 is to mislead a public servant and cause him to use his lawful power to the injury or annoyance of any person.

203. Whoever, knowing or having reason to believe

Giving false information respecting an offence committed,

shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

* *Explanation*—In sections 201 and 202 and in this section the word "offence" includes any act committed

* The explanation was added by s. 6 of Act III of 1894.

at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460

For commentary on ss. 201 to 203, see Part II., Ch. VII, § 122

204. Whoever secretes, or destroys, any document

Destruction of document to prevent its production as evidence

which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant as such, or obliterates, or renders illegible, the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

Notes—This section is only an aggravated form of the offence already dealt with in s. 175 *supra*. Here the act amounts to a suppression of evidence. But no question of materiality of the evidence destroyed arises. Nor is it necessary there should be legal proceedings pending. Thus a *Patwari* was held liable under this section for destroying a leaf out of the Register of Mutations of a village, 1839 P. R. No. 24. But the destruction of the rough notes designed for the preparation of a fair document is not an offence under this section. 14 Bom. L. R. 1163 = 1 Bom. Cr. C. 234

Where a party to a suit snatched up a document, which had been produced in evidence, and ran away with it, in order to prevent a witness referring to it, he was held to have committed an offence under this section, and not theft 3 M. 261. So also where a police officer destroyed a genuine report of the commission of an offence, and substituted for it a false report. 20 A. 307

205. Whoever falsely personates another, and in such

False personation for the purpose of any act or proceeding in a suit.

assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued, or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either description for a

term which may extend to three years, or with fine, or with both.

Notes. Fraudulent gain or benefit to the party charged is not an essential element of this offence. Therefore, a conviction was upheld where the 1st prisoner was charged with personating the 4th, and the 4th prisoner was charged with abetting the personation by the 1st, the facts being, that the 4th, to save himself the trouble of laying information before a Magistrate with regard to the theft of some bullocks, sent the 1st prisoner to do so, and to represent himself as being the 4th. 1 M. H. C. R. 430; see 8 W. R. (Cr.) 80; 5 Bom. L. R. 138 following 2 B. L. R. (A. Cr.) 25.

It has been ruled in Bengal that the offence may be committed even where the prisoner has personated a purely imaginary person. 1 Ind. Jar (O. S.) 123. But the High Court of Madras has declined to follow that decision, saying :—

“ To constitute the offence of false personation under s 205 of the Penal Code, it is not enough to show the assumption of a fictitious name. It must also, we think, appear that the assumed name was used as a means of falsely representing some other individual. The use of an assumed name without more is not an offence. It only becomes a crime when connected by proof with some other act or piece of conduct, and the gist of the offence of false personation under s 205, we think, is the feigning to be another known person. The whole language of the section clearly imports the acting the part of another person, the actor pretending that he is that person.”

“ There are sections of the Penal Code under which the false assumption of appearance or character may be an offence, though no individual is meant to be represented, or only an imaginary person. Such are the ss 140, 170, 171, and 415 but they have no application to the present case, and the last section is made applicable to personation of an imaginary person by an express enactment.” 4 M H C. R 18

206. Whoever fraudulently removes, conceals, trans-

fers, or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture, or in satisfaction of a fine, under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made, or which he knows to be likely to be made, by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

Fraudulent removal or concealment of property to prevent its seizure as a forfeiture or in execution of a decree

Note—A suit for rent tried by a Collector is a civil suit and removal with intent to prevent execution of the Collector's decree is within the section 2 B. L. R (Sh N.) 4=10 W. R. (Gr) 46. But where the Collector distrained two tents to recover arrears of land revenue and entrusted them to the care of the accused, the latter's removal or concealment of the tents distrained was held not to be within the section for the reasons (1) the property being already under distraint, the intention of the accused was not to prevent its seizure and (2) the intended sale realised arrears of land revenue which could not be described as forfeiture under a sentence pronounced or likely to be pronounced, 1888 A. W. N. 237.

For commentary on ss 206—208, see Part II., Ch. VII, §§ 123—125, pp 392—409

207. Whoever fraudulently accepts, receives, or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture, or in satisfaction of a fine under a sentence which has been pronounced, or which he knows to be likely to be pronounced, by a Court of Justice, or other competent authority, or from being taken in execution of a decree, or order, which has been made, or which he knows to be likely to be made, by a Court of Justice in a civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

208. Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is due to such person, or for any property, or interest in property, to which such person is not entitled, or fraudulently causes or suffers a decree, or order, to be executed against him after it has been satisfied, or for anything in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration.

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account, or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decree. Z has committed an offence under this section.

Note.—Where an application for execution is refused, it cannot amount to an offence under this section. The gist of the offence is not in allowing an execution petition to be filed but in causing the decree to be executed. 23 C. 971.

209. Whoever fraudulently or dishonestly, or with Dishonestly making false claim in a Court of Justice intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Note.—This section is limited to false claims to a Court of Justice and not to mere applications to execute decrees privately adjusted in whole or in part. 12 W. R. (Gr.) 37. That part of the claim is true is no defence 1890, A. W. N. 1 provided he knew the other part was false 1893 P. R. No. 38. But a person cannot be convicted both for making a false claim as well as for false verification of his plaint. 1901 A. W. N. 187. See Ratanlal 25.

210. Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied, or for anything in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Note.—The word "satisfied" in this section is to be understood in

on notice to the judgment-debtor, because it appeared that the decree had been satisfied out of Court, is not an offence under this section. 23 C. 971. The gist of the offence is in getting the decree to be executed after satisfaction. 12 W. R. (Cr.) 37; 1885 P. R. No. 7; 1902 P. R. (Cr.) 13=1902 P. L. R. 88. In the case of having fraudulently obtained a decree the offence is completed the moment the decree is obtained. The fact that the decree so obtained is still in force and has not been set aside is not a bar to a prosecution. 33 C. 193.

211. Whoever, with intent to cause injury to any

False charge of person, institutes or causes to be institu-
offence made with
intent to injure. ;

having committe

just or lawful ground for such proceedings or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

For commentary on this section, see Part II, Ch VII, § 127.

212. Whenever an offence has been committed, who-

Harbouring an offender.

ing him from legal

If a capital offence.

It punishable with transportation for life, or with imprisonment.

ever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished

with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment which may extend to one year and not to ten years, shall be

punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

“Offence” in this section includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460; and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception — This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration.

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to transportation for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine

Note.—For commentary, see Part II, Ch. IV, § 87. The word ‘offence’ in this section has to be understood as regards offences under special or local law as restricted to offences punishable under such law with imprisonment for a term of 6 months or upwards whether with or without a fine. See last paragraph in s. 40, *supra*.

213. Whoever accepts, or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence, *If a capital offence,* is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall

If punishable with transportation for life, or with imprisonment also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Note.—For commentary on ss. 213, 214, see Part II., Ch. IV., § 88. See the recent case reported in 13 Bom. L.R. 694=2 Bom. Cr. C. 101=14 Cr. L. J. 433=20 Ind. Ca. 613, where 14 M. 400, 23 C. 420 and other cases discussed at pp. 266, 267 of Part II. were considered to support the proposition that liability under these sections would arise only if it is established that an offence has actually been committed.

214. Whoever gives or causes, or offers or agrees to

Offering gift or restoration of property in consideration of screening offender.

give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

If punishable with transportation for life, or with imprisonment.

shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception —The provisions of sections 213 and 214 do not extend to any case in which the offence may lawfully be compounded.

Note - The illustrations formerly appended to this section have been repealed by Schedule I of the 1892 Crim. P. C. The whole law as to compounding offences is now contained in s. 345 of the 1898 Code.

215. Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Note.—For commentary on this section see Part II, Ch. IV, § 89, at p. 271. 23 A. 81 cited at p. 272 was also considered in 12 Cr. L. J. 72=9 Ind. Ca. 421. See 1 Bur. 461.

216. Whenever any person convicted of or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the manner following, that is to say, if the offence for which the person was in custody, or is ordered to be apprehended, is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; if the offence is punishable with transportation for

Taking gift to help to recover stolen property, etc.

Harbouring an offender who has escaped from custody, or whose apprehension has been ordered.

If a capital offence.

life, or imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine; and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both

“ Offence ” in this section includes also any act or omission of which a person is alleged to have been guilty out of British India which, if he had been guilty of it in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India; and every such act or omission shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India.

Exception.—This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended

216A. Whoever, knowing or having reason to believe that any persons are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity or of screening them or any of them from punishment, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without British India.

Exception.—This provision does not extend to the case in which the harbour is by the husband or wife of the offender.

216B. In sections 212, 216, and 216A, the word "harbour" includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension.

For commentary on ss 216, 216A, see Part II., Ch. IV., § 87, at p. 260.

217. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or subject him to a less punishment than that to which he is liable, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture, or any charge, to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

Note—The direction of law here referred to means some express statutory provision such as Cr P. C., ss 44, 45, or of some rules and regulations having the force of law, 1902 A. W. N. 16. It does not extend to the general obligation not to stifle a criminal charge, which is common to all subjects 1 M. 265. On the other hand, it is not necessary to show that the person intended to be saved had committed any offence, or was justly liable to punishment. The criminality consists not in saving a guilty man from punishment, but in obstructing the proper course of justice in his case. 3 C. 412 = 1 C. L. R. 483, where 20 W. R. (Cr.) 66 is distinguished. See 8 W. R. (Cr.) 68. The intention must be to save a person from legal punishment, i.e., from judicial sentence and not merely departmental punishment—per Pontifex, J., 19 W. R. (Cr.) 40. It is immaterial for the purpose of this section that the intention to save was founded upon a mistaken belief as to the person's liability to punishment—per Jackson, J., 3 C. 412. Again the intention may be to save any person, including the public servant himself, 19 A. 303, overruling 6 A. 42 on this point. Where, however, the facts found were that an illiterate police patel, on receiving information that two persons had committed rape, prepared a panchanama and arrested the accused and sent them towards the police station, but on the way the parties resolved to drop the matter presumably to save the reputation of the girl, and on their return to the village informed the patel of the compromise, and the patel thereupon tore

up the panchanama, his conviction under this section was annulled on the ground the knowledge or intention requisite for a conviction under this section could not be imputed to him, 13 Bom. L. R. 578=2 Bom Gr C 90=14 Cr. L. J. 441=20 Ind. Ca. 601

218. Whoever, being a public servant, and being, as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or to any person, or with intent thereby to save, or knowing it to be likely that he will thereby save, any person from legal punishment, or with intent to save, or knowing that he is likely thereby to save, any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both

Notes.—This section contemplates the wilful falsification of a public document with intent to cause loss or injury, and this means by the document itself or by some transaction with which it is essentially connected. The accused must not be convicted on a remote and speculative chain of possibilities, *Ratanlal* 201. This section may be useful when an attempt to cheat has not proceeded beyond the stage of preparation. Preparation when it has got to a certain stage is made punishable by this section, as when a public servant prepares false vouchers with a view to get paid sums of money to which he is not entitled. It is not necessary the incorrect document should be submitted to another person. 1931 P. R. No. 13.

See the remarks upon this section, *ante* note to s. 167, and 20 A., 307. A man who intentionally read out false abstracts of papers to a person who was preparing a record, in consequence of which the latter innocently produced what was a false record, was held not to have committed an offence under this section, but to be properly indictable for abetting such an offence 7 N.-W. P. H. C. R 131.

The public servant must be one who is bound to prepare the record, *Weir* I. 197. A public servant who frames a false document, of a character which it was not his duty to prepare, is not punishable under this section, 5 A. 553, but the words 'charged with the preparation' are not restricted to the narrow meaning of 'enjoined by a special provision of law.' It is sufficient to show that the document was prepared in accordance with a practice, to which it was the official duty of the accused to conform. 27 C. 144,

at 151. It has been held that he is not punishable, if his object in preparing the false document was to screen himself from punishment, by concealing the fact that he had committed a breach of duty, 6 A. 42, unless the mode in which he has framed the false document has, and must have been known by him to have, the effect of causing injury to the public or to others 8 A. 633. In a later case, however, the same Court held that if the act charged would tend to save any person from legal punishment, it was equally an offence where the accused intended to save himself. 19 A. 303. In 7 B. H. C. R. (Cr. Ca.) 61, a Kulkarne sent a false report about an offence committed in his village intending to save the real culprit from punishment and he was held liable under this section. See also 21 A. 159, at p. 163. Where certain persons informed the police that they had been decoited, but the police-officer to save himself trouble wrote down that his informant was not decoited and to support this version, destroyed the note-books of his beat constables and substituted fresh note-books he was adjudged liable under this section [1911] 2 M. W. N. 44=12 Cr. L. J. 453=11 Ind. Ca. 799.

A sub-inspector of police was charged with having falsely reported the absence from duty of one of the chowkeedars. Part of the evidence against him was an entry by the defendant, a constable, that the supposed absentee had been present on a particular day. It was proved that the charge by the sub-inspector was perfectly true, and that the entry by the constable was false. A conviction of the constable under this section was set aside. The Court held that the intention to injure the sub-inspector by the false entry was too remote. That the real intention was to screen the chowkeedar, but that the term "legal punishment" was not intended to apply to a case of this kind, where, if the chowkeedar had been found to be absent, he could only be fined by his superior in the police. 19 W. R. (Cr.) 40.

219. Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both

Public servant in a judicial proceeding corruptly making an order, report, etc., which he knows to be contrary to law

Note.—This section must be read with s. 77 *supra*. Knowledge that the order is contrary to law is a question of fact and its existence or otherwise would depend on the circumstances of each case (9 B. H. C. R. 346) and malice must be proved and must not be presumed and an honest mistake would preclude such knowledge. 13 K. L. R. 332=1 Cr. L. J. 146; 7 W. R. (Cr.) 3.

As to the phrase "judicial proceeding," see Part II, Ch. VII, § 118.

220. Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly, or maliciously, commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Commitment for trial or confinement by a person having authority who knows that he is acting contrary to law

Note.—It is only where there has been an excess, by a Police officer, of his legal powers of arrest, that it becomes necessary to consider whether he has acted corruptly or maliciously, and with the knowledge that he was acting contrary to law. Where the excess is legal, there can be no fault on his charge, superadded to an offence against the accused, 10 B. 503; see 5 Bom.

10 B. 503.

221. Whoever, being a public servant, legally bound as such public servant to apprehend, or to keep in confinement, any person charged with, or liable to be apprehended for, an offence intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping, or attempting to escape, from such confinement, shall be punished as follows, that is to say.—

Intentional omission to apprehend on the part of a public servant bound by law to apprehend.

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable by death; or

With imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with transportation for

life, or imprisonment for a term which may extend to ten years ; or

With imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended, for an offence punishable with imprisonment for a term less than ten years.

222. Whoever, being a public servant, legally bound as such public servant to apprehend, or to keep in confinement, any person under sentence of a Court of Justice for any offence or lawfully committed to custody, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping, or attempting to escape, from such confinement, shall be punished as follows, that is to say —

Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice

With transportation for life, or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death ; or

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life, or penal servitude for life, or to transportation, or penal servitude, or imprisonment for a term of ten years or upwards ; or

With imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, to imprisonment for a term not exceeding ten years, or if the person was lawfully committed to custody.

As to the phrase "judicial proceeding," see Part II, Ch. VII, § 118.

220. Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly, or maliciously, commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Commitment for trial or confinement by a person having authority who knows that he is acting contrary to law

Note.—It is only where there has been an excess, by a Police officer, of his legal powers of arrest, that it becomes necessary to consider whether he has acted corruptly or maliciously, and with the knowledge that he was acting contrary to law. Where the arrest is legal, there can be no guilty knowledge, superadded to an illegal act, such as it is necessary to establish against the accused, so as to justify a conviction under this section. 10 B. 503; see 5 Bom. L. R. 597.

221. Whoever, being a public servant, legally bound as such public servant to apprehend, or to keep in confinement, any person charged with, or liable to be apprehended for, an offence intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping, or attempting to escape, from such confinement, shall be punished as follows, that is to say —

Intentional omission to apprehend on the part of a public servant bound by law to apprehend.

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable by death; or

With imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended for, an offence punishable with transportation for

life, or imprisonment for a term which may extend to ten years ; or

With imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement, or who ought to have been apprehended, was charged with, or liable to be apprehended, for an offence punishable with imprisonment for a term less than ten years.

222. Whoever, being a public servant, legally bound as such public servant to apprehend, or to keep in confinement, any person under sentence of a Court of Justice for any offence or lawfully committed to custody, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping, or attempting to escape, from such confinement, shall be punished as follows, that is to say —

With transportation for life, or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement, or who ought to have been apprehended, is under sentence of death ; or

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life, or penal servitude for life, or to transportation, or penal servitude, or imprisonment for a term of ten years or upwards ; or

With imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement, or who ought to have been apprehended, is subject, by a sentence of a Court of Justice, to imprisonment for a term not exceeding ten years, or if the person was lawfully committed to custody,

Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice

Note.—It is essential to prove the legal obligation imposed upon a public officer, neglect of which is charged against him. For instance, a village watchman in the U. P. is not bound to arrest beyond his beat a person who is not a proclaimed offender, nor one who has committed certain heinous offences specified in Act XVI of 1873, s. 8, unless such offences were committed in his presence 3 A. 60 See also 29 A. 377 Where a police officer allowed a prisoner to escape from his custody while he was on sentry duty, it was held, he was liable under this section and not under Act V of 1861. 1874 P. R. 11; 1863 P. R. 2

223. Whoever, being a public servant, legally bound as such public servant to keep in confinement any person charged with or convicted of any offence or lawfully committed to custody, negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Notes—1. This section deals with three classes of persons. The

to cases where the person who is allowed to escape, is in custody for an offence or has been committed to custody, and not to cases where such person has simply been arrested under civil process. 12 C. 190. Such a case would, however, be met by s. 225A.

2. Convict warders are public servants within the meaning of this section. 7 W. R. (Cr) 99; Ratanlal 389 So also a *rakha* Ratanlal 388, but not a village *vetti*, Weir I. 197 though a *talari* is a public servant within this section. See s. 21, *supra*.

3 The public servant must be legally bound to keep in confinement. A village policeman is nowhere authorised to keep in confinement convicted prisoners and he is not liable if he negligently suffers a prisoner to escape. 1 Bom. L. R. 349. See 1891 P. R. (Cr) 20, where the custody was found to be not legal and consequently accused was held innocent.

4. For purposes of ss. 220-225, confinement is used as synonymous with custody—*per* Plowden, J, 891 P. R. Cr. 2 (F.B.). The expression 'escape from confinement' is not limited in application to escape from enclosed space, 1890 P. R. 32 In this last case, the accused happened to be guard of certain cells in which condemned prisoners were confined. The latter made an attempt to escape and were discovered crouching on the roof and accused were acquitted as they negligently suffered an attempt to escape and not a completed escape.

5. The negligence of the accused must be the proximate cause of the escape and not merely remotely connected with it. 7 A L. J. 907=11 Cr. L J 478=7 Ind. Cas. 411. Thus in 1900 P. L R (Cr.) 12 a police-officer absented himself from the station and during his absence one of the persons detained in the lock-up escaped; it was held that it cannot be said that he negligently suffered the person to escape, although the officer should have been at the station under the departmental rules at the time of escape. Where the accused marched a prisoner after sunset contrary to the direction of magistrate and the person was rescued, no offence was made out under this section as there was no neglect of duty. 6 M. L. T. 247=10 Cr. L.J 233 See 6 A 129 & 1883 P R. (Cr.) 19 for cases really within the section

6 Where the police of a native state effected an arrest in British territory for an offence committed within the state and made over the accused to the custody of a Choukidar the latter could not be held liable for having suffered the accused to escape, neither the original arrest nor the subsequent custody being legal. 1907 A. W. N. 94=5 Cr. L. J. 277. See also 9 Cr. L. J. 431.

224. Whoever intentionally offers any resistance, or illegal obstruction, to the lawful apprehension of himself for any offence with which he is charged, or of which he has been convicted, or escapes, or attempts to escape, from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

Explanation—The punishment in this section is in addition to the punishment for which the person to be apprehended, or detained in custody, was liable for the offence with which he was charged, or of which he was convicted.

Notes —The escape which is punishable under this section is escape from custody for an offence. Escape from custody under civil process is not punishable, 6 B. H. C. R (Cr. Ca.) 15. Nor escape from or resistance to apprehension under s. 55 of the Cr. P. C., as being a person of bad livelihood 7 A., 67. Such cases would now be covered by s. 401. The word "escape" includes the case where he escapes from custody after having been taken into custody.

-constitute arrest. Weir I. 203. *Bird v. Jones*, 15 L. J. Q. B. 82. But trivial resistance to unlawful force on the part of an arresting officer, such as hand-cuffing a person arrested for a bailable offence, does not constitute an offence under this section. 1 L. B. R. 173.

Act IV, of 1867 (defining "offence"), followed by Act XXVII, of 1870 (Penal Code Amendment) has cleared away a good many difficulties which attended these sections, 221-225. It extends the meaning of the word "offence" to anything made punishable by a special or local law, 3 M. H. C. R. App. XI. and renders escape from custody for default of giving security under Chapter XXXVIII of the Cr. P. C. punishable with one year's imprisonment, or fine, or both (s 225-A, *post*). The introduction of the words "lawfully committed to custody" in s. 222 and 223 also meets the case of persons lawfully arrested on suspicion, e.g., under Cr. P. C., s. 55, though not actually charged with any specific offence. An arrest of a person by a duly authorised officer is a charging, i.e., an imputation of an alleged offence, though only a *prima facie* imputation until the case goes before a magistrate. (Ratanlal 298. See 5 W. R. (Cr. Let.) 9=1 Wym. Circ. 26; 6 A. 129; 1883 P. R. 19; Ratanlal 298) or lawfully arrested on a charge
 : : : : : R. (Cr.) 45;
 : : : : : B. R. 221=
 2, : : : : where the
 : : : : : arrested by a

private person for an offence, such as theft not committed in his presence. (5 M. 22; 27 C. 366; 19 M. 310; 1893 P. R. 12; Weir I. 205; Nor when a person had been arrested by mistake for another of the same name against whom a warrant had been issued because he is not detained for any offence 21 C. 337. But if the detention is lawful and for an offence it is no excuse to plead that the escape was effected with the consent, connivance or neglect of the detaining officer, 1 Russ 555; 15 M. C. C. R. Cr. 42; Weir I. 203; 18 M. 401; see, however, 7 Ind. Cas. 392=11 Cr. L. J. 477, nor when he is being taken before a magistrate for being bound over under s. 109 or s. 110, Cr. P. C. 8 C. 331; 7 A. 67; 9 A. 452; 7 M. H. C. R. App. XLI. But where a private person has arrested a thief, caught in the act of stealing, his arrest continues to be lawful, though he is forwarded to the police station in custody of a person who has not witnessed the offence. 11 M. 480; 29 A. 575=1307 A. W. N. 179=4 A. L. J. 483=6 Cr. L. J. 10. And so it was held when the accused had been apprehended on a hue and cry raised as he was running away after committing a robbery, he was then handed over to the village magistrate, from whose custody he escaped. The village magistrate was authorized under Reg. XI of 1816, s. 5, to apprehend all persons charged with committing crimes and to forward them to the police officer. His detention for this purpose was therefore legal. 11 M. 480; 17 M. 103. But simple evading of arrest would not amount to resistance or illegal obstruction to lawful apprehension. Weir I. 203; 12 Bur. L.R. 272=4 Cr. L. J. 287.

1891 A. W. N. 64. Nor would it constitute an offence to sit at the entrance to a house if the person sitting is entitled to be seated there and offers no further resistance to retaking beyond his physical presence at the entrance. Weir I. 211.

To sustain a conviction the custody from which he escapes must be one in which he is lawfully detained. Thus when a man accused of petty theft was handed over at night to a village headman and the latter as the safest mode of detaining him put him in stocks and set the talari and vetta to watch the offender and when the watchman fell asleep the accused drew out the pin of the stocks and escaped, it was held in Weir I. 199 & 203 (23 A. 263) that detention in stocks otherwise than as punishment on conviction being illegal, the offender was not lawfully detained so as to make his escape punishable under this section. But the mere fact that a constable in charge who lawfully detained a prisoner fell asleep or became insensible would not determine lawful custody. Weir I. 203. If a police officer arrests without warrant a person charged with non-cognizable offence, the custody is not lawful and escape not punishable 21 W. R. (Cr.) 43; 1896 A. W. N. 151; 5 L. B. R. 21=10 Cr. L. J. 118=2 Ind. Cas. 619, 35 C. 361. Similarly where the person apprehending has no power to arrest, 1833 P. R. (Cr.) 21. Where the warrant is not lawfully signed, it is no offence to escape from an arrest made thereunder, 1883 P. R. (Cr.) 21. See *contra* 5 C. W. N. 447 where the warrant was merely initialed. But in order to make the detention lawful, it is not necessary a warrant must be shown before the person to be arrested demands its production 27 C. 320. See further as to cases falling within this section 10 C. W. N. 287=3 Cr. L. J. 201; Weir I. 201; 4 M. H. C. R. 152. Where a private person acting within the terms of s. 59, Cr. P. C., makes an arrest and hands over the accused to a village *Chowkidar*, the *Chowkidar* cannot be held to be a police officer within the terms of s. 59, Cr. P. C., and escape from his custody is not an offence under this section 27 C. 366=4 C. W. N. 232, followed in 41 C. 17=17 C. W. N. 978=14 Cr. L. J. 484=20 Ind. Cas. 740.

A charge of having escaped from custody may be inquired into and tried where the person charged happens to be when the charge is made. (Cr. P. C., s. 181)

Any sentence passed on an escaped convict, either for the escape or for any other offence, may, according to its nature, be ordered to take effect immediately, or at the expiration of the period of his former sentence (Cr. P. C., s. 396) Weir I. 203, 8 W. R. (Cr.) 83.

225. Whoever intentionally offers any resistance, or illegal obstruction, to the lawful apprehension of any other person for an offence, or rescues, or attempts to rescue, any other person from any custody in

Resistance or ob-
struction to the
lawful apprehen-

sion of another person. which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ;

Or, if the person to be apprehended, or the person rescued, or attempted to be rescued, is charged with, or liable to be apprehended for, an offence punishable with transportation for life, or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

Or, if the person to be apprehended, or rescued, or attempted to be rescued, is charged with, or liable to be apprehended for, an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

Or, if the person to be apprehended, or rescued, or attempted to be rescued, is liable, under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to transportation for life, or to transportation, penal servitude, or imprisonment for a term of ten years or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

Or, if the person to be apprehended, or rescued, or attempted to be rescued, is under the sentence of death, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine

Note.—A person who rescues a prisoner arrested by a Police officer as a member of an unlawful assembly is guilty of an offence under this section. 13 W. R. (Cr) 75. And the offence is equally committed by rescuing one who has been lawfully arrested by a private person. For instance, a thief who was seized in the act of stealing, 11 M. 441; Weir I. 209, 1907 A. W. N. 179=4 A. L. J. 483=6 Cr. L. J. 10. But if the Police officer contrary to the provisions of the Cr. P. C. directs an arrest,

the resistance to such an arrest would not be an offence, *e.g.*, when a Police officer directed a mere villager to arrest a man suspected of theft, 5 L. B. R. 21=2 Ind. Cas. 619. Thus in 16 C. W. N. 549=15 Ind. Cas. 1005=13 Cr. L. J. 590, a Police officer arrested on a bailable warrant without telling the accused bail was allowed and it was held the custody was illegal and the rescue constituted no offence. Nor would it constitute the offence of rescue if the private person after making the illegal arrest detains, 33 C 361; 21 W. R. (Cr.) 22. The case would be quite different if the proper officer himself arrests and hands over the prisoner to an agent for custody, 23 A. 266 at 268. The converse case of a private person making a legal arrest and transferring the custody to a chowkidar is also within the section, 29 A. 573; 10 C. W. N. 287=3 Cr. L. J. 201. But if the original arrest by the private person was not lawful, the case would be outside the section. 27 C 366=4 C. W. N. 232. As regards *rescue*, if the custody is lawful private custody, the offender must have notice of that fact as the word implies intention coupled with violence, 1893 P. R. No. 19; *Quere*, can a man be convicted both of rescue under this section and of assault under s. 352? 3 B. L. R. (A. Cr.) 14=12 W. R. (Cr.) 2.

225A. Whoever, being a public servant legally bound

Omission to apprehend, or sufferance of escape, on part of public servant in cases not otherwise provided for.

as such public servant to apprehend, or to keep in confinement, any person in any case not provided for in section 221, section 222, or section 223, or in any other law for the time being in force, omits to apprehend that person or suffers

him to escape from confinement, shall be punished—

(a) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both, and

(b) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both

225B. Whoever, in any case not provided for in section

Resistance or obstruction to lawful apprehension, or escape or rescue, in cases not otherwise provided for.

224 or section 225, or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in

which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that

person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Note.—This section was added by s. 24 of Act X of 1886 to supply an omission in the Law brought to light by 8 C. 331 & 7 A. 67 at 72. This section also provides for the punishment of those who escape from arrest before they are delivered into custody. 31 M. 271=8 Cr. L. J. 203. In 18 M. 401, a conviction under s. 224 was held to be right. To make this section applicable, two circumstances must co-exist: the arrest must be lawful but not for an offence, *e. g.*, a warrant issued for non-payment of public dues, 23 C. 399; 32 A. 116=7 A. L. J. 21=5 Ind. Cas. 449=11 Cr. L. J. 137; 6 C. W. N. 845, or arrest under civil warrant, 1904 P. R. No. 16=1 Cr. L. J. 1031. But if a person who is outside the jurisdiction is forcibly brought within, so that he might be arrested, resistance or escape in such a case is not punishable under this section. See 5 A. 318, 5 C. W. N. 313; 23 C. 896, 25 C. 743, 10 C. W. N. 237=3 Cr. L. J. 201; 28 C. 399; 4 L. B. R. 103=7 Cr. L. J. 74; for instances of alleged irregularity which rendered resistance not liable to punishment. When the presence of a witness being desired a warrant was issued under s. 70, Cr. P. C. and the only reason assigned for this extreme step was the stereotyped printed form copied from form No. 7 of schedule V of the Code, the adoption of the printed form was held not to be a sufficient compliance with law so as to render obstruction to the arrest punishable under this section. 38 C. 789=15 C. W. N. 1001=12 Cr. L. J. 409=11 Ind. Cas. 593. The gist of the offence consists in active opposition accompanied by force. Mere evasion of arrest by shutting oneself up is not within the section. 1903 U. B. R. (P. C.) 29=4 Cr. L. J. 287, Weir 1 203, 7 A. L. J. 1174=11 Cr. L. J. 721=8 Ind. Cas. 823. The *onus* is on the prosecution to show the accused is the person directed to be arrested. It is not for the accused to establish the warrant is not really against him, 28 C. 399.

A person who has been acquitted of a charge on the ground of insanity, and confined in gaol under the orders of Government, would be punishable under s. 225B if he escaped after he became sane, though he would not be liable under s. 224 (*Pro Mad H C.*, 25 Nov., 1862).

226. Whoever, having been lawfully transported,

Unlawful return from transportation. returns from such transportation the term of such transportation not having expired and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine, and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported.

Note—To constitute this offence it is essential that the convict should actually have been sent to a penal settlement, and have returned before his sentence had expired or been remitted. Where a prisoner had escaped from custody whilst on his way to undergo sentence of transportation, it was held that he had committed an offence punishable under s. 224, not under s. 226. 4 M. H. C. R. 152, followed in 4 Bur. L. T. 261=13 Cr. L. J. 54=13 Ind. Cas. 390.

227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

Note—A person convicted for burglary by a Court outside British India and sentenced to transportation for ten years was released from *Ratnagiri* goal on ticket-of-leave. He committed breach of the condition of his release in British India. *Held*, the Magistrate of the place where the condition was broken had jurisdiction to deal with him for an offence under this section, 9 B. H. C. R. 356.

228. Whoever intentionally offers any insult, or causes any interruption, to any public servant while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both

Notes.—1 The proceeding under s. 480 of the Cr. P. C. when resulting in a punishment under this section, is a "conviction upon trial" within the meaning of the Cr. P. C., s. 410, against which an appeal lies. 4 M. H. C. R. 146. See too, *re Pollard* L. R., 2 P. C. 106. The power to deal summarily for contempt must be exercised forthwith, 11 A. 361, and the proceedings must comply with all the requirements of law, 10 C. W. N. 1032=4 Cr. L. J. 210=4 C. L. J. 415 and the interruption or insult must be intentional, *Weir* I. 216; 15 W. R. (Cr.) 62; 4 M. H. C. R. 146; and not merely due to an excess of zeal on the part of a pleader in defence of his client, 6 Bom. L. R. 541 at 513=1 Cr. L. J. 612, 1883 A. W. N. 145; 1903 P. L. R. 582; 6 Cr. L. J. 403=6 C. L. J. 713. The provisions of this section are very much restricted in scope as compared with

(It is proposed to add the following sections.)

228A. Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into contempt, or lowers or attempts to lower, the authority—

- Contempt of authority of Court or of person empowered by law to record evidence on oath.
- (a) of any Court of Justice, or
 - (b) of any person empowered by law to record or direct the recording of evidence on oath (when exercising such powers),
- shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Exception—It is not an offence under this section to comment on the action of any Court of Justice or person referred to in clause (b), provided that any such comments are in substance true and made in good faith for the public good.

Publication of false or misleading report of pending judicial proceeding, or of comments regarding pending judicial proceeding

“228B. Whoever, during the pendency of a judicial proceeding, by words either spoken or written, or by signs, or by visible representation, or otherwise makes or publishes—

- (a) a false or misleading report of such proceeding or any stage thereof, or
- (b) any comments relating to such proceeding or regarding the presiding officer, the parties, witnesses, assessors, jurors or pleaders concerned in, such proceeding, knowing or having reason to believe that such comments may cause or tend to cause prejudice in the public mind in regard to such proceeding, or prejudice or tend to prejudice the trial thereof, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Explanation 1.—A judicial proceeding for the purposes of this section includes any proceeding in the course of which evidence is or may be legally taken on oath.

Explanation 2.—A true, full and fair report of a judicial proceeding or any stage thereof does not constitute an offence under this section.

Explanation 3.—A judicial proceeding which has

become abortive, rendering a new judicial proceeding necessary, is a pending judicial proceeding within the meaning of this section "

Note—The chartered High Courts have inherent power to punish summarily acts of contempt committed in *facie Curie* or acts calculated to interfere with the even course of justice in pending cases, 10 C. 109, 1 Hyde 79. S 228 renders punishable intentional insult or interruption to a public servant sitting in a judicial proceeding. It is felt greater protection ought to be afforded to courts against attempts to lower their prestige and to check the tendency to comment on pending cases in a manner prejudicial to the dispassionate administration of justice.

Again, the power to deal summarily with contempt is often found very inadequate to deal with a growing class of evil where parties to legal proceedings or their sympathisers are tempted to try their strength with the judicial officer who is called upon to adjudicate. Such a case arose in 21 M. L. J 832=10 M. L. T. 209=12 Cr. L. J. 525=12 Ind. Ca. 293. A party to a civil suit disobeyed an injunction issued by a *Munsif*. While proceedings were pending against him for disobedience to the injunction order, he served the *Munsif* with a notice of suit for damages in respect of the injunction proceedings. The matter was reported to the High Court to deal with the contempt committed before the inferior court and the Madras High Court, following the rulings in *King v. Parhe* [1903] 2 K B. 432 and *King v. Davies* [1903] 1 K. B. 32, held that the High Court had jurisdiction. The same point arose in Calcutta in connection with the alleged contempt of court on the part of the *Amerita Bazar Patrica* in commenting on the Barisal conspiracy case then pending before the District Magistrate of Barisal. A very strong Bench composed of *Jenkins, C. J., Stephen and Mookerjee, JJ.*, came to an opposite conclusion that what may be contempt of an inferior court is not necessarily a contempt of the High Court and it is desirable that such matters are left to be dealt with by the general law according to the ordinary procedure for dealing with crimes and not by resort to the extraordinary power of the High Court to deal by summary proceeding for contempt. 41 C. 173=17 C W N. 1253=18 C L. J 452=14 Cr L J. 321=20 Ind Ca 81

Sections 228A & 228B are the outcome of this conflict of authority and the suggestions thrown out. There is considerable public criticism on the scope of these sections as they embrace not only contempts of courts in the strict sense but also of persons empowered by law to record evidence on oath. To meet this class of objections it is provided that prosecutions for the new offences created by these two sections shall be instituted only by order of or under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in this behalf, and that such cases shall be triable only by a Presidency Magistrate or a Magistrate of the first Class.

The Exceptions and Explanations have been introduced with a view to protect *bona fide* reports or comments

229. Whoever, by personation or otherwise, shall intentionally cause, or knowingly suffer himself to be returned, empanelled, or sworn as a juror or assessor in any case in which he knows that he is not entitled by law to be so returned, empanelled, or sworn, or, knowing himself to have been so returned, empanelled, or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Note — See as to the persons disqualified to serve as jurors or assessors, Cr. P. C., s 278.

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

230. Coin is metal used for the time being as money, and stamped and issued by the authority of some State or Sovereign Power in order to be so used

Queen's coin is metal stamped and issued by the authority of the Queen, or by the authority of the Government of India, or of the Government of any Presidency, or of any Government in the Queen's dominions, in order to be used as money, and any metal which has been so stamped and issued shall continue to be Queen's coin for the purposes of this chapter, notwithstanding that it may have ceased to be used as money.

Illustrations.

- (a) Cowries are not coin.
- (b) Lumps of unstamped copper, though used as money, are not coin.
- (c) Medals are not coin, inasmuch as they are not intended to be used as money.

(d) The coin denominated as the Company's rupee is the Queen's coin.

(e) The "Farukhabad rupee," which was formerly used as money under the authority of the Government of India, is Queen's coin although it is no longer so used.

Note.—The Farukhabad rupee was called in in 1877. The present definition of Queen's coin and illustration (e) above were introduced by s. 1 of Act VI of 1896. Moorshidabad rupees stand on the same footing as Farukhabad rupees, 23 A. 62 = 2 A. L. J. 493 = 1903 A. W. N. 184 = 2 Cr. L. J. 395, 1903 A. W. N. 115; 1903 P. R. No. 1.

231. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation—A person commits this offence who, intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin

For commentary on sections 230—232, see Part II, Ch. XII.

232. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting the Queen's coin, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

233. Whoever makes, or mends, or performs any part of the process of making, or mending, or buys, sells, or disposes of, any die or instrument, for the purpose of being used, or knowing, or having reason to believe, that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

For commentary on ss. 233, 234, see Part II., Ch. XII.

234. Whoever makes, or mends, or performs any part of the process of making, or mending, or buys, sells, or disposes of, any die or instrument, for the purpose of being used, or knowing, or having reason to believe, that it is intended to be used, for the purpose of counterfeiting the Queen's coin shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

235. Whoever is in possession of any instrument, or material, for the purpose of using the same for counterfeiting coin, or knowing, or having reason to believe, that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the coin to be counterfeited is the Queen's coin, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

236. Whoever, being within British India, abets the counterfeiting of coin out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India.

237. Whoever imports into British India, or exports therefrom, any counterfeit coin, knowing, or having reason to believe, that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows, or has reason to believe to be, a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

239. Whoever, having any counterfeit coin which at

Delivery to another of coin, possessed with the knowledge that it is counterfeit.

the time when he became possessed of it he knew to be counterfeit, fraudulently, or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine

For commentary on ss. 239 and 240, see Part II., Chapter XII.

240. Whoever, having any counterfeit coin which is a

Delivery of Queen's coin, possessed with the knowledge that it is counterfeit

counterfeit of the Queen's coin, and which at the time when he became possessed of it he knew to be a counterfeit of the Queen's coin, fraudulently, or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

241. Whoever delivers to any other person as genuine,

Delivery of coin as genuine which, when first possessed, the deliverer did not know to be counterfeit.

or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both

Illustration.

For commentary on ss. 241—243, see Part II., Chapter XII.

242. Whoever fraudulently, or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

243. Whoever fraudulently, or with intent that fraud may be committed, is in possession of counterfeit coin, which is a counterfeit of the Queen's coin, having known at the time when he became possessed of it, that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

244. Whoever, being employed in any mint lawfully established in British India, does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

245. Whoever, without lawful authority, takes out of any mint, lawfully established in British India, any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Note.—Where a person is known to be intending to commit a crime, as, for instance, to taking coining tools out of a mint under this section, if the authorities, knowing of this intention, allow him to carry out his criminal purpose for the purpose of ensuring his detection, this does not amount to such a lawful authority as will justify the prisoner. *R. v. Harvey*, L. R. 1. C. C. 281.

254. Whoever delivers to any other person as genuine, or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine, or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in sections 246, 247, 248, or 249, has

Delivery to another of coin as genuine, which, when first possessed, the deliverer did not know to be altered.

been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed, or attempted to be passed.

Note.—In the great majority of coin offences, the false coin is substantially worthless. It would, however, be a very profitable transaction to make and circulate silver or copper coins of exactly the same intrinsic value as those issued by Government. Such an act would undoubtedly come within the meaning of Counterfeit Coin under the previous sections of this chapter. It is specifically provided for by *The Metal Tokens Act I of 1899*, which forbids the making or issuing of metal intended to be used as money, but not authorized by the Indian Government.

255. Whoever counterfeits, or knowingly performs any

Counterfeiting a Government stamp, part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

Note.—In this section, the word 'stamp,' is used in a generic sense so as to include court-fee stamps, postage stamps or any other paper-token for the payment of a charge, tax or revenue. See s. 255, 256, 257. More definition of 'stamp' on the section of a stamp.

256. Whoever has in his possession any instrument, or material, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Note.—As to the effect of the corresponding English statute, see *Dickins v. Gill* [1896] 2 Q. B. D. 310. The result of the case would have been quite different under this code because an intention to practise deception or knowledge to that effect is involved in the definition in s. 28 supra.

257. Whoever makes, or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing, or having reason to believe, that it is intended to be used for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

258. Whoever sells, or offers for sale, any stamp which he knows, or has reason to believe, to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

259. Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use, or dispose of, the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either

description for a term which may extend to seven years, and shall also be liable to fine.

260. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Using as genuine
a Government
stamp known to
be counterfeit.

Note.—Here the stamp used as genuine must be a counterfeit stamp. Selling a genuine one-anna-stamp as a one-rupee stamp is cheating but not an offence under this section. 2 W. R. (Cr.) 65.

261. Whoever fraudulently, or with intent to cause loss to the Government, removes, or effaces, from any substance bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Effacing writing
from substance
bearing Govern-
ment stamp, or
removing from
document a stamp
used for it, with
intent to cause loss
to Government.

Note.—The intention with which the acts named in the above section are done may be either fraudulent generally, or with a special view to cause loss to Government. And, therefore, a conviction would be good where the intention of the act was merely to efface a document with a view injuriously to affect the rights of another person. No intention to cause loss to Government can be assumed unless it is shown, or may be inferred, that the intention of the party was to use the stamp as a stamp a second time. And, therefore, no conviction could be supported, if the object of removing writing from a stamped paper was merely to write upon the blank space something which required no stamp.

262. Whoever fraudulently, or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be

Using Govern-
ment stamp known
to have been before
used.

punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Note.—The mere affixing a used postage stamp to a letter is not an offence under this section, the intent to defraud must also be proved, 1881 A. W. N. 56, Ratanlal 145; but if he posts the letter with the stamp affixed he may be liable, 5 C. P. L. R. 43. The mere affixing may be preparation but would fall short of an attempt.

263. Whoever fraudulently, or with intent to cause loss to Government, erases, or removes, from a stamp issued by Government for the purpose of revenue, any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession, or sells or disposes of, any such stamp from which such mark has been erased or removed, or sells, or disposes of, any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both

263A. (1) Whoever—

(a) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(b) has in his possession, without lawful excuse, any fictitious stamp, or

(c) makes or, without lawful excuse, has in his possession any die, plate, instrument, or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees

(2) Any such stamp, die, plate, instrument, or materials in the possession of any person for making any fictitious stamp, may be seized and shall be forfeited.

(3) In this section "fictitious stamp" means any stamp falsely purporting to be issued by Government for the purpose of denoting a rate of postage, or any facsimile or

imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255—263, both inclusive, the word "Government," when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorized by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

264. WHOEVER fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent use
of false instrument
for weighing

Notes —1. The Indian Weights and Measures of Capacity Act XXXI of 1871 provides for the ultimate adoption of a uniform system throughout, whenever the Government issues Notifications under the Act. As to measures of length, see Act II of 1889. See s. 153, Cr. P. Code, as to right of entry by Police for inspection.

2. The instrument used must not only be known to be false, but must also be fraudulently so used; that is, it must be used for the purpose of passing off short weight upon persons who are entitled to full weight. See *Griffiths v. Place*, 20 L. T. (N. S.), 484; 1 B. H. C. R. 181; 18 W. R. (Cr.) 7. But a one tola below weight in a five seers weight only represents fair wear and tear, and is no evidence of a fraudulent intention, 1893 A. W. N. 224. Again fraudulent use of correct scales is not an offence under this section, but it may be cheating. To make it an offence under this section, the deception must be practised with the aid of false scales. *Weir I*, 223.

In general the mere possession of a false balance, which is used as a true one, will be sufficient evidence of a fraudulent intention.

" The intention, however, must be alleged in laying the charge, though it may be a matter of inference only, from the fact of the possession, and the attending circumstances as manifesting the purpose, and the inference may, of course, be rebutted. But where the incorrectness of the scale is visible, and there is no attempt to cover or conceal it, there can be no ground for imputing fraud from the defect alone, the circumstances negative the intention of fraud, and no charge would lie against the party using such a balance " (2nd Report, 1847, ss. 220, 221.)

As to the summary jurisdiction of the Magistrate of the district over offences defined by this section, and ss. 265, 266, see s. 260 (b), Cr. P. C.

265. Whoever fraudulently uses any false weight, or false measure of length or capacity, or
Fraudulent use of false weight or measure. fraudulently uses any false weight or measure of length or capacity, or

be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Note.—Where a tradesman supplied milk, which he sent in his own churns by train, the churns being fitted with a gauge to show how many gallons they held and the gauge indicated a greater amount than was actually contained, the churns were held to be measures within the meaning of an English Act similar to ss. 265, 266 *Harris v. London County Council* [1893], 1 Q. B. 240.

This section has no application to cases in which the accused did not profess to sell by any standard weight or measure, *e.g.*, by a cocoanut shell used as a measure, *Weir I. 223*; *Ratanlal 386*. Selling by an unstamped measure does not, in the absence of fraud or falsity of the measure, by itself constitute an offence *Weir I. 223*. Again in deciding whether a measure is correct or false, the weight of grain that it holds, as compared with weight of grain contained in a standard measure, is no evidence unless the very same grain is used, *Ratanlal 989*. In every place there are customary standards of weight and bulk and any dishonest use of a weight or measure knowing that it is less than the customary weight or measure is punishable under this chapter *L.B.R. (1893-1900) 353*.

The mere possession of weights in excess of the authorised standard will not support a conviction, *1 B. H. C. R. 181*; nor the possession of a scale which may be used honestly or fraudulently by adjusting a string. *Ratanlal 514*. Where the accused professed to sell by weights of certain English standard and the weights used were deficient in favour of the accused, the mere fact that he used them openly would not negative the presumption of fraud arising out of the deficiency being in favour of the accused, *Weir I. 223*. A person who represents himself as using a measure

or weight of a particular standard is bound to see that it is correct according to that standard and if they are defective so as to give the seller an advantage the Court would be justified in inferring fraud. *Weir* I 225. But where standard weights are not prescribed, no presumption of fraud can arise in respect of short weights, 1908 U. B. R. (P. C.) 17=9 Cr. L. J. 415.

266. Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Being in possession of false weights or measures.

Note.—No one can say with precision what a standard weight really is in a particular place. Government has published no rules or tables of equivalent under Act XXXI of 1871, though Sec 2 says the primary standard of weight is a *ser* equal to the French Kilogramme. A corresponding Indian weight of the kilogramme has not been given and traders cannot be expected to know with accuracy what precise weight is intended, though a kilogramme is about $2\frac{1}{4}$ British pounds. A maund of 40 *ser*s is often taken as equivalent of 80 pounds. Hence a conviction under this section is unsustainable, if no comparison is made of the weight said to be false with standard weights. It is most improper to assume arbitrarily a certain weight to be correct and to treat all deviations therefrom as false without making any allowance for ordinary wear and tear and for the rough and ready methods of country shop-keepers.—Per *Kensington*, J. 3 Cr. Law Rev. 163=1913 P. R. No 29=15 Cr. L. J. 11=22 Ind. Cas. 155.

267. Whoever makes, sells, or disposes of, any instrument for weighing, or any weight, or any measure of length or capacity, which he knows to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Making or selling false weights or measures

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY, AND MORALS.

268. A person is guilty of a public nuisance who does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance, to the public or to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance, to persons who may have occasion to use any public right

Public nuisance.

A common nuisance is not excused on the ground that it causes some convenience or advantage

For commentary on this section, see Part II, Ch VIII, §§ 128-129.

269. Whoever unlawfully, or negligently does any act which is, and which he knows, or has reason to believe, to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Negligent act likely to spread infection of any disease dangerous to life.

For commentary on ss 269 and 270, see Part II, Ch. VIII, § 131.

270. Whoever maliciously does any act which is, and which he knows, or has reason to believe, to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Malicious act likely to spread infection of any disease dangerous to life.

271. Whoever knowingly disobeys any rule made and promulgated by the Government of India, or by any Government, for putting any vessel into a state of quarantine,

Disobedience to a quarantine rule.

or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Note.—The Indian Ports Act XV, of 1908, s. 6 (p) confers power to make quarantine rules in ordinary cases. Similarly the Epidemic Diseases Act III, of 1897, and the Plague Regulations made thereunder by the various local authorities are rules within this section.

272. Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Adulteration of food or drink which is intended for sale

Note.—Soaking paddy in dirty water with a view to being powdered and sold was held in *Weir I, 227* to be an offence under this section. But watering milk not being likely to make the resultant article noxious is not within this section, *1 L. B. R. 153, Weir I, 228*. It is not an offence to sell inferior food cheap unless the prosecution shows it to be noxious, *1873 P. R. No. 15*. Similarly as to adding oil to ghee, *12 C. W. N. 608 = 7 Cr. L. J. 405*.

273. Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing, or having reason to believe, that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Sale of noxious food or drink

Note.—The adulteration mentioned in the two preceding sections must be such as renders it injurious to health. Mixing water with milk, aloe leaves with tea, or chicory with coffee, would not be punishable under this section, though it will amount

to cheating if sold on the misrepresentation that the article was unadulterated, 3 C. W. N. 66. It would be otherwise with such compounds as beer doctored with strychnine, spirits mixed with vitriol, cakes coated with red lead, and such like poisonous compounds. Where the person charged is himself the party who has directed the adulteration, the fact that the article has been sold, or was manufactured for sale, will be sufficient to warrant a conviction. On the other hand, where the party is merely the vendor of that which has been manufactured by others, some further evidence will be necessary, in order to show that he knew, not only that there was some adulteration, but also what was the extent and probable consequence of that adulteration. It must be remembered that in most cases there are some recognized modes of adulterating particular articles of food, which are perfectly well known to the trade, and, therefore, where it is shown that the vendor knew that the article was in fact adulterated, it will, in most cases, be no very unsafe presumption that he had reason to know what the character of the adulteration was. The knowledge of the adulteration will seldom be capable of direct proof. Where the articles, in fact, adulterated, and where it is shown that the vendor purchased it at a price below that for which the genuine article could be procured, such knowledge may safely be inferred. The presumption would be strengthened if it could be shown that the vendor had several articles of the same species on hand, at different prices, some adulterated and some not, or adulterated to different degrees.

Though the language of the section is wide and speaks of food or drink it must be limited to human food or drink as the chapter deals only with offences affecting the public health, etc., and the expression, 'the public,' must be confined to mankind. Thus sale of noxious horse-food was held to be not within this section, 1908 P. R. (Cr.) 3=3 P W R Cr. 10=1907 P L R, 423=7 Cr. L. J. 278.

Under an English statute somewhat similar to the above, it has been held that the offence is only committed by the sale of an article which, at the time of sale, professes to be either food or drink. An article such as baking powder, which is not itself food, though used in the preparation of food, is not within the Act. *James v. Jams* [1894], 1 Q. B., 304. But sale of cream mixed with boracic acid as a preservative perfectly harmless when consumed by adults, but injurious to the health of children and invalids was held to be an offence in *Cullen v. Menier* 21 Cox, 682., Similarly, where, as a matter of trade, the entire contents of a grain-pit was sold at a particular rate per maund, the pit being closed but on opening the pit the major portion of the grain was found unfit for human consumption, it was held a conviction cannot be sustained as there was no sale as food, 23 A. 312=3 A. L. J. 840=1906 A. W. N. 23=3 Cr. L. J. 203. But sale of unadulterated, but rancid ghee was held to be no offence on the ground to sustain a conviction it must be established (1) the article was noxious, and (2) that it was noxious to the knowledge or belief

of the accused, 25 A. 387=1 A. L. J. 64=1901 A. W. N. 56=1 Cr. L.J. 210. Again, sale of adulterated stuff is not *per se* an offence, *e. g.*, where wheat is sold containing a large admixture of mud, wood, dirt, charcoal, blackseeds, etc., 6 Bom. L. R. 520=1 Cr. L. J. 618. Sale of noxious human food, if sold as food for animals, would not be an offence under this section, *Crawley*, 3 F. & F. 103.

Little difficulty can ever be felt where the bad quality of the article arises not from any adulteration which might possibly escape notice, but from its own intrinsic defects. As, for instance, where unsound meat is sold. And even though the defect has escaped the notice of the purchaser, it must be remembered that the seller has generally such an accurate knowledge of the qualities of his ware, and of the previous history of each particular article, as renders it very unlikely that he could be ignorant of any fault of a glaring character.

It must be remembered the gist of the offence under s. 273 consists in selling or exposing for sale. Where, therefore, the evidence merely disclosed that a butcher had killed a sheep and had it hung up and the flesh was unfit for food, his conviction under this section was annulled as he had neither removed the flesh to his shop nor exposed or offered it for sale, *Weir I*, 227. Where, however, the accused exposed for sale toddy in which worms had germinated he was held liable under this section, *Weir I*, 228.

On a conviction under ss. 272 to 275 inclusive, the Court may order the food, drink, drug, or medical preparation, in respect of which the conviction was had, to be destroyed. (Cr. P. C., s. 521.)

274. Whoever adulterates any drug, or medical preparation, in such a manner as to lessen the efficacy, or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for, any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

275. Whoever, knowing any drug or medical preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadul-

terated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Note.—Under this and the previous section it is not necessary to show that the drug was so adulterated as to render it noxious to life. It is sufficient if its efficacy is lessened. The necessity for this enactment is obvious enough. All drugs are of a recognized average strength, and prescriptions are made up on the understanding that they possess such strength. If, however, the drug which a physician prescribes proves to be only half the strength on which he calculated it may prove wholly useless, and death may ensue before the error is remedied. The act only speaks of the efficacy of the drug being lessened, or its operation changed. It would, however, be necessary to show that the difference in the drug was of so considerable a character as to make an appreciable and important change in its character and effect. The use of the word "adulteration" implies the mixture of some foreign element. And, therefore, a merely inferior quality of the same medicine will not amount to an adulteration. For instance, there are many different sorts of cod liver oil, and the same oil prepared in different ways may produce different degrees of effect. But if an apothecary, being ordered to supply a quart of cod liver oil for a person in consumption, were to send a quart of the most inferior oil of that description, this would not be an act indictable under either section, provided the oil, however inferior in quality, was genuine of its kind.

It will be observed that the essence of the offence consists, not so much in the adulteration, as in the passing the article off as unadulterated. Anyone who chooses may mix anything he likes with any medicine, but he must not sell it as if it was unadulterated, nor for the purpose of being sold as unadulterated. This must be taken as the meaning of the words "knowing it to be likely that it will be sold as if it had not undergone such adulteration." If a druggist were to sell a compounded medicine to an apothecary, communicating exactly its real nature to him, he could not be rendered criminally answerable because the apothecary sold it again as genuine, even though his knowledge of the apothecary's morals made it very probable that such might be the result. But it would be very different if it could be shown that he supplied the spurious commodity, by mutual understanding, for the purpose of being issued to the world as something different. The liability under this section is upon the actual seller, no matter whether he is the master of the shop or only a servant, *Pharmaceutical Society v. London and Provincial Supply Association*, L. R. 5 A. C. 557, *Hotchin v Hindmarsh* [1891] 2 Q. B. 181, but a mere canvasser for orders is not liable not being a seller. *Pharmaceutical Society v. White*, [1901] 1 K. B. 601. As to

what would constitute exposure for sale, see *Wheat v. Brown*, [1892] 1 Q. B. 418, where it was held keeping the drug in a packet in the shop was a sufficient exposure cf. *Crane v. Lawrence*, L. R. 25 Q. B. D. 152 where keeping it in the store was held not an exposure for sale.

276. Whoever knowingly sells, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medicinal preparation as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Sale of any drug as a different drug or preparation.

Note—The offence constituted by this section does not involve the idea of any adulteration, or inferiority, in the substituted medicine. It is sufficient that it is not in fact what it purports to be. If a chemist were to discover a drug which he considered to be just as effective as quinine, and which could be procured for half the price, he would not be justified in selling it as quinine, even though it answered precisely the same purpose. The fraud consists, not in the injury done, but in the false pretence by which using one medicine, are forced
Knight v. Bowers, L. R. 14 Q. B. D. 532.

277. Whoever voluntarily corrupts, or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to five hundred rupees, or with both.

Fouling the water of public spring or reservoir

Note.—The offence is confined to corrupting reservoirs of a public nature. The word public is nowhere defined, but a public place is a place where the public go, no matter whether they have a right to go or not. *Q. v. Wellard*, L. R. 14 Q. B. D. 63 at 66.

This section does not apply to a public river, 2 C. 383; 6 Bom. L. R. 52=1 Cr. L. J. 6; *Ratanlal* 14, though polluting a river may well be a nuisance under s. 290, *infra* or to a continuous stream of water running along the bed of a river, 4 M. 229; *Weir* I. 230, or to a *Nullah*, *Ratanlal* 203 & 963, nor as held in *Weir* I. 228 to mere bathing in a tank, not set apart by any lawful order for bathing purposes. *Contra*, *Weir* I. 229. But it was held to apply to cultivating paddy

in the bed of a tank, the water of which was used by the public for drinking purposes Weir I. 229. The water of a rivulet even though standing in pools would not constitute a public spring within the meaning of this section, *Ratanlal* 215. While angling in a tank was held to be not within the section, Weir I. 231, in the next case on the same page fishing with baskets causing disturbance of drinking water was held to be within the section. The act of a low-caste man touching the water of a well is not within the section, which is confined to some act which physically defiles or fouls the water, 2 Bom. L. R. 1078; 13 C. P. L. R. 92, 5 C. P. L. R. 20.

278. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling, or carrying on business, in the neighbourhood, or passing along a public way, shall be punished with fine, which may extend to five hundred rupees.

Making atmosphere noxious to health

Note—The alleged evil smell should be noxious to health. Thus allowing large quantities of bones to remain uncovered in the open air was held to be an offence under this section. 34 C. 73=5 C. L. J. 40=5 Cr. L. J. 43. But performing offices of nature in a public street in front of one's doorstep was held not an offence under this section in *Ratanlal* 200. Tanning skin near a highway would probably be an offence, *Pappinean* (1725) 2 Stran 633=93 Eng. Rep. 137.

279. Whoever drives any vehicle, or rides on any public way in a manner so rash, or negligent, as to endanger human life, or to be likely to cause hurt, or injury, to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Rash driving or riding on a public way.

Note.—For commentary on the law of Negligence as relating to ss 279—289, see Part II, Ch. VIII, §§ 132—137.

280. Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Rash navigation of vessel

281. Whoever exhibits any false light, mark, or buoy, intending, or knowing it to be likely, that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Exhibition of a false light, mark, or buoy.

282. Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state, or so loaded, as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Conveying person by water for hire in a vessel overloaded or unsafe.

See Pt. II, Ch. VIII, § 133.

283. Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction, or injury to any person in any public way or public line of navigation, shall be punished with fine, which may extend to two hundred rupees.

Danger or obstruction in a public way or navigation

For commentary on this section, see Part II., Ch. VIII, § 133.

284. Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Negligent conduct with respect to poisonous substance.

Note.—It is not necessary for liability under this section that the negligent omission should be followed by disastrous conse-

quences, 1882 P. R. No. 16. But the prosecution must prove to sustain a conviction under this and the following three sections the accused was guilty of culpable rashness or negligence, 28 A 484

285. Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire, or any combustible matter in his possession, as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both

Note.—This section is confined to rash or negligent acts; it cannot cover a wilful act of setting fire to a house. *Ratanlal* 126. See also 5 Sind. L. R. 263—13 Cr L J 536—15 Ind. Cas. 903 The owner of a house in which fire breaks out cannot be convicted under this section in the absence of proof there was any illegal omission on his part from which rashness or negligence may be inferred. 1881 P. J. L. B. 134; 1891 P. J. L. B. 569 But where the accused was found smoking a *bidi*, close to half-pressed cotton bales, his conviction under this section was held right *Ratanlal* 135; 1903 U. B. R. (P. C.) 7; 1885 P. J. L. B. 337; 1887 P. J. L. B. 411, but letting off fire balloons was held to be no offence in 1899 P. J. L. B. 628.

It has been held upon this section that the words "injury to any person" include injury to his property as well as to his person 5 B. H. C R. (Cr. Ca.) 67.

286. Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Note.—A revolver was held not to be an explosive substance within the meaning of this section, *Weir I.* 235, but it is clearly covered now by the definition of that expression in s. 2 of Act VI of 1908. But where death followed from a child playing with a loaded gun, 8 M. 421, the person who left the gun in a place where a child could meddle with it was held not liable under this section on the ground that the place where the gun was left was not a place where children were usually playing to the knowledge of the accused. In 28 A. 464=1906 A. W. N. 91=3, A. L. J. 332=3 Cr. L. J. 363, the mere fact that the accused fired and some one was hurt with a pellet was held insufficient to support an inference of rashness or negligence. See *Archer I.* F. & F. 351, *Blades v. Higgs*, 10 C. B (N. S.) 713, and *Dixon v. Bell*, 5 M. & S. 198. The first part of this section is not confined to cases where the explosive is in possession of the accused at the time of injury. It applies also to a case where the injury takes place after it left his possession and when it was being conveyed to its destination, *Weir I.* 236.

287. Whoever does, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any machinery in his possession, or under his care, as is sufficient to guard against any probable danger to human life from such machinery, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both

Negligent conduct with respect to machinery.

See as to unfenced machinery, *Indermaur v. Dames*, L. R. 2 C. P. 311; *Britton v. G. H. Cotton Co.*, L. R. 7 Ex. 130; *Hindle v. Birtchistle*, [1897] 1 Q. B. 192; *Tate v. Latham*, *ib.*, 502; if the proprietor of a factory knows machinery unsafe, he cannot escape liability by proving that he has employed a competent hand to look after the machinery, unless it be the injury resulted solely from the negligence or errors of such employee. 1906 P. R. No. 8=1907 P. L. R. 112=4 Cr. L. J. 279. It is to the interests of the state that machinery should be safe for negligent as well as careful people. *Blenkinsop v. Ogden*, L. R. [1893]. 1 Q. B. 783.

288. Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof,

Negligent conduct with respect to pulling down or repairing buildings

shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Note.—This section will not apply where a building suddenly collapses causing injury to neighbouring property. 13. K. L. R. 19=1 Cr. L. J. 488.

289. Whoever knowingly or negligently omits to take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to one thousand rupees, or with both.

Negligent conduct with respect to animal

Note.—For commentary on this section, see Part II, Ch. VIII, § 132.

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred rupees.

Punishment for public nuisance in cases not otherwise provided or

Note—Having regard to s. 67, *supra*, the imprisonment in default of payment of fine must be simple, see Weir I. 239, 5 B. H. C. R. (Cr. Ca.) 45, *contra*, 5 M. 157. The mere fact accused's land has been by the tortious act of third parties brought into such a state as to be a nuisance to a public right of way over the same would not make him liable. 10 Cr. L. J. 10=2 Ind. Cas. 424.

291. Whoever repeats, or continues, a public nuisance, having been enjoined by any public servant, who has lawful authority to issue such injunction, not to repeat, or continue, such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Continuance of nuisance after injunction to discontinue

Note.—See Cr. P.C., ss 133, 144, Part II, Ch. VIII, §§ 123—131. In 8 A. 99., it was held that a conviction under this section can be had only on proof (1) accused had on some previous occasion committed the particular nuisance and (2) he repeated it after being personally enjoined not to do so, say under s. 143, Cr. P. C. The

order forbidding the continuance and the precise terms thereof must be recorded in the case. A conviction for an act not *Malum in se* cannot be had without strict proof of all the ingredients. See 20 W. R. (Cr.) 55. A general proclamation issued by the Magistrate to the public at large without naming the accused is not enough to secure a conviction under this section. Even if the propriety of the injunction order in itself is not liable to be questioned by way of appeal or revision, once a prosecution is started for its disobedience, its legality and propriety has to be gone into before the accused could be convicted, 6 C. 88. Where an injunction issued by a civil court under O. XXXIX. r. 2, C.P.C., is disobeyed, sub-rule (3) of the same rule provides a punishment for the contempt of court involved in such disobedience. The fact the accused has been dealt with under sub-rule (3) will not prevent the operation of this section.

292. Whoever sells, or distributes, imports, or prints
 for sale or hire, or wilfully exhibits to
 Sale, etc., of ob- public view, any obscene book, pamphlet,
 scene books paper, drawing, painting, representation,
 or figure, or attempts or offers so to do, shall be punished
 with imprisonment of either description for a term
 which may extend to three months, or with fine, or
 with both.

Exception.—This section does not extend to any representation sculptured, engraved, painted, or otherwise represented, on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

Note.—The word "obscene" is one of considerable ambiguity. In one sense, Hiram Power's statue of the Greek Slave, Ruben's picture of the Judgment of Paris, and the works of Martial or Catullus, must be considered as obscene, that is, as capable of exciting sensual feelings. But it could not be endured that a shopkeeper should be prosecuted for selling copies of the works just mentioned. I conceive that the word must be limited to those productions, the primary and palpable result of which is to excite to lust. Whatever may have been the original object of such writers as Martial or Catullus in their amatory odes, in the present day they are bought and read as monuments of a classical age. Nor can there be any greater indelicacy than the delicacy of those who profess to find impropriety in some of the noblest works of painting and sculpture that have descended to our times. But, however difficult it may be to draw the line in words, the distinction between the two cases will generally be bold enough. In the language of Cockburn, C. J., "the test of obscenity is this

whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of the sort may fall " Therefore, where a person was indicted for selling a book

marked "obscene" and the tendency of the ques-
ruff of
it not

for gain, nor for the purpose of prejudicing good morals, but for the purpose of exposing what he considered to be the errors of the Church of Rome, a conviction was supported. The Court held that the immediate motive of the defendant was not the question. If, in fact, the work was one of which it was certain "that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character," then its sale was a criminal offence, and it was immaterial that the defendant had in view an ulterior object which was innocent, or even laudable. The law assumed that he contemplated those results which would naturally flow from the perusal of the treatise (*R. v Hicklin*, L. R., 3 Q. B. 360, 371; 3 A., 837; 32 C. 247=2 Cr. L. J. 201, 28 A. 100=1905 A. W. N. 203=2 Cr.

Whether a publication is obscene is a question of fact, 20 B. 193. And it makes no difference that the obscene matter is contained in an accurate account of a judicial proceeding. *Steele v. Brannan*, L. R., 7 C. P. 261. The fact a trap was laid for the accused by his being requested to supply obscene prints is no defence, *Cutler*, 1 Cox. 229. If a publication is in fact obscene it is no defence to a charge of selling or distributing the same that the accused had no criminal intention. 23 A. 100=1903 A. W. N. 203=2 Cr. L. J. 520. The motive of the accused is immaterial *R. v. Thomson*. 64 J. P. 456. There is nothing obscene as that word is used in this section in advocating checks to conception or in explaining what these checks are or in the mere statement of the places where and the prices at which they can be procured, *Ratanlal*. 620. Bradlaugh and Annie Besant were however convicted in England for publishing a book called 'fruits of Philosophy.' See *Q. v. Bradlaugh* L. R. 2 Q. B. D. 569 and 3 Q. B. D. 607 though the conviction was quashed by the court of appeal on the technical ground the title of the book alone had been set out in the charge. To sustain a conviction under this section, the particular representations or words exhibited or uttered must be specifically found to be obscene 1 C. 356. The proprietor of a newspaper will not be liable

unless the matter objected to was inserted in his paper under his
 1890 A. W. N. 175; 1903 P.
 ny [1907] 1 K. B. 388 = 76 L.
 ledge may be assumed if it
 ade management 52 Sol.

Jo 784; 35 C 945.

293. Whoever has in his possession any such obscene book, or other thing as is mentioned in the last preceding section, for the purpose of sale, distribution, or public exhibition, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Having in possession obscene book, etc., for sale or exhibition

Note.—Upon a conviction under ss 292 or 293, the Court may order the destruction of all copies of the thing in respect of which the conviction was obtained. (Crim. P. C., s. 521)

Obscene acts and songs. **294.** Whoever, to the annoyance of others,

(a) does any obscene act in any public place, or

(b) sings, recites, or utters any obscene song, ballad, or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Note.—The words of this section, which make it necessary that the place should be public, and that the act should be to the annoyance of others, *Strickland v. Hayes*, L.R. [1896] 1 Q.B. 290 *Innes v. Neuman*, L. R. [1894] 2 Q. B. 292 seem to point to such open obscenity as would have been a nuisance at common law. Some person actually annoyed should be called as a witness, L. B. R. (1872-1882) 332, 537 and 59.

"It seems an established principle, that whatever openly outrages decency and is injurious to public morals is a misdemeanour at common law." *R. v. Crunden*, 2 Camp. 90n.

According to English law, such an act, even if committed in a place of public resort, was not indictable if only one person could have been annoyed by it *R. v. Webb*, 1 Den., 338. *Elliot*, [1861] L. & C. 103 But though the plural word "others" is used in this section, it includes the singular number under s. 9, unless the contrary appears from the context There certainly is

no reason why a person who howls out an indecent song in a railway carriage, to the annoyance of a single lady, should not be punished for it

An omnibus is a public place for this purpose, *R. v. Holmes, Dears.*, 207=22 L. J. (M. C.) 123 and so, of course, would a railway train be, or any other place where a great number of persons might be affected by the criminal act, *R. v. Thallman*, 33 L. J. (M. C.) 59=L. & C., 326 or a public urinal. *R. v. Harris*, L. R. 1 C. C. R. 292.

* In considering whether a particular locality is a public place or not, the Courts look at it in respect to the manner in which it was used at the time of the alleged offence. Thus, if a village storehouse to which people resort for the purchase of goods, or a shop in which medicines are sold, is locked up at night, it then ceases to be a public place, though it was such during the day. And the general principle seems to be, that the place must be one to which people are at the time privileged to resort without an invitation. On the other hand, any place may be made public by a temporary assemblage, and the exclusion of a few persons is not alone sufficient to prevent its being such." 1 Bishop, s. 315

"A public place is a place where the public go, no matter whether they have a right to go or not. The right is not the question." (Per *Grove, J.*, *R. v. Wellard*, 14 Q. B. D., 63 at 65; 17 A. 163; 10 Bom. L. R. 1017, *Sanders*, L. R. 1 Q. B. D. 15=43 L. J. (M. C.) 11.

A charge under s. 292 or s. 294 should be specific as to the words or representations, alleged to be obscene, and the Magistrate should expressly state what he finds to have been exhibited, or uttered, so that the legality of the conviction may be open to examination on appeal. 1 C. 356; followed in L. B. R. (1893 1900), 50. A contrary view prevailed in *Weir I.* 251, where a Police constable deposed that the words used were not fit to be heard and the accused merely denied the occurrence. It has been held in 4 B. H. C. R. (Cr. Ca.) 25 that a *lavan* is not necessarily an obscene song. To secure a conviction, the actual words of the song must be proved to be obscene. A conviction under this section for uttering obscene songs in a public place being one for an offence involving breach of the peace would justify action under s. 106, Cr. P. C., 1901 U. B. R. (P. C.) 4=1 Cr. L. J. 553; 26 C. 376; 27 C. 983.

294A. Whoever keeps any office, or place, for the purpose of drawing any lottery not authorized by Government, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything

for the benefit of any person, or any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees.

Note.—This section was added by Act XXVII of 1870, s. 10; see s. 13 of the Act and note to s. 130 at p. 78, *supra*.

is bargained for. Where a dealer sold packets of tea containing one pound each for 2s. 6d., and each packet contained a coupon entitling the purchaser of the packet to a prize specified in the coupon, this was held to be a lottery. It was admitted that the tea was fair value for the money, but the inducement to the purchaser and what he actually bought was the tea, coupled with the chance of getting something of value by way of a prize, but without the least idea what that prize might be. What the prize might turn out to be was the result of mere chance or accident. *Taylor v. Smetton*, 11 Q. B. D. 207. *Hall v. McWilliam*, 20 Cox. 33; *Hardwick v. Lane*, [1901] 1 K. B. 204; *Willis v. Young*, [1907] 1 K. B. 448. See a curious case which was decided not to be a lottery, in 22 M. 212. This case was discussed at length by the Punjab chief court in 1910 P. R. Cr. 47=1910 P. L. R. No. 92=1910 P. W. R. Cr. 14=11 Cr. L. J. 332=6 Ind. Cas. 620, and distinguished. The decision in *Taylor v. Smetton* was followed in what was known as the "Missing Word Competition case." *Burday v. Pearson*, [1893] 2 Ch. 154. A newspaper proprietor printed in each copy of his paper a paragraph in which the last word was omitted. Any person who cut out a coupon annexed to the paper, and sent it in, filling up what he supposed to be the missing word, and enclosing a shilling, became a competitor. The whole of the money arising from the shillings was to be divided among the successful competitors. If the object had been to indicate the most appropriate word, this would have been an effort of skill. As the competition was arranged the missing word was one chosen at random, and the selection of it was a mere matter of chance. The following cases were accordingly decided not to be lotteries as the prizes were to be won by skill. *Stollert v. Storr*, [1931] 2 Q. B. 474; *Hall v. Cox*, [1899] 1 Q. B. 193. The periodical drawing of a prize by members of a club fund who subscribed each a certain sum every month the result of which was his ceasing to be a subscriber thereafter and loss to other members was held to be within this section, *Weir I. 231* where 1 M. H. C. R. 448 is distinguished. The fact that the Company is registered would not take the case out of this section, *Weir I. 232*. Such registration would not amount to authorisation by the Government under this section. The word 'Government' is defined in s. 17, *supra*, and would not include the British Government of a Colony like Australia, 10 B. 97.

The offence under the first paragraph is the keeping of an office or place where the actual drawing takes place; keeping a small place for doing preliminary business and correspondence and not intended and fit for drawing purposes is not an offence under this section. 1910 P. R. Cr. 17=1910 P. L. R. 92=1910 P. W. R. Cr. 14=11 Cr. L. J. 382=6 Ind. Cas. 620. Again the use of a place once is not *keeping* it which means something habitual, *Mirza v Benjamin*, [1907] 1 K. B. 64.

An advertisement of a lottery to be held in Melbourne was published in a Borneo paper. It was held that the words "such lottery," in the second clause of the above section, applied to "any lottery not authorized by Government," and therefore to a lottery in a foreign country which was not authorized in India, and that an offence punishable under that clause was committed by the person who forwarded the notice for publication, and by the newspaper proprietor who printed it 10 B. 97.

"No Court shall take cognisance of any offences punishable under s. 294A, unless upon complaint made by order of or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf (Crim. P. C 1898, s. 196)

CHAPTER XV

OF OFFENCES RELATING TO RELIGION.

295. WHOEVER destroys, damages, or defiles any place of worship, or any object held

Injuring or defiling a place of worship, with intent to insult the religion of any class

sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons, or with the knowledge that any class of persons is likely to consider such destruction,

damage, or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

Notes. 1 The High Court of Allahabad has held that the word "object" in this section must be an inanimate object, and therefore that the slaughtering of a cow, which is held sacred by many Hindus, is not an offence under this section, 10 A. 150; followed in 17 C. 852, *contra* by the Punjab Court 1893 P. R. No. 34; 10 A. 159n =1893 P. R. No. 27.

2. The word *defile* is not restricted in meaning to acts that would make an object of worship unclean as a material object,

but extends to acts done in relation to the object of worship, which would render such object ritually impure, *Weir* l. 233 & 236, *Contra* 1 U. B. R. 199. As to whether a *Kyauing* is a place of worship or an object held sacred by the Buddhists within the meaning of s. 295, and whether injuring or defiling the same, would be an offence under the above section, see 1 U. B. R. 198.

3. As to the distinction between objects of respect or veneration and objects that are held sacred, see 10 M. 126.—*Per Brandt, J.*, at p. 127-28.

4. *Any class of persons*.—This section would cover acts done by one sect of Hindus to wound the feelings of another sect. It is not limited to the acts of those who follow different religions, *Weir* l. 233.

5. The intention of the accused must be to insult the religion. See *Ratanlal* 979; 1883 A. W. N. 39; 7 C. P. L. R. 45; 5 C. P. L. R. 20.

To be entitled to the protection afforded by this section, the assembly must be lawfully engaged in religious worship. An assembly whose real common object is one of those set out in s. 141 *supra* or which has been commanded to disperse under s. 151 is not entitled to the protection of this section. Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance. *Booth v. Bank of England*, 7 Cl. & F. 503=6 Bing (N. C.) 16: 7 B. 42; 23 C. 60; 1909 P. W. R. Cr. 33=1909 P. L. R. 119 10 Cr. L. J. 445=3 Ind. Cas. 981; The use of public streets for religious processions is now well established, despite the weighty observations of Bashyam Iyengar and Subrahmanya Iyer, JJ., in 26 M. 554. The view of Benson, J., in this case, was followed by the Allahabad High Court in 8 A. L. J. 1150=12 Cr. L. J. 573=12 Ind. Cas. 837, and is undoubtedly the law after the pronouncement of their Lordships of the Privy Council on the subject, 30 M. 185 (P. C.), 32 M. 527; 13 Cr. L. J. 534=15 Ind. Cas. 806. But a religious sect cannot claim exclusive right, inconsistent with the equal rights of all, to the use of a public way, 32 M. 478 at 483.

It is not necessary for liability under this section that the intention was to disturb, knowledge of such likelihood is enough, 7 M. L. T. 429=11 Cr. L. J. 400=6 Ind. Cas. 774.

296. Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Disturbing a religious assembly.

Note.—Among Muhammedans there are two sects, one of whom says the *Ames* in a low tone, while the other repeats it aloud. A

member of the latter sect entered a mosque belonging to the former, and called out his *Amen* in a loud voice, and was convicted under this section. *Mahmood, J.*, was of opinion that his act was justified under s. 79 as being one directed by the religious law to which he was subject. The other members of the Court disagreeing with him, ordered the case to be retried, the Magistrate to have regard to the questions, Whether there was an assembly lawfully engaged in the performance of religious worship? Whether it was, in fact, disturbed by the accused? And whether the accused intended to cause disturbance, or to do an act which he knew to be likely to cause disturbance? 7 A. 431, at 474 (F. B.); 12 A. 491 (F. B.); 12 C. W. N. 289; 13 A. 419 (F. B.) See 18 I. A. 59; 23 C. 60. It is not necessary that there should be an actual stay or interruption of service. *Weir I* 239.

297. Whoever, with intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship, or on any place of sepulture, or any place set apart for the performance of funeral rites, or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Note—Acts done by a co-owner of property in the exercise of his rights of property cannot amount to a trespass under the first portion of this section, unless they amount to an exclusion of the other co-owners from their rights, 3 M. 178. Intention or knowledge of either of the things specified is essential to the offence, *Weir I*, 287, 1837 P. R. (Gr.) 26. But it has been laid down, *obiter*, that a person would be punishable under this section, who opposed the performance of funeral ceremonies by an alleged adopted son, thereby wounding the feelings of the widow, although the opposition was by way of asserting the invalidity of the adoption. In the particular case, supposing the adoption to have been invalid, the widow was the proper person to perform the funeral rites, and could have done so by proxy. The resistance, therefore, by the defendant was purely illegal, 6 M. 231, at 237. But a *Mohurram* procession is not a funeral ceremony within the meaning of this section, 1833 A. W. N. 49. The ploughing up of a burial ground and disturbance of graves was held to be punishable under this section, though it was done with the consent of the

owner, 18 A. 393, or by a co-owner of the graveyard in question, 8 A. L. J. 927 = 12 Cr. L. J. 532 = 12 Ind. Cas 309. As it was found, as a matter of fact, that the accused knew that their act was likely to wound the feelings of others, the consent of the owner was immaterial.

A Hindu had sexual intercourse with a woman in an enclosure surrounding the tomb of a Muhammedan Fakir who was venerated by some of his co-religionists. The Madras High Court set aside a conviction under s. 295, as it was not shown that the place was "held sacred by any class of persons," they substituted a conviction under this section being of opinion that he knew that his act, if detected, would wound the feelings of the Muhammedan admirers of the Fakir, and that it was immaterial that he believed that his act would not be detected. Considering that the Court negatived all intention to insult anyone, and found that the act was committed at 9 P.M., and that the accused was only detected

1.
A few isolated and secret cases of burial in the course of many years on a piece of land do not constitute the place one of sepulture within the meaning of the section, 10 Cr. L. J. 150 = 2 Ind. Cas. 825.

The word trespass as used in this section need not necessarily mean the same thing as *criminal trespass*, s. 441, Knox, J., in 18 A. 395 says: I am not prepared to construe the word trespass, in s. 297 as it is defined in the case of *criminal trespass* under the Penal Code. In a section of this kind, I see no reason for restricting the original meaning of the word, which covered any injury or offence done, and to couple it with entry on property." In 40 C. 548 = 17 C.W.N. 534 = 14 Cr. L.J. 117 = 18 Ind. Ca. 677, Richardson, J., says the term 'trespass' is used in this section in the sense of any violent or injurious act committed. It was further held in this case that the fact that the graveyard was a disused one will not make an act of trespass with the specified intention or knowledge any the less an offence if there are graves still visible on it.

298. Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Uttering words,
etc., with deli-
berate intent to
wound the reli-
gious feelings of
any person

Note — These sections are of so dangerous a character, that it is most necessary to bear in mind the general exceptions contained in ss. 76—80. It is clear that a missionary or teacher, *boni fide* pursuing his calling, could not be indicted for any offence he might give to others, nor, of course, could a Magistrate, who felt it to be his duty to prevent or interrupt a religious procession; nor a Municipal Commissioner, or Engineer, who dug up a burial ground, or threw down a temple, in the performance of some public work, nor a person who did such an act upon ground which was lawfully his own, whatever might be the offence given thereby. A merely spiteful act, such as throwing down a shoe, done for the purpose of annoying another, by polluting his food, is not within this section. 24 A. 153, of 6 C. P. L. R. 7, where a woman threw the cloth in which she was confined upon the alleged father of her illegitimate child. The section applies only to insults to religious feelings and not to *caste*.

The original framers of the Code say, in reference to this section (p. 48) —

"In framing this clause we had two objects in view — we wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional insults to what is held sacred by others. We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbours by words, gesture, or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by a person not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause," note J.

Notwithstanding this explanation the complaints against this section were numerous, not only from the Missionaries, but from the Company's Judges, one of whom, Mr. Giberne, Judge of the Bombay Sudder Court, says, "this clause might, I think, be excluded, for it almost amounts to a prohibition of preaching the Gospel." In commenting upon these criticisms, the Commissioners quote the above passage, and go on to say —

"We understand these instances to be mentioned as indicative of the strictness with which the definition is to be construed, so as not to make a person criminally liable for words, etc., wounding the religious feelings of another, unless a deliberate intention so to wound his feelings be unequivocally manifested, as it would be by mere railing and abuse, and by offensive attacks upon his religion, under the pretext of discussion, without any argument which an impartial arbiter could possibly believe to have been addressed to him in good faith merely for the purpose of convincing him of the truth. It is here to be observed, that it is not the impression of the offended party that it is to be admitted to decide whether the words uttered deserve to be considered as insulting, and whether they were uttered with the deliberate intention of insulting; these are points to be determined upon cool and calm consideration of the circumstances by the Judge. The intention to wound must be *deliberate*,

Where the lesser penalty is inflicted, it is imperative upon the Court under s. 367 (5), Cr. P. C., to state the reason why the sentence of death was not passed, thus implying that the extreme sentence is the normal sentence, 1 L. B. R. 216 followed in 1 Cr. L. J. 473; 10 Bur. L. R. 123=1 Cr. L. J. 663; 3 L. B. R. 111. Where adequate judicial reasons could not be found, the court is bound to pass the death sentence, coupled if necessary with a recommendation to the Executive Government for the exercise of its prerogative under s. 401, Cr. P. C. Very often the age, 1911 U. B. R. I. 87=12 Cr. L. J. 449=11 Ind. Crs. 792, or sex of the accused has been treated as sufficient reason for not passing death sentence, 11 C. W. N. 901=5 Cr. L. J. 151, (1892-93) U. B. R. I. 203 *contra*, 1 L. B. R. 319. Similarly where the accused murdered his wife labouring under an unfounded suspicion of her chastity, 8 C. W. N. 218=1 Cr. L. J. 62; 12 Cr. L. J. 215=10 Ind. Cas. 119. Several reasons will be found stated in 1893 P. J. L. B. 112; 1899 P. J. L. B. 503; Ou. s. c 216 & 210; 2 A. 33; 1866 P.R. No. 103. Where a Hindu widow kills her illegitimate child to hide her shame, 14 K. L. R. 312=2 Cr. L. J. 193; Ratanlal 401, and in general circumstances of youth and heat of passion, 14 K. L. R. 21=1 Cr. L. J. 491; where there is an absence of direct evidence, 14 K. L. R. 376=2 Cr. L. J. 339; and where the corpse is not forthcoming, 11 W. R. (Cr.) 20; 3 A. 383; or the case is murder as falling only under cl (4) of s. 300, 1899 S. J. L. B. 439; or where there is an absence of premeditation coupled with intoxication, 1 Cr. L. J. 493, it has been thought proper not to award the extreme penalty.

It is hardly necessary to observe that no Statute of Limitations exists in criminal law. But where prisoners were convicted of murders committed 19 and 13 years prior to trial, the Court remitted the extreme penalty of the law, considering that it was not called for as a public example. (Mad. F. U., 196 of 1851; 226 of 1852.)

As to finding a verdict of culpable homicide, or of any minor offence, where the facts charged as murder do not make out that offence, see Cr. P. C. s. 238.

A person who unintentionally commits murder in a dacoity may be punished under s. 396, but he cannot be separately convicted of murder under s. 302, and of dacoity under s. 393. 1931 W. R. (Cr.) 39. On a conviction on the alternative of murder or causing disappearance of evidence (s. 201) only the punishment prescribed for the latter offence could be awarded, see s. 72, I. P. C., 1903 A. W. N. 93=3 Cr. L. J. 354.

Punishment for
murder by a life-
convict

303. Whoever, being under sentence of transportation for life, commits murder, shall be punished with death.

Note.—Death is the only legal sentence in such a case, 19 W. R. (Cr) 15. The view in 14 K. L. R. 151=1 Cr L. J. 920 probably is based on the ground that the accused there had been sentenced to twenty years' imprisonment at Ahmedabad and though a sentence of transportation for life is regarded as equivalent to imprisonment for twenty years, for purposes of this section they ought to be treated as sentences coming under different categories of punishment. Similarly it would be inapplicable to a European under sentence of penal servitude for life. But probably a person undergoing imprisonment in lieu of transportation would be within the section.

304. Whoever commits culpable homicide not amounting to murder shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death

304A. Whoever causes the death of any person, by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary on this section, see Part II, Ch IX, § 157, at p. 519.

305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

306. If any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

For commentary on ss 305 and 306, see Part II., Ch. IX, § 158, at p 529.

307. Whoever does any act with such intention, or knowledge, and under such circumstances that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned

When any person offending under this section is under sentence of transportation for life, he may, if hurt is caused, be punished with death.

Illustrations

(a) A shoots at Z with intent to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section

(b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section; and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table, or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

For commentary on ss. 307—309, see Part II., Ch. IX, § 159, at p. 530.

308. Whoever does any act with such intention, or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both

Illustration

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that, if he thereby caused death, he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

309. Whoever attempts to commit suicide, and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both

Note—The Court should exercise its discretion and pass a lenient sentence, where the accused is found suffering from a bodily affection causing acute mental depression 2 L. B. R. 209—1 Cr. L. J. 477. The ruling 1 B. H. C. R. 4 has been overruled by the Legislature so that as the section as now stands, a sentence of fine only may be imposed.

310 Whoever, at any time, after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child stealing by means of, or accompanied with, murder, is a Thug

311. Whoever is a Thug shall be punished with transportation for life, and shall also be liable to fine

Note.—As to the jurisdiction over Thugs, see Cr. P. C., s. 181. Habitual association for the purpose specified is the gist of the offence 1881 P. R. No. 28

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO
UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS,
AND OF THE CONCEALMENT OF BIRTHS.

312. Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A woman who causes herself to miscarry is within the meaning of this section

For commentary on ss 312—316, see Part II., Ch IX, § 160 at p. 538

313. Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

314. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the act is done without the consent of the woman, shall be punished either with transportation for life, or with the punishment above-mentioned.

Explanation —It is not essential to this offence that the offender should know that the act is likely to cause death.

315. Whoever, before the birth of any child, does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both

316. Whoever does any act under such circumstances that, if he thereby caused death, he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Illustration.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die, but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this section.

317. Whoever, being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both

Explanation — This section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure.

For commentary on this section, see Part II., Ch. IX., § 161 at p. 542.

318. Whoever, by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals, or endeavours to conceal, the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

Concealment of
birth by secret dis-
posal of dead body

For commentary on this section, see Part II, Ch. IX., § 162 at p. 545

OF HURT

319. Whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt

Hurt

320. The following kinds of hurts only are designated as "grievous" —

Grievous hurt

First.—Emasculation

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint

Fifthly.—Destruction, or permanent impairing, of the powers of any member or joint

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits.

Note—For commentary on ss. 319 & 320, see Part II., Ch. IX., § 163 at p. 549.

Where a man was so much injured that he had to go to hospital, but left it perfectly cured on the twentieth day after the hurt, it was held that this day would count as one of the twenty days during which he had been unable to follow his ordinary pursuits. (*R. v. Shail Bahadur*, Scotland, C.J., 2nd Madras Sessions, 1862.) Remaining in hospital is evidence from which it may be inferred that a man was unable to follow his ordinary pursuits, but it is not of itself conclusive evidence. 19 B. 247, 1 L. B. R. 221. Even though the bodily pain or inability to follow one's ordinary pursuits, does not continue for the length of twenty days, the offence may amount to grievous hurt within cl. (8) of s. 320, if the life of the injured was endangered, 2 W. R. (Cr.) 29 cf. 4 W. R. (Cr.) 4. It is not the duty of a medical witness to classify hurt. This the Court will have to do for itself. The witness can only describe facts within his observation, 3 L. B. R. 196=4 Cr. L.J. 202; 12 W. R. (Cr.) 25.

321. Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Voluntarily causing hurt

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause, or knows himself to be likely to cause, is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

Voluntarily causing grievous hurt

Explanation —A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt, and intends, or knows himself to be likely, to cause grievous hurt. But he is said voluntarily to cause grievous hurt if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration

A intending, or knowing himself to be likely, permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

323. Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both

324. Whoever, except in the case provided for by section 334, voluntarily causes hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Note.—A substance which if administered in small quantities is not deleterious, will be deleterious if administered in such a quantity as to be dangerous to life, and causing hurt by so administering it will be punishable under this section. (See *R. v. Cramp*, 5 Q. B. D. 307.)

Firing into a crowd with intent to wound some one, supports an indictment which alleges an intent to wound the person who was actually injured. *R. v. Prettell* 33 L. J. (M. C.), 128 = L. & C. 443 9 Cox. 471.

It is, of course, not necessary for a conviction under this section that the manner in which the weapon has in fact been used should be likely to cause death. (7 M. H. C. R. Appx. 11.) The section takes into account only the nature of the instrument. (1897-1901) U. B. R. 311. If the act by itself is ordinarily capable of causing death and is committed with the requisite intention or knowledge it would amount to an offence under s. 307 *supra*. But it cannot be such a blow with a hatchet on the neck as such an act. It would depend upon the nature of the injury caused. It would be covered by this section where the injury is not severe to come under s. 307, 15 Bom. L. R. 931 = 2 Bom. Cr. Ca. 159 = 14 Cr. L. J. 611 = 21 Ind. Ca. 881; 4 B. H. C. R. (Cr. Ca.) 17. Cases are conceivable which would come under s. 307 without being covered by this section so that it is not possible always to say that the

offence under this section is necessarily implied in a charge under s. 307 *supra*. Thus in *R. v. Cludray*, 4 Cox. 81 = 1 Den. C. C. 314, the prisoner with intent to kill a child nine months old gave it two berries the kernel of which was highly poisonous, but the outer pod was very hard and indigestible by the child. One of the berries the child vomited and the other passed through the bowels quite undigested. It cannot be said that the administration caused any bodily pain, disease or infirmity, but the act undoubtedly amounted to an attempt to murder (s. 307). If intent to kill is not established it would be an offence under s. 328.

325. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Punishment for voluntarily causing grievous hurt

326. Whoever, except in the case provided for by section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt by dangerous weapons or means

Note—This section like s. 144 *supra* applies only to the person actually handling the dangerous weapon or means, 6 C. W. N. 93, unless it be the liability arising constructively by reason of s. 34 or s. 114 or s. 149 *supra*, 35 C. 639; 4 L. B. R. 271.

327. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal, or which

Voluntarily causing hurt to extort property, or to constrain to an illegal act

may facilitate the commission of an offence shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

328. Whoever administers to, or causes to be taken by, any person any poison or any stupefying, intoxicating, or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or facilitate the commission of any offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Causing hurt by means of poison, etc., with intent to commit offence

Note.—A man placed in his toddy pots juice of the milk bush, knowing that if taken by a human being it would cause injury, and with the intention of detecting an *unknown* thief who was in the habit of stealing his toddy. The toddy was drunk by some soldiers who purchased it from an unknown vendor. Held that he was rightly convicted under this section of "causing to be taken an unwholesome thing" 5 B H C. R. (Cr. Ca.) 59.

In a case under a similar English Statute, where it appeared that the prisoner had administered a drug to a female with intent to excite her sexual passions, in order that he might have connection with her, the conviction was affirmed (*R. v. Wilkins*, 31 L. J. (M. C.) 72—L. & C 89=9 Cox. 20. But the offence of administering a drug is not committed where the accused has merely procured the drug at the request of another, who took it herself, although the drug was given to her with the knowledge that it would be taken, and for that purpose. *R. v. Fretwell*, 31 L. J. (M. C.) 143=L. & C. 131. *Harrell Wilson*, D & B 127 *Mary Tarrow*, lb 164; *Guyton*, lb, 283. Nor, as I conceive, could it be said, under such circumstances, that the accused had caused it to be taken. Romeo might have been indicted under this section, but not the Apothecary. But to constitute administering, it is not necessary, the poison should be delivered by the hand of the accused, *Hannah Harby*, 4 C & P. 369, *Dalb* 6 Cox. 14. *Lewis*, 6 C. & P. 161; but it must reach the stomach, *Cadman*, R & M (C C R.,) 114. Otherwise it may amount to an attempt, 5, L B R. 79.

The words "other thing" must be read "other unwholesome thing". Hence, administering a substance, as to whose nature no evidence was given, which was intended to act as a charm, was held to be no offence. 1 W. R. (Cr.) 7. To administer a deleterious drug when life is not endangered, is to commit an offence under this section. 4 W. R. (Cr.) 4. Similarly when the accused employed a

'medicine man' to detect the thief who had stolen his money and the medicine man in the presence of the accused administered to all the villagers the juice of some leaves saying it would cause the belly of the thief to swell and three of the villagers exhibited symptoms of poisoning, the accused was held liable under this section Weir I. 335; 30 A. 558; 1881 P. R. No 28.

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer,

Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.

or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal, or which

may facilitate the commission of an offence shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

330. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from

Voluntarily causing hurt to extort confession or to compel restoration of property

any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person

interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Illustrations.

(a) A, a Police officer, tortures B in order to induce Z to confess that he had committed a crime. A is guilty of an offence under this section

(b) A, a Police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(c) A, a Revenue officer, tortures B in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

may facilitate the commission of an offence shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

328. Whoever administers to, or causes to be taken by, any person any poison or any stupefying, intoxicating, or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or facilitate the commission of any offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing hurt by means of poison, etc., with intent to commit offence

Note.—A man placed in his toddy pots juice of the milk bush, knowing that if taken by a human being it would cause injury, and with the intention of detecting an *unknown* thief who was in the habit of stealing his toddy. The toddy was drunk by some soldiers who purchased it from an unknown vendor. Held that he was rightly convicted under this section of "causing to be taken an unwholesome thing" 5 B. H. C. R. (Cr. Ca.) 59.

In a case under a similar English Statute, where it appeared that the prisoner had administered a drug to a female with intent to excite her sexual passions, in order that he might have connection with her, the conviction was affirmed (*R. v. Wilkins*, 31 L. J. (M. C.) 72—L. & C. 89=9 Cox. 20. But the offence of administering a drug is not committed where the accused has merely procured the drug at the request of another, who took it herself, although the drug was given to her with the knowledge that it would be taken, and for that purpose. *R. v. Fretwell*, 31 L. J. (M. C.) 445—L. & C. 151. *Harriott Wilson*, D & B 127. *Mary Tarrow*, 1b 164; *Guyton* 1b. 285. Nor, as I conceive, could it be said, under such circumstances, that the accused had caused it to be taken. Romeo might have been indicted under this section, but not the Apothecary. But to constitute administering, it is not necessary, the poison should be delivered by the hand of the accused, *Hannah Harlow*, 4 C. & P. 369, *Dalb* 6 Cox. 14. *Lewis*, 6 C. & P. 161; but it must reach the stomach, *Cadman*, R & M (C. C. R.) 114. Otherwise it may amount to an attempt, 3, L. B. R. 79.

The words "other thing" must be read "other unwholesome thing." Hence, administering a substance, as to whose nature no evidence was given, which was intended to act as a charm, was held to be no offence. 1 W. R. (Cr.) 7. To administer a deleterious drug when life is not endangered, is to commit an offence under this section. 4 W. R. (Cr.) 4. Similarly when the accused employed a

'medicine man' to detect the thief who had stolen his money and the medicine man in the presence of the accused administered to all the villagers the juice of some leaves saying it would cause the belly of the thief to swell and three of the villagers exhibited symptoms of poisoning, the accused was held liable under this section. Weir I. 335; 30 A. 558; 1881 P. R. No 28.

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal, or which may facilitate the commission of an offence shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.

330. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Voluntarily causing hurt to extort confession or to compel restoration of property.

Illustrations.

(a) A, a Police officer, tortures B in order to induce Z to confess that he had committed a crime. A is guilty of an offence under this section.

(b) A, a Police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section.

(c) A, a Revenue officer, tortures B in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section.

may facilitate the commission of an offence shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

328. Whoever administers to, or causes to be taken by, any person any poison or any stupe-

Causing hurt by
means of poison,
etc., with intent to
commit offence

ifying, intoxicating, or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or facilitate the commission of

any offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Note.— A man placed in his toddy pots juice of the milk bush, knowing that if taken by a human being it would cause injury, and with the intention of detecting an *unknown* thief who was in the habit of stealing his toddy. The toddy was drunk by some soldiers who purchased it from an unknown vendor. Held that he was rightly convicted under this section of "causing to be taken an unwholesome thing" 5 B. H. C. R. (Cr. Ca.) 59.

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'medicine man' to detect the thief who had stolen his money and the medicine man in the presence of the accused administered to all the villagers the juice of some leaves saying it would cause the belly of the thief to swell and three of the villagers exhibited symptoms of poisoning the accused was held liable under this section Weir I. 335; 30 A. 568; 1881 P. R. No 28.

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal, or which may facilitate the commission of an offence shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.

330. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Voluntarily causing hurt to extort confession or to compel restoration of property

Illustrations

(a) A, a Police officer, tortures B in order to induce Z to confess that he had committed a crime. A is guilty of an offence under this section

(b) A, a Police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this section

(c) A, a Revenue officer, tortures B in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this section

(d) A, a Zemindar, tortures a ryot in order to compel him to pay his rent. A is guilty of an offence under this section.

Note — The confession must be of some offence, or misconduct, under the Code. Hence the extortion of a confession of witchcraft could not fall under this section. 13 W. R. (Cr.) 23. If a person by threats forces another to dip his hands into hot oil, he cannot be convicted under this section but only under s. 506 *infra*, 9 C. P. L. R. 18. It is immaterial whether the offence, or misconduct, have been committed. 20 W. R. (Cr.) 41.

This section aims at repressing torture by the Police, investigating a crime, 1886 P. R. No. 85. 11 C. 530. A person who stands by and acquiesces in the torture of a suspect by a Policeman in order to extort a confession was held liable under this section, 20 B. 394. Similarly one who lends a house to a Police-officer with the knowledge the house was to be used for torturing persons suspected of complicity in the offence is liable especially where he is also present at such torturing 1893 A. W. N. 191. And so also a village-headman who was present at the beating of a suspect by the Police and by his conduct in other ways afforded encouragement to the ill-treatment, Weir I. 50. If death results from such torture, a conviction under s. 304 could not be had as the intention of the torturer is not one of those specified in s. 299 or s. 300; the accused may be sentenced, however, to the maximum sentence prescribed by the next section, 7 W. R. (Cr.) 3.

The Madras High Court has ruled that the "demand" in the latter part of the section must relate to property, and that a man was not punishable under this section who caused hurt to his wife, to constrain her to obey his demand that she should return to her house. 11 M. 257; 4 C. L. J. 92 - 4 Cr. L. J. 71.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the

Voluntarily
causing grievous
hurt to extort con-
fession, or to com-
pel restoration of
property

sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

332. Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both

Note.—When an accused under trial struck a Police-officer in the witness-box, his act was held to fall more appropriately under s. 355 than under this section, 6 Cr. L. J. 22.

The words "in the discharge of his duty as such public servant" mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done by him in the discharge of his office, 18 A. 246, which must A. W. N. 1; see next Part II., (Cr.) 69; 1910 P. R. No. 18, 1; *Rorburgh* 12 Cox 8; but it is not necessary that the duty on which the public servant is employed should be a particular duty imposed expressly by the law on the particular occasion. If a Constable to the knowledge of the accused is told off to shadow him, an assault whilst performing that duty is covered by this section, 7 M. L. T. 386=11 Cr. L. J. 221=6 Ind. Ca. 12, 1910 P. R. (Cr.) 18; 1910 P. W. R. (Cr.) 32=11 Cr. L. J. 423=6 Ind. Ca. 955 26 C. 630. If the public servant is found not to be acting strictly within the scope of his duty, the offence would be reduced to one under s. 323, 9 B. 558, 4 C. L. J. 92=4 Cr. L. J. 71, 12 Cr. L. J. 236=10 Ind. Ca. 278, 1913 P. L. R. 155=14 Cr. L. J. 142=18 Ind. Ca. 894, 27 A. 491, 8 A. 293; 1885 A. W. N. 244; 20 C. 895, 29 C. 244=6 C. W. N. 164, 3 C. W. N. 603, in some cases the accused has even been acquitted on the ground the public servant was acting outside his duty. This was result in the case of a vaccinator who tried to take lymph out of the arms of a child he had vaccinated and sustained slight injuries from people who resisted the unlawful act, 3 C. W. N. 627; 1 C. W. N. 233, 30 C. 97; 31 C. 421, 1901 P. L. R. 390 9 Cr. L. J. 956; 3 A. L. J. 327, 7 N. W. P. H. C. R. 209. But the illegality in the public servant's proceeding cannot be set up as a justification unless the public servant is clearly acting without good faith and with malice (s. 99) 19 M. 349, 21 M. 793, 27 M. 52, Weir I. 314 & 315. Though in this section as well as in the next the expression "knowing or having reason to believe, does not occur, this qualification must apply, when Police Constables ordinarily wearing uniform while on duty do not proclaim their authority or do not wear the

(d) A, a Zemindar, tortures a ryot in order to compel him to pay his rent. A is guilty of an offence under this section.

Note — The confession must be of some offence, or misconduct, under the Code. Hence the extortion of a confession of witchcraft could not fall under this section. 13 W. R. (Cr.) 23. If a person by threats forces another to dip his hands into hot oil, he cannot be convicted under this section but only under s. 506 *infra*, 9 C. P. L. R. 18. It is immaterial whether the offence, or misconduct, have been committed. 20 W. R. (Cr.) 41.

This section aims at repressing torture by the Police, investigating a crime, 1885 P. R. No. 86, 11 C. 530. A person who stands by and acquiesces in the torture of a suspect by a Policeman in order to extort a confession was held liable under this section, 20 B. 394. Similarly one who lends a house to a Police-officer with the knowledge the house was to be used for torturing persons suspected of complicity in the offence is liable especially where he is also present at such torturing, 1893 A. W. N. 194. And so also a village-headman who was present at the beating of a suspect by the Police and by his conduct in other ways afforded encouragement to the ill-treatment, Weir I. 50. If death results from such torture, a conviction under s. 304 could not be had as the intention of the torturer is not one of those specified in s. 299 or s. 300; the accused may be sentenced, however, to the maximum sentence prescribed by the next section, 7 W. R. (Cr.) 3.

The Madras High Court has ruled that the "demand" in the latter part of the section must relate to property, and that a man was not punishable under this section who caused hurt to his wife, to constrain her to obey his demand that she should return to her house. 11 M. 257; 4 C. L. J. 92 - 4 Cr. L. J. 71.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer, or any person interested in the sufferer, to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt to extort confession, or to compel restoration of property

332. Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or

Voluntarily causing hurt to deter public servant from his duty

with intent to prevent or deter that person or any other public servant from discharging his duty as such public

servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both

Note.—When an accused under trial struck a Police-officer in the witness-box, his act was held to fall more appropriately under s 355 than under this section, 6 Cr L J. 22.

The words "in the discharge of his duty as such public servant" mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done

his office 18 A. 246, which must

A. W. N. 1; see next Part II,

Cr 69; 1910 P. R. No 18,

1; Roxburgh 12 Cox 8; but

it is not necessary that the duty on which the public servant is employed should be a particular duty imposed expressly by the law on the particular occasion. If a Constable to the knowledge of the accused is told off to shadow him, an assault whilst performing that duty is covered by this section, 7 M. L. T. 386—11 Cr. L. J. 221—6 Ind. Ca. 12, 1910 P. R. (Cr) 18, 1910 P. W. R. (Cr.) 32—11 Cr. L. J. 423—6 Ind. Ca. 935 26 C. 630. If the public servant is found not to be acting strictly within the scope of his duty, the offence would be reduced to one under s 323, 9 B. 558, 4 C. L. J. 92—4 Cr. L. J. 71, 12 Cr. L. J. 235—10 Ind. Ca. 278, 1913 P. L. R. 155—13 Cr. L. J. 142—18 Ind. Ca. 894; 27 A. 491, 8 A. 293, 1885 A. W. N. 244; 20 C. 896, 29 C. 244—6 C. W. N. 164, 3 C. W. N. 603. in some cases the accused has even been acquitted on the ground the public servant was acting outside his duty. This was result in the case of a vaccinator who tried to take lymph out of the arms of a child he had vaccinated and sustained slight injuries from people who resisted the unlawful act, 3 C. W. N. 627; 1 C. W. N. 233, 30 C. 97; 31 C. 424, 1901 P. L. R. 390—9 Cr. L. J. 936; 3 A. L. J. 327, 7 N. W. P. H. C. R. 209. But the illegality in the public servant's proceeding cannot be set up as a justification unless the public servant is clearly acting without good faith and with malice (s 99) 19 M. 349, 21 M. 293 27 M. 52, Weir I. 314 & 345. Though in this section as well as in the next the expression knowing or having reason to believe, does not occur, this qualification must apply, when Police Constables ordinarily wearing uniform while on duty do not proclaim their authority or do not wear the

prescribed uniform, 19 K. L.R. 68=10 Cr. L. J. 102; 17 B. 625. But persons other than public servants who may accompany them for aid and guidance are not entitled to invoke the special protection afforded by this section. 6 C. W. N. 202; Weir I. 342.

333 Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt to deter public servant from his duty.

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine, which may extend to five hundred rupees, or with both.

Voluntarily causing hurt on provocation

Note.—See 1 B. H. C. R. 17.

335. Whoever voluntarily causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine, which may extend to two thousand rupees, or with both.

Causing grievous hurt on provocation

Explanation.—The last two sections are subject to the same provisos as Exception 1, section 300.

Note.—See 3 W. R. (Cr.) 55; 1889 A. W. N. 9; 12 W. R. (Cr.) 7; 19 W. R. (Cr.) 23, and Part II, Ch. IX., § 146 at p. 489.

336. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to two hundred and fifty rupees, or with both.

Note.—For commentary on ss 336—338, see Part II, Ch IX, § 157, at p 519, where Justice Holloway's exposition of the law on the subject in 7 M H C. R. 119 is referred to. Where an engine-driver was taking an engine which was letting off steam along a public thoroughfare at a time when the traffic was exceptionally heavy and within a few yards of a large number of horses and carriages which had been parked together, in spite of warnings from the police that to do so would endanger public safety, he was adjudged guilty under this section (though he might have believed that no danger would in fact be caused) *Weir I 337*. In deciding whether an act is within this section or not no distinction ought to be drawn between the act itself and the instrument with which it was done, *Weir I 337*. The expression 'does any act so rashly or negligently' has the same meaning as 'rash or negligent act' in s 304A, 36 C. 302, where such an act is not followed by any evil consequence, the doer is liable under this section but where the act causes death the doer is liable for

The absence of
ons If criminal
gligence could be
being covered by

s 80 *supra*, 1903 A. W. N 71, 5 A. L. J 155 7 Cr L J. 303. If the likelihood of endangering human life or the personal safety of others is also eliminated, as when stones are thrown at a house at a time when there were no people in the house, a conviction under this section cannot be sustained. S 436 *infra* would probably cover such a case, 5 L. B. R. 100=10 Cr. L. J. 552-4 Ind Cr 293; 1879 S. J. L B. 91; 1 L. B R 45

337 Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, which may extend to five hundred rupees, or with both.

Note.—This section applies only to acts done without any criminal intent. Personal injury intentionally caused is neither

a rash not a negligent act, 1901 U. B. R. (P. C.) 6=1 Cr. L. J. 557; 1903 U. B. R. 15=2 Cr. L. J. 475; 1 L. B. R. 259; 3 L. B. R. 194=4 Cr. L. J. 201, L. B. R. [1872-1892] 593. See 18 C. 49 for an act which was held properly to fall within this section. In a similar case in the Central Provinces the conviction was under s. 325, 12 C. P. L. R. (Cr.) 11. Contributory negligence is not a valid plea in defence, *Ratanlal* 198. From the mere fact that a mishap has occurred, rashness or negligence cannot be inferred, 6 M. H. C. R. Appx. 31; see also 28 A. 454; 1903 P. R. 22=1903 P. L. R. 112=2 Cr. L. J. 207.

338 Whoever causes grievous hurt to any person by

doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, which may extend to one thousand rupees, or with both.

Note.—See 13 Cr. L. J. 703, 16 Ind. Ca. 511; 1903 P. R. (Cr.) 22; 1903 P. L. R. (Cr.) 24=2 Cr. L. J. 207.

WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT.

339 Whoever voluntarily obstructs any person so as

Wrongful restraint to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Exception—The obstruction of a private way over land or water, which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

Note.—For commentaries on ss. 339–348, see Pt. II., Ch. IX., § 164, at p. 551.

340. Whoever wrongfully restrains any person in

Wrongful confinement. such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said “wrongfully to confine” that person.

Illustrations.

(a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(b) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

341. Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine, which may extend to five hundred rupees, or with both.

Punishment for wrongful restraint

342. Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both.

Punishment for wrongful confinement

343. Whoever wrongfully confines any person for three days or more shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Wrongful confinement for three or more days

344. Whoever wrongfully confines any person for ten days or more shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful confinement for ten or more days

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any term of imprisonment to which he may be liable under any other section of this Code.

Wrongful confinement of person for whose liberation a writ has been issued.

Note—Knowledge is much stronger than belief, 6 B.

346. Whoever wrongfully confines any person in such manner as to indicate an intention

Wrongful confinement in secret

that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement.

Note.—Under this section, as in all others, whose essence consists in the existence of a particular intention in the mind of the accused, such intention must be strictly made out, 9 C. 221.

347. Whoever wrongfully confines any person for

Wrongful confinement for the purpose of extorting property, or constraining to an illegal act

the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security, or of constraining the person confined, or any person interested in such person, to do anything

illegal, or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Note —If a servant or subordinate wrongfully confines to extort money for his superior the latter cannot be held liable without proof that he ordered the mal-treatment or acquiesced therein, 31 C. 710, *cf. Me v Cruickshank*, 20 Cox 210, as to civil liability of master. Those that pay money to get a person released from police custody, do not do so voluntarily; they are not accomplices to an act of bribery, and on their testimony the policeman can be convicted under this section, 27 C. 923; 33 C. 649.

348. Whoever wrongfully confines any person for

Wrongful confinement for the purpose of extorting confession, or of compelling restoration of property.

the purpose of extorting from the person confined, or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined, or any person in-

interested in the person confined, to restore or to cause the restoration of any property or valuable security, or satisfy any claim or demand, or to give any information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Note.—When the accused made over a suspected thief to the police, who wrongfully confined him to extort a confession, the police were held liable under this section and not the accused, 1 W. R (Cr) 26.

OF CRIMINAL FORCE AND ASSAULT.

349. A person is said to use force to another if he causes motion, change of motion, or cessation of motion, to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion, as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling, provided that the person causing the motion, or change of motion, or cessation of motion, causes that motion, change of motion, or cessation of motion, in one of the three ways herein after described.

First.—By his own bodily power.

Secondly.—By disposing any substance in such a manner that the motion, or change, or cessation of motion, takes place without any further act on his part, or on the part of any other person.

Thirdly —By inducing any animal to move, to change its motion, or to cease to move

For commentary on ss. 349 & 350, see Part II, Ch IX., § 165, at p 559

350. Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing

Criminal force

it to be likely that by the use of such force he will cause injury, fear, or annoyance to the person to whom the force is used, is said to "use criminal force" to that other.

Illustrations.

(a) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part. A has therefore, intentionally used force to Z, and if he has done so without Z's consent, in order to the committing of any offence, or intending, or knowing it to be likely, that this use of force will cause injury, fear, or annoyance, to Z, A has used criminal force to Z.

(b) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has, therefore, caused force to Z, and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy, Z, A has used criminal force to Z.

(c) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has, therefore, used force to Z, and as A has acted thus intentionally without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(d) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has, therefore, intentionally used force to Z, and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, he has used criminal force to Z.

(e) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z or with Z's clothes, or with anything possessed by Z, and that it will hurt him, and Z.

to Z.

(f) A intentionally pulls up a woman's veil. Here A intentionally uses force to her; and if he does so without her consent, intending or knowing it to be likely that he may thereby frighten or annoy her, he has used criminal force to her.

(g) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally, by his own bodily power, causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has, therefore, intentionally used force to Z, and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear, or annoyance to Z, A has used criminal force.

(h) A incites a dog to spring upon Z without Z's consent. Here if A intends to cause injury, fear, or annoyance to Z, he uses criminal force to Z.

351. Whoever makes any gesture, or any preparation, intending, or knowing it to be likely, that such gesture, or preparation, will cause any person present to apprehend that he who makes that gesture, or preparation, is about to use criminal force to that person, is said to commit an assault.

Explanation — Mere words do not amount to an assault. But the words which a person uses may give to his gestures, or preparation, such a meaning as may make those gestures, or preparations, amount to an assault.

Illustrations.

(a) A shakes his fist at Z, intending, or knowing it to be likely, that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely, that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

explained by the words may amount to an assault.

352. Whoever assaults, or uses criminal force to, any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both

Punishment for using criminal force otherwise than on grave provocation

Explanation.—Grave and sudden provocation will not mitigate the punishment for an offence under this section if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence—or

If the provocation is given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant—or

If the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence is a question of fact.

Note.—For commentary on the law of provocation, see Part II., Ch. IX., § 146, at p. 489

353. Whoever assaults, or uses criminal force to, any person, being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both.

Note.—See notes under s. 332 *supra*. The public servant must be

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L. J. 368; 3 C. W. N. 627; 5 C. W. N. 135; 1904 P. L. R. 103. When accused is put on his trial under this section, and it is not established the person assaulted was a public servant in the discharge of his duty as such, no conviction can be had under s. 352 *supra*, especially in the absence of a complaint from the actual party assaulted. 6 C. W. N. 202. When the warrant under which the public servant was supposed to be acting is not produced at the trial, nor secondary evidence of its contents adduced, a conviction under this section cannot be sustained, 26 C.

630; 3 C. W. N. 603; 3 L. B. R. 128=3 Cr. L. J. 351 (*contra* 29 A. 272=4 A. L. J. 132; 1907 A. W. N. 42=5 Cr. L. J. 110). There must further be proof the warrant was directed against the accused, 28 C. 339; 1903 P.C.L.R. 390=1 Cr. L. J. 956; 16 C. W. N. 549=13 Cr. L. J. 590=15 Ind. Ca. 1006; 19 M. L. J. 238=11 Cr. L. J. 209=4 Ind. Ca. 1166.

Resistance to a public officer who is attempting to search a house without the proper written order authorizing him to do so is not punishable under this section (7 N.-W. P.H. C. R. 209; 1 C. W. N. 733; 23 C. 895; 1907 P. R. Cr. 4=6 Cr. L. J. 107; 25 C. 630.) But the fact that a warrant for the arrest of a debtor was only initialled by the officer of the Court, instead of being signed in full under O XXI r 24 (2) C. P. C. is no defence to the debtor who resists arrest 8 A. 293; 1883 A. W. N. 244; 19 M. 319; 21 M. 296; 13 W.R. (Cr.) 49; 13 M. 131; 27 A. 491. See Part II., Ch IX., § 165, at p 559

354. Whoever assaults, or uses criminal force to, any

Assault or use of criminal force to a woman with intent to outrage her modesty

woman, intending to outrage, or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

Note.—See Weir I. 347. The fact the accused is in love with the girl and pulled her hair and hand, being jealous of the attentions paid by a rival is no excuse, 4 Bur. L. T. 268=13 Cr. L. J. 53=13 Ind. Ca. 389. The gist of the offence however is in the intention of the accused. See McCormick's case, 6 Bur. L. T. 21=14 Cr. L. J. 149=19 Ind. Ca. 149. An offence under this section may be committed in respect of a girl of six years, 14 Bom. L. R. 951=1 Bom. Cr. C. 205. When however the evidence of rape depends on the uncorroborated testimony of the prosecutrix, it has been held safe to convict only under this section, U. B. R. (1897-1901) I 329; U. B. R. (1892-1896) I. 229.

355. Whoever assaults, or uses criminal force to, any

Assault or criminal force with intent to dishonour a person, otherwise than on grave provocation.

person, intending thereby to dishonour that person, otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Note.—Assault committed by an accused on his trial, on the police inspector in the witness-box was held to be an offence under this section, 1907 A. W. N. 186=6 Cr. L. J. 22.

356. Whoever assaults, or uses criminal force to, any person, in attempting to commit theft of any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Note.—This section deals with cases of attempt to commit theft by use of force where the act falls short of robbery. Ratanlal 3. The section therefore seems to be specially meant for pickpockets who fail to accomplish their objects.

357. Whoever assaults, or uses criminal force to, any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both

358. Whoever assaults, or uses criminal force to, any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine, which may extend to two hundred rupees, or with both

Explanation.—The last section is subject to the same explanation as section 352.

OF KIDNAPPING, ABDUCTION, SLAVERY, AND FORCED LABOUR

359. Kidnapping is of two kinds: kidnapping from British India and kidnapping from lawful guardianship.

360. Whoever conveys any person beyond the limits of British India without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from British India.

Note.—Inducing certain women to leave British India for Ceylon on the misrepresentation they were to be married to accused's sons but really to work as coolies on tea estates amounts to 'conveying' them without their consent within the meaning of this section, 1910 M. W. N. 262=8 M. L. T. 91=11 Cr. L. J. 368=6 Ind. Ca. 503.

361. Whoever takes, or entices, any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who, in good faith, believes himself to be the father of an illegitimate child, or who, in good faith, believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Note—For commentary on this section, see Part II, Ch. IX., § 166, at p 564.

362. Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Note.—For commentary, see Part II., Ch. IX., § 167, at p 578.

363. Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

364. Whoever kidnaps, or abducts, any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or
abducting, in
order to murder

Illustrations.

(a) A kidnaps Z from British India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this section.

(b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this section.

365. Whoever kidnaps, or abducts, any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or
abducting with in-
tent secretly and
wrongfully to con-
fine a person.

Note.—Though professional brigandage is not very common in this country, this section has been held to apply to the act of a man who confines another with a view to exact a ransom, as the intention at the moment of abduction would be first to confine with the ultimate object of extorting money thereby, 6 L. B. R. 160 = 14 Cr. L. J. 167 = 19 Ind. Ca. 167.

366. Whoever kidnaps, or abducts, any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or
abducting a
woman to compel
her marriage, etc.

Note.—For commentary, see Part II., Ch. IX., § 167, at p. 579.

367. Whoever kidnaps, or abducts, any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

368. Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or keeps such person in confinement, shall be punished in the same manner as if he had kidnapped or abducted such person, with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.

Note.—For commentary, see Part II., Ch. IX., § 167, at p. 582.

369. Whoever kidnaps, or abducts, any child under the age of ten years, with the intention of taking dishonestly any movable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

370. Whoever imports, exports, removes, buys, sells, or disposes of any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Note.—For commentary on ss. 367, 370, 371, see Part II., Ch. IX., § 168, at p. 583.

(g) A finds a ring lying on the high road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding-place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security enters the shop openly, takes his watch by force out of Z's hand and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft inasmuch as he takes it dishonestly.

(k) Again, if A having pawned his watch to Z takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly, A has, therefore, committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence and takes away a book without Z's express consent, for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food, and clothes, which A knows to belong to Z, her husband. Here, it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

367. Whoever kidnaps, or abducts, any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected, to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc

368. Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or keeps such person in confinement, shall be punished in the same manner as if he had kidnapped or abducted such person, with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement

Wrongfully concealing or keeping in confinement a kidnapped person

Note — For commentary, see Part II., Ch. IX., § 167, at p. 582

369. Whoever kidnaps, or abducts, any child under the age of ten years, with the intention of taking dishonestly any movable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or abducting child under ten years with intent to steal movable property from the person of such child.

370. Whoever imports, exports, removes, buys, sells, or disposes of any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Buying or disposing of any person as a slave.

Note.—For commentary on ss. 367, 370, 371, see Part II., Ch. IX., § 168, at p. 581.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under twelve years of age, is not rape.

376. Whoever commits rape shall be punished with Punishment for transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Note.—For commentary, see Part II., Ch IX., § 171, at p. 592.

OF UNNATURAL OFFENCES.

377. Whoever voluntarily has carnal intercourse Unnatural of. against the order of nature with any man, woman, or animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Explanation —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section

Note.—For Commentary, see Part II., Ch IX., § 172, at p. 604.

CHAPTER XVII

OF OFFENCES AGAINST PROPERTY.

OF THEFT.

378. WHOEVER, intending to take dishonestly any Theft movable property out of the possession of any person without that person's consent, moves that property, in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being movable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2 — A moving, effected by the same act which effects the severance, may be a theft.

Explanation 3.—A person is said to cause a thing to move, by removing an obstacle which prevented it from moving, or by separating it from any other thing, as well as by actually moving it

Explanation 4 — A person who, by any means, causes an animal to move is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5 — The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority, either express or implied.

Illustrations.

(a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree, in order to such taking, he has committed theft

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(d) A, being Z's servant and entrusted by Z with the care of Z's plate, dishonestly runs away with the plate without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not, therefore, be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the high road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding-place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security enters the shop openly, takes his watch by force out of Z's hand and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft inasmuch as he takes it dishonestly.

(k) Again, if A having pawned his watch to Z takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has, therefore, committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence and takes away a book without Z's express consent, for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food, and clothes, which A knows to belong to Z, her husband. Here, it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(o) A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A, in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both

Punishment for theft

Note —For commentary on ss. 378 & 379, see Part II., Ch. X., §§ 174 and 175, at pp 607-627

See as to the summary jurisdiction of Magistrates over offences under this section, and ss 380, 381, where the value of the property does not exceed Rs 50, the Editor's Commentaries on the Cr. P. C., s 260 (d), As to power to restore to the owner stolen property, ss. 517-520, Cr. P. C.

380. Whoever commits theft in any building, tent, or vessel, which building, tent, or vessel is used as a human dwelling, or for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft in a dwelling-house, etc

Note.—For commentary, see Part II, Ch. X., § 176, at pp. 627-629.

381. Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft by clerk or servant of property in possession of master.

For commentary, see Part II., Ch. X., § 177, at pp. 629-631.

382. Whoever commits theft, having made preparation for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Theft after preparation made for causing death or hurt, in order to the committing of the theft.

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if the robbery be committed on the highway, between sunset and sunrise, the imprisonment may be extended to fourteen years.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

394. If any person, in committing, or attempting to commit, robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing, or attempting to commit, such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Note.—The offence defined in s. 390 is included in this section

aggravated form of the offence here dealt with—aggravated by reason of the fact the hurt caused is grievous hurt, 1901 P.R. No. 16.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Note.—If it is thought necessary to award a sentence of transportation the only legal sentence would be one for life or by less than seven years

31—1903 P. L. R. 41—1

Illustrations.

(a) A commits theft on property in Z's possession; and, while committing this theft, he has a loaded pistol under his garment, having provided this pistol for the purpose of hurting Z in case Z should resist. A has committed the offence defined in this section.

(b) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in this section.

Note.—The fact the thief was armed with a *lethal* weapon such as a knife would not make him liable under this section. There must be proof of preparation for causing one or more of the results mentioned in the section, 10 Bur. L.R. 87 = 1 Cr. L. J. 378. If it went beyond the stage of preparation as for instance when hurt is actually caused, it would become robbery, 6 W. R. (Cr.) 83. In 4 L. B. R. 147, a thief was caught while making away with a bag of rice. He dropped the bag and stabbed his captor. It was held the offence was one under this section and not one under s. 394 *infra*.

OF EXTORTION.

383. Whoever intentionally puts any person in fear of
 Extortion any injury to that person or to any
 other, and thereby dishonestly induces
 the person so put in fear to deliver to any person any
 property or valuable security, or anything signed or
 sealed which may be converted into a valuable security,
 commits "extortion."

Illustrations.

(a) A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain monies to A. Z signs and delivers the note. Z has committed extortion.

(c) A threatens to send club-men to plough up Z's field, unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(d) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper, and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed

For commentary see Part II., Ch. X, § 179. p. 635

384. Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for extortion.

385. Whoever in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Putting person in fear of injury, in order to commit extortion.

386. Whoever commits extortion by putting any person in fear of death, or of grievous hurt to that person, or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Extortion by putting a person in fear of death or grievous hurt.

387. Whoever in order to the committing of extortion, puts, or attempts to put, any person in fear of death, or of grievous hurt to that person, or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Putting person in fear of death or of grievous hurt, in order to commit extortion.

Note.—The feigning of an attempt to commit suicide in order to extort money is an offence under this section 1 Ind. Jur. (N. S.) 423.

388. Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed an offence punishable with death or transportation, etc., shall be punished with imprisonment for a term which may extend to

Extortion by threat of accusation of an offence punishable with death or transportation, etc.

~~ment of either description for a term which may~~
 extend to ten years, and shall also be liable to fine; and,
 if the offence be one punishable under section 377, of this
 Code may be punished with transportation for life.

389. Whoever, in order to the committing of ex-
 tortion, puts, or attempts to put, any
 person in fear of an accusation against
 that person, or any other, of having
 committed, or attempted to commit, an
 offence, punishable with death, or with
 transportation for life, or with imprisonment for a term
 which may extend to ten years, shall be punished with
 imprisonment of either description for a term which
 may extend to ten years, and shall also be liable to fine;
 and, if the offence be punishable under section 377, of
 this Code may be punished with transportation for life.

For commentary on ss. 388 & 389 see Part II, Chapter X., § 179.,
 pp. 636 637.

OF ROBBERY AND DACOITY.

Robbery. **390.** In all robbery there is either
 theft or extortion.

Theft is "robbery," if, in order to the committing
 of the theft, or in committing the theft
 or in carrying away, or attempting to
 carry away, property obtained by the
 theft, the offender, for that end, voluntarily causes, or
 attempts to cause, to any person death, or hurt, or
 wrongful restraint, or fear of instant death, or of instant
 hurt, or of instant wrongful restraint.

Extortion is "robbery" if the offender, at the time of
 committing the extortion, is in the pre-
 sence of the person put in fear, and
 commits the extortion by putting that
 person in fear of instant death, of instant hurt, or of
 instant wrongful restraint to that person, or to some
 other person, and, by so putting in fear, induces the

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint

Illustrations.

... y and jewels
committed
voluntarily
committed
robbery.

(b) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, being at the time of committing the extortion in his presence. A has, therefore, committed robbery.

(c) A meets Z and Z's child on the high road. A takes the child and threatens to fling it down a precipice unless Z delivers his purse. Z, in consequence, delivers his purse. Here, A has extorted the purse from Z by causing Z to be in fear of instant hurt to the child who is there present. A has, therefore, committed robbery on Z.

(d) A obtains property from Z by saying, "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion and punishable as such, but it is not robbery unless Z is put in fear of the instant death of his child.

For commentary, see Part II., Ch. X, § 180, p. 641

391. When five or more persons conjointly commit, or attempt to commit, a robbery, or where
Dacoity. the whole number of persons conjointly committing, or attempting to commit, a robbery, and persons present and aiding such commission or attempt amount to five or more, every person so committing, attempting, or aiding, is said to commit "dacoity."

Note—Where hurt is caused in the commission of a robbery or dacoity, it need not be charged as a separate offence, since it is included in the definition of the crime. 1 R. J. & P., 65. But hurt

Illustrations.

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if the robbery be committed on the highway, between sunset and sunrise, the imprisonment may be extended to fourteen years.

Punishment for robbery.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Attempt to commit robbery.

394. If any person, in committing, or attempting to commit, robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing, or attempting to commit, such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing hurt in committing robbery.

Note.—The offence defined in s. 390 is included in this section.

aggravated form of the offence here dealt with—aggravated by reason of the fact the hurt caused is grievous hurt, 1901 P. R. No. 16.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Punishment for dacoity.

Note.—If it is thought necessary to award a sentence of transportation, the only legal sentence would be one for life or by the application of s. 59 *supra* for a term not less than seven years and not more than ten years. 1903 P. R. (Cr.) 31=1903 P. L. R. 41=1 Cr. L. J. 89; 12 Bur. L. R. 237=1 Cr. L. J. 385.

396. If any one of five or more persons, who are jointly committing dacoity, commit murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Note.—This section provides for murder unintentionally done while committing dacoity. The accused cannot be separately convicted under s. 302 or s. 303 *supra*, 1851 W.R. (Cr.) 30, see 6 C.W. N. 72 as to the essential elements of the offence under this section.

The High Court of Allahabad has ruled "that to establish a liability to the punishment provided in this section, it is necessary to prove that the person said to be liable was one of the persons who were jointly committing dacoity, and was present when the act of murder in the dacoity was committed." 18 A. 437 at 442. The section would be rendered idle if those who did not actually use personal violence could avoid the penalty by simply walking aside. This view has accordingly been adopted in 17 A. 86, where it was held that if the murder was committed in the course of the dacoity, it was immaterial whether it was perpetrated inside or outside the house, or whether the dacoit was or was not. This was also the ruling in 1900 P. R. No. 4, 1901 A. W. N. 47-3 Cr. L. J. 201 where it was held that if a murder is committed solely for the purpose of escaping capture, the associates in dacoity would not be liable. 1906 A. W. N. 47-3 Cr. L. J. 201.

But murder committed by dacoits while carrying off stolen property is within the section as murder committed in the commission of dacoity, 17 M. L. J. 118-3 Cr. L. J. 201 where 1905 A. W. N. 47-3 Cr. L. J. 201 is distinguished.

Where the dacoits have the intention of causing neither death nor such bodily injury as is likely to cause death, they could not be held liable under this section simply because death ensued. Under such circumstances the liability would be under s. 307, 6 W. R. (Cr.) 16. But where one of the dacoits causes death in committing dacoity with the intention or knowledge specified in s. 300 *supra*, all the dacoits are liable even for the death of the person killed, even if it was not any part of the common object of the dacoity, and it was likely to be committed in prosecution of the common object of his comrades, 4 C.P.L.R. 1; L.R. (1872-1893), 302; 1900 P.L.R. (Cr.) 44. Again if murder is committed in a dacoity, any person who abetted the murder, but was not present as one of the body of dacoits at its commission would be liable under s. 304 and

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if the robbery is committed on the highway, between sunset and sunrise, the imprisonment may be extended to fourteen years.

Punishment for robbery.

Whoever attempts to commit robbery shall be punished with rigorous imprisonment for which may extend to seven years,

Note—The word "liable to fine."

to
at robbery
section the accused has not
when he overawed the person
to the length of stabbing or
cutting, etc. s. L. J. 11. 11—1 Mar. L. J. 9=13 Cr. L. J. 267=14 Ind. Ca. 551. To secure a conviction under this section either the weapon the accused had must be deadly or the hurt caused must be grievous. Causing simple hurt with an ordinary stick in committing dacoity is punishable only under s. 393. 1 Cr. L. J. 901=14 K. L. R. 130. A staff or a club may be regarded as a deadly weapon. 1 N. L. R. 134=2 Cr. L. J. 746 *contra* 1912 P. W. R. 19=1912 P. L. R. 17=13 Cr. L. J. 152=13 Ind. Ca. 993. Where the accused struck one or two blows with a stick and broke one of the arms of a woman with the object of stealing the pony on which

The liability to enhanced punishment under s. 392 is held to be limited to the offender who actually hurt. Weir I. 450. A different view is in 31 A. C. J. 1906 A. W. N. 61=3 Cr. L. J. 372; 22 N. L. J. 35=11 N. L. T. 20=13 Cr. L. J. 43=13 Ind. Ca. 797, 3 L. B. R. 171=3 Cr. L. J. 354 16 C. P. L. Cr. L. J. 432=20 Ind. Ca. 318. The early Allahabad Court seems to have taken the current

section was.
grievous
A.

109 and not under ss 396 and 109 as s. 396 cannot over-ride s. 302 so as to render the accused liable to a less severe sentence than could legally be inflicted under the latter section, 10 C.P.L.R (Cr.) 20.

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Note.—The word "use" in this section has been construed in a wide sense so as to include not only carrying, cutting, stabbing, shooting, but also carrying a weapon for the purpose of overawing the person used in this section, or an attempt at robbery; it is difficult to prove any "use" except the carrying; whereas in the case of completed robbery under this section the accused has not only carried but used the weapon when he overawed the person robbed, even if he desists from going to the length of stabbing or cutting, etc. 6 L. B. R. 41=5 Bur. L. T. 9=13 Cr. L. J. 267=14 Ind. J. 651. To secure a conviction under this section either the weapon the accused had must be deadly or the hurt caused must be grievous. Causing simple hurt with an ordinary stick in committing dacoity is punishable only under s. 395, 1 Cr. L. J. 901=14 K. L. R. 180. A *lathi* or a club may be regarded as a deadly weapon, 1 N. L. R. 134=2 Cr. L. J. 746 *contra* 1912 P. W. R. 19=1912 P. L. R. 17=13 Cr. L. J. 182=13 Ind. Ca. 993. Where the accused struck one or two blows with a stick and broke one of the arms of a woman with the object of stealing the pony on which she was riding but was prevented from riding off with the pony by the snapping of the girth of the saddle, it was held he was rightly convicted under this section, 1901 P. R. No. 6. But where two men beat another with *lathis* and broke his finger, but the evidence did not indicate which of them was the author of the grievous hurt, it was held they were not liable to the enhanced punishment under this section, 3 O. C. 263.

The liability to enhanced punishment under this section was held to be limited to the offender who actually causes grievous hurt, Weir 1. 430. A different view in 21 A. 263 was expressly *dissented from* in 1899 A. W. N. 186=28 A. 404n see also 25 A. 404=1906 A. W. N. 61=3 Cr. L. J. 322; 22 M. L. J. 186=1912 M. W. N. 33=11 M. L. T. 20=13 Cr. L. J. 42=13 Ind. Ca. 282; Ratanlal 63 & 797, 3 L. B. R. 121=3 Cr. L. J. 354 16 C. P. L. R. 97; 7 L. B. R. 28=14 Cr. L. J. 432=20 Ind. Ca. 416. The earlier unsound view of the Allahabad Court seems to be the current law in Punjab, 1901 P. R. Nos. 15 & 16.

109 and not under ss. 396 and 109 as s. 396 cannot over-ride s. 302 so as to render the accused liable to a less severe sentence than could legally be inflicted under the latter section, 10 C.P.L.R. (Cr.) 20.

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or Robbery or dacoity, with attempt to cause death or grievous hurt. causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Note—The word "use" in this section has been construed in a wide sense so as to include not only cutting, stabbing, shooting, but also the putting of a person to flight for the purpose of overawing the person. It is not necessary that the offender should be armed with a weapon used in this section, as in s. 396. It is not necessary that there should be an attempt at robbery; it is sufficient that there should be an attempt at dacoity. It is difficult to prove any "use" except the carrying; whereas in s. 396 it is necessary to prove that the accused has not only carried but also used the weapon. 9 = 13 Cr. L. J. 267 = 14 Ind. Ca. 651.

To secure a conviction under this section either the weapon the accused had must be deadly or the hurt caused must be grievous. Causing simple hurt with an ordinary stick in committing dacoity is punishable only under s. 395, 1 Cr. L. J. 901 = 14 K. L. R. 180. A *lathi* or a club may be regarded as a deadly weapon, 1 N. L. R. 134 = 2 Cr. L. J. 746 *contra* 1912 P. W. R. 19 = 1912 P. L. R. 17 = 13 Cr. L. J. 182 = 13 Ind. Ca. 998. Where the accused struck one or two blows with a stick and broke one of the arms of a woman with the object of stealing the pony on which she was riding but was prevented from riding off with the pony by the snapping of the girth of the saddle, it was held he was rightly convicted under this section, 1901 P. R. No. 6. But where two men beat another with *lathis* and broke his finger, but the evidence did not indicate which of them was the author of the grievous hurt, it was held they were not liable to the enhanced punishment under this section, 3 On. Ca. 263.

The liability to enhanced punishment under this section was held to be limited to the offender who actually causes grievous hurt, Weir I. 450. A different view in 21 A. 263 was expressly *dissented* from in 1899 A. W. N. 186 = 28 A. 401n, see also 28 A. 401 = 1906 A. W. N. 61 = 3 Cr. L. J. 322; 22 M. L. J. 186 = 1912 M. W. N. 35 = 11 M. L. T. 20 = 13 Cr. L. J. 42 = 13 Ind. Ca. 282; Ratanlal 63 & 797, 3 L. B. R. 121 = 3 Cr. L. J. 354 16 C. P. L. R. 97; 7 L. B. R. 26 = 14 Cr. L. J. 432 = 20 Ind. Ca. 416. The earlier unsound view of the Allahabad Court seems to be the current law in Punjab, 1901 P. R. Nos. 13 & 15.

them liable, *Ratanlal* 863, 12 Cr. L. J. 204 = 10 Ind. Ca. 23. As to what

of the accused with the gang need not be for the entire period of the existence of the gang. Even a recent recruit would be liable under this section, 1 Cr. L. J. 920; 1 C. W. N. 146 at 149; 1911 P. L. R. 68 = 10 Ind. Ca. 833. The general criminality of a tribe or caste like *Korachas* or *Kallars* cannot be imputed to individual members in prosecutions under this section, the offence under this section is of a very special character and the section must be strictly construed in the interests of the liberty of subjects, 16 C. W. N. 69 = 13 Cr. L. J. 39 = 13 Ind. Ca. 279, where 23 W. R. (Cr.), 18 is followed; *Ratanlal* 318.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine

Punishment for
belonging to gang
of thieves.

Note.—In a case under this section, it is necessary first to prove association; and, secondly, that the association is for the purpose

were arrested, many of them gave false names and addresses, the High Court of Bengal held that, however suspicious the circumstances might be, they fell short of what was necessary for conviction under this section, for there was no proof that the appellants belonged to

committing
CCGXXV. 17 Ind. Ca. 343 where the evidence proved (1) the accused were seen together at midnight in a certain place with implements of housebreaking; (2) that some of them were seen together in different places where housebreaking and theft were immediately afterwards committed, and (3) that they have been each convicted at different times of theft, etc., the Madras High Court held as regards

190; 1 C. W. N. 2; 23 W. R. (Cr.) 18; a 3077 On Ca 163. The association of the accused with the gang must have been for the entire period of the existence of the gang. Even a recent recruit would be liable under this section, 1 Cr. L. J. 920; 1 C. W. N. 156 at 149; 1911 P. L. R. 68=10 Ind. Ca. 833. The general criminality of a tribe or caste like *Korachas* or *Kallars* cannot be imputed to individual members in prosecutions under this section; the offence must be proved against each and the section must be applied with liberty of subjects, 16 C. W. N. 69=13 Cr. L. J. 55=13 Ind. Ca. 217, where 23 W. R. (Cr.) 18 is followed; Ratanlal §18.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Note.—In a case under this section, it is necessary first to prove association; and, secondly, that the association is for the purpose of habitual theft, and that habit is to be proved by an aggregate of acts. 6 M. H. C. R 120; 1886 A. W. N. 16. I do not imagine, however, that it would be necessary to prove such acts with the same accuracy as if each was the subject of a charge of theft. In the case of the appellants, the evidence was that they had been found

High Court of Bengal held that, however suspicious the circumstances might be, they fell short of what was necessary for conviction under this section, for there was no proof that the appellants be-

ent places where housebreaking and theft were immediately afterwards committed, and (3) that they have been each convicted at different times of theft, etc., the Madras High Court held as regards

(1) it is only evidence of their being once associated, which is insufficient to constitute a habit, as regards (2) there is nothing to indicate the offence was committed by these persons, and the evidence (3) would not support the theory they formed a gang who habitually commit theft. The findings therefore were insufficient to prove (a) association and (b) the association was for habitual theft, *Weir* 1. 452. Habit has to be proved by an aggregate of acts, *Ratanlal*, 418; and evidence of previous conviction is admissible to prove habit, 38 C. 408=15 C. W. N. 461=12 Cr. L. J. 97=9 Ind. Ca. 555 where 27 C. 139 is doubted and 1 C. W. N. 146 followed; 16 C. W. N. 69=13 Cr. L. J. 39=13 Ind. Ca. 279; 1863 P. R. No. 37. The possession of stolen property by the gang and the fact the district they recently visited was until they visited, free from petty crime are relevant facts, 7 Ou. Ca. 163=1 Cr. L. J. 690. Evidence that each member of the gang is a convicted thief is also relevant, 14 Bom. L. R. 373=13 Cr. L. J. 539=15 Ind. Ca. 811=1 Bom. Cr. Ca. 136.

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Assembling for purpose of committing dacoity

Note.—See 9 W. R. (Cr. L.) 5; 7 W. R. (Cr.) 61; 23 A. 124, 22 C. 164 & 391; 23 M. 159 Under s 106 of the Ind. Ev. Act, the *onus* would be upon the accused to prove that the assembly was for an innocent purpose

OF CRIMINAL MISAPPROPRIATION OF PROPERTY.

403. Whoever dishonestly misappropriates, or converts to his own use, any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest misappropriation of property

Illustrations.

(a) A takes property belonging to Z out of Z's possession, in

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied con-

(c) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1.—A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration.

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2.—A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined if he appropriates it to his own use, when he knows or has the means of discovering the owner or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time, in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations.

(a) A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque appears. A knows that this person can direct him to the person in whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

Note.—For commentary see Part II, Ch X., § 191, at p. 646

404 Whoever dishonestly misappropriates, or converts

Dishonest misappropriation of property possessed by deceased person at the time of his death

to his own use, property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be

punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and, if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

Note.—This section and s. 405 only apply to movable property. 6 B. H. C. R. (Cr. Ca.) 33; 23 C. 372. All the elements of misappropriation in respect of a person alive, must be made out. 2 W. R.

(Cr.) 39. The offence under this section can be committed, even if the dying owner put the property into the custody of the accused, being his clerk or servant (s. 27, I. P. C.) 11 W. R. (Cr.) 1.

A conviction under this section or s. 403 will be valid, although the offence really committed was a theft under ss. 378, 380 or 391, (Cr. P. C. s. 237.) The offence is non-compoundable, 7 M. H. C. R. Appx. 34.

OF CRIMINAL BREACH OF TRUST.

405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses, or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express, or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Criminal breach
of trust.

Illustrations.

(a) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it should be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Calcutta, is agent for Z, residing at Delhi. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions, and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly, but in good faith, believing that it will be more for Z's advantage to hold shares

on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue officer, is entrusted with public money, and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

For commentary, see Part II, Ch. X, § 182 at p. 652.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for criminal breach of trust

407. Whoever, being entrusted with property as a carrier, wharfinger, or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by carrier, etc.

408. Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Criminal breach of trust by a clerk or servant

409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant, or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Criminal breach of trust by public servant, or by banker, merchant, or agent.

For commentary on ss. 407-409, see Part II, Ch. X, § 183, at p.

OF THE RECEIVING OF STOLEN PROPERTY.

410. Property, the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect of which criminal breach of trust has been committed, is designated as "stolen property," whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without British India. But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

411. Whoever dishonestly receives, or retains, any stolen property, knowing, or having reason to believe, the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

For commentary on ss. 410 & 411, see Part II., Ch. X, § 184 at pp 662-68.

412. Whoever dishonestly receives, or retains, any stolen property, the possession whereof he knows, or has reason to believe, to have been transferred by the commission of dacoity, or dishonestly receives from a person whom he knows, or has reason to believe, to belong, or to have belonged, to a gang of dacoits, property which he knows, or has reason to believe, to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Note — For commentary on ss. 412 & 413, see Part II., Ch. X, § 185 at pp. 641-63.

A commuted sentence of transportation under this section and s. 59 *supra* cannot exceed ten years. 5 W. R. (Cr.) 16.

413. Whoever habitually receives, or deals in, property which he knows, or has reason to believe, to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Habitually dealing in stolen property.

414. Whoever voluntarily assists in concealing or disposing of, or making away with, property which he knows, or has reason to believe, to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Assisting in concealment of stolen property.

For commentary, see Part II, Ch. X, § 184 at pp. 668 81.

OF CHEATING.

415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes, or is likely to cause, damage or harm to that person in body, mind, reputation, or property, is said to "cheat."

Cheating.

Explanation —A dishonest concealment of facts is a deception within the meaning of this section

Illustrations.

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

413. Whoever habitually receives, or deals in, property which he knows, or has reason to believe, to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Habitually dealing in stolen property

414. Whoever voluntarily assists in concealing or disposing of, or making away with, property which he knows, or has reason to believe, to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Assisting in concealment of stolen property.

For commentary, see Part II, Ch. X, § 184, at pp. 668-81.

OF CHEATING.

415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes, or is likely to cause, damage or harm to that person in body, mind, reputation, or property, is said to "cheat."

Cheating.

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations.

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

...ple of an article, intending that the article corresponds with the article. A cheats.

(d) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to advance him money, and that if A, at the time of obtaining the money, intends to deliver the indigo-plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into the belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage-money from Z. A cheats.

For commentary, see Part II., Ch X, § 186 at p. 693.

416. A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Cheating by personation.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Illustrations.

(a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for cheating.

418. Whoever cheats, with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.

Note —This section would apply to cases of cheating by a guardian, trustee, solicitor, or agent, by the manager of a Hindu family, or the Karnaven of a Tarwad in Malabar, or by the directors or managers of a bank in fraud of the shareholders. 15 A. 83.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Punishment for cheating by personation.

..... property, could be

420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, or which is in any way authenticated, or which is in any way connected with any document, or which is in any way connected with any instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cheating and dishonestly inducing delivery of property.

is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary on ss 421-424, see Pt. II, Ch VII, § 125 pp 401-407

OF MISCHIEF.

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property, or in the situation thereof, as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief."

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations.

(a) A voluntarily burns a valuable security belonging to Z, intending to cause wrongful loss to Z. A has committed mischief.

(b) A introduces water into an ice house belonging to Z, and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(c) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby causing damage to Z. A has committed mischief.

(e) A, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(f) A causes a ship to be cast away, intending thereby to cause damage to Z, who has lent money on bottomry on the ship. A has committed mischief.

(g) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(h) A causes cattle to enter upon a field belonging to Z, intending to cause, and knowing that he is likely to cause, damage to Z's crop. A has committed mischief.

For commentary, see Part II., Ch. X., § 187, at p. 715.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Note.—A prisoner charged with the theft and killing of two sheep under the value of Rs. 10 can only be dealt with under this section.

Mischief such as is described by s. 477 should be charged and tried under that section, as not only the punishment but the jurisdiction is different 12 M. 54.

427. Whoever commits mischief, and thereby causes loss or damage to the amount of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Committing mischief and thereby causing damage to the amount of 50 rupees.

course of a single
d, L. R., 1 C. C. R.
wood, 11 Cox. 526;
cannot be taken

428. Whoever commits mischief by killing, poisoning, maiming, or rendering useless any animal or animals of the value of ten rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Mischief by killing or maiming animal of the value of 10 rupees.

Note.—To complete this offence, the requirements of s. 425 as to intention or knowledge must be satisfied. Thus the mere fact the

accused threw a stone at a cow and its leg was broken would not constitute an offence in the absence of evidence as to the size of the stone from which an inference may be made as to intent or knowledge *Weir I. 497 & 502; 3 Cr. L. J. 107.*

The word *maiming* as used in this section and in s. 429 *infra* means the privation of the use of a limb or member and implies a permanent injury, 1881 P. R. No. 33; *Jeans, 1 C. K. 539; 1903 U. B. R. (P. C.) 25=12 Bur. L. R. 116=3 Cr. L. J. 107; 1898 P. R. No. 7, 1883 S. J. L. B. 405*

The use of an instrument is not necessary for maiming. Pouring acid into the eye of a mare and blinding her was held to be maiming. See *Owens, 1 Moody 205; Bullock, L. R., 1 C. C. R. 115* But if a wound is healed, it is only an offence under s. 426. *supra, 3 Bom. L. R. 503.* Breaking the ribs of a pony; 1885 S. J. L. B. 404; or even clipping its ears, 21 M. L. J. 843=(1911) 2 M. W. N. 141=10 M. L. T. 192=12 Cr. L. J. 482=12 Ind. Ca. 90, or killing it by inserting a fork through one of the external orifices. *Welsh, 1 Q. B. D. 23. Pimbleton, L. R., 2 C. C. R. 9,* has been held to be within this section. Mere wounding which involves only bringing about discontinuity in the upper skin, *R. v. McLoughlin. 8 C. & P. 633, R. v. Beckett, 1 M. & Rob. 526, 1891 P. R. No. 7,* is not within this section and so also cutting a scar on its forehead. 1881 P. R. No. 33. When a man first steals an animal and then kills it, he cannot be dealt with under this section, but only under s. 379, *supra, Ratanlal 129.* The ruling in *Ratanlal 430,* to the contrary seems to be against the current of authority. When a *Sambur* kept by the Mahant in a fold and having a nose-string attached to it escaped and was shot by the accused, the plea that it was originally an animal *feræ naturæ* and that by escaping it reverted to that condition was overruled in *Weir I. 498,*

429. Whoever commits mischief by killing, poisoning,

Mischief by killing or maiming cattle, etc., of any value, or any animal of the value of 50 rupees. maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow, or ox, whatever may be the value thereof, or any other animal of the value of fifty rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Note.—It has been held in Madras that a calf does not come within the terms "bull, cow, or ox," and therefore, if not worth Rs. 50, its destruction must be dealt with under s. 425 or s. 433 according to its value. (*R. v. Choley, per Scotland, C. J., 413* Madras Sessions, 1864.) The Calcutta High Court has refused to follow this decision: they said: "It seems to us that

section specifies the more valuable of the domestic animals without regard to age, but in respect of other kinds of animals not so specified the section would not apply, unless the particular animal in question was shown to be of the value of Rs. 50 or upwards." 22 C. 457. A bull dedicated to a temple is within the section, 11 M. 145. When a man released a bull at a funeral but still retained same control over it, it grazed on his land and returned to his house in the evenings it could not be considered a *nullus proprietatis*, Weir I. 500; 17 C. 852, *contra* 1884 A. W. N. 87.

430. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings, or for animals which are property, or for cleanliness, or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by injury to works of irrigation or by wrongfully diverting water.

Note.—For commentary, see part II, Ch. X, § 188, at p. 722.

431. Whoever commits mischief by doing any act which renders, or which he knows to be likely to render, any public road, bridge, navigable river or navigable channel, natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by injury to public road, bridge, river or channel.

ledge to bring it within s. 420 *supra*, Weir I. 510. A path through a jungle is not a road, 1839 P. J. L. B. 629. The term bridge would include also a viaduct or an aqueduct, but the offence is confined to damage to public roads, bridges, etc. Mere placing of bricks on road is not within this section, 12 C. W. N. CXXII. Cutting a trench on waste land abutting a road so as to prevent drainage water, damaging accused's land is not an offence on the bare ground there is a possibility of the road being inundated, Weir I. 511.

432. Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by causing inundation or obstruction to public drainage attended with damage.

Note.—The act must be done with knowledge of the injurious results, 25 W. R. (Cr.) 69; It is not sufficient to show probable consequential damage to other property, 4 M. H. C. R. Appx. 15; 7 M. H. C. R. Appx. 39; Weir I 511.

433. Whoever commits mischief by destroying, or moving, any lighthouse or other light used as a sea-mark, or any sea-mark, or buoy, or other thing placed as a guide for navigators, or by any act which renders any such lighthouse, sea-mark, buoy, or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Mischief by destroying, moving, or rendering less useful a lighthouse or sea-mark

Note—This section equally with s. 426 *supra*, excludes a case of accident or inadvertence, *Senior* [1899] 1 Q. B. 283 at 291.

434. Whoever commits mischief by destroying or moving any landmark fixed by the authority of a public servant, or by any act which renders such landmark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Mischief by destroying or moving, etc., a landmark fixed by public authority.

Note.—The mark should be fixed by authority of a public servant lawfully empowered. A first-class magistrate investigating a case under s. 145, Cr. P. C., is not such an authority, 27 A. 300=1 Cr. L.J. 991 & 1012. A *bona fide* removal is not within this section, *Ratanlal* 746, such as the abatement of a nuisance. A conviction under this section has been held to be one for an offence involving a breach of the peace, so as to justify an order under s. 106, Cr. P. C., 8 A.L.J. 925=12 Cr. L.J. 405=11 Ind. Ca. 589.

section specifies the more valuable of the domestic animals without regard to age, but in respect of other kinds of animals not so specified the section would not apply, unless the particular animal in question was shown to be of the value of Rs. 50 or upwards." 22 C. 457. A bull dedicated to a temple is within the section, 11 M. 145. When a man released a bull at a funeral but still retained same control over it, it grazed on his land and returned to his house in the evenings it could not be considered a *nullius inquit*, Weir I. 500; 17 C. 852, *contra* 1884 A. W. N. 87.

430. Whoever commits mischief by doing any act

Mischief by injury to works of irrigation or by wrongfully diverting water.

which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings, or for animals which are property, or

for cleanliness, or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both

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Mischief by injury to public road, bridge, river or channel.

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Mischief by causing inundation or obstruction to public drainage attended with damage

Note.—The act must be done with knowledge of the injurious results, 25 W. R. (Cr.) 69; It is not sufficient to show probable consequential damage to other property, 4 M. H. C. R. Appx. 15; 7 M. H. C. R. Appx. 39; Weir I 511.

433. Whoever commits mischief by destroying, or moving, any lighthouse or other light used as a sea-mark, or any sea-mark, or buoy, or other thing placed as a guide for navigators, or by any act which renders any such lighthouse, sea-mark, buoy, or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Mischief by destroying, moving, less useful a lighthouse or sea-mark

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Mischief by destroying or moving, etc., a landmark fixed by public authority

Note.—The mark should be fixed by authority of a public servant lawfully empowered. A first-class magistrate investigating a case under s. 145, Cr. P. C., is not such an authority, 27 A. 300 = 1 Cr. L.J. 991 & 1012. A *bona fide* removal is not within this section, *Ratanlal* 746, such as the abatement of a nuisance. A conviction under this section has been held to be one for an offence involving a breach of the peace, so as to justify an order under s. 106, Cr. P. C., 8 A.L.J. 925 = 12 Cr. L.J. 405 = 11 Ind. Ca. 589.

Note.—See *Faulkner*, 13 Cox. 550, where both intention and knowledge were absent, though the accused was doing in a negligent manner an unlawful act, viz. stealing rum. Mere running aground and refloating of a ship is not *mischief* which implies *destruction* or *damage* to property. *Delondo*, 2 East P. C. 1098. But deliberately sinking a ship to defraud the underwriters would be quite a different matter. *Gilson*, R & R 138.

438. Whoever commits or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for the mischief described in section 437 committed by fire or explosive substance.

Note.—This is another section where attempt is regarded as serious an offence as the completed offence itself

439. Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein, or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for intentionally running vessels aground or ashore with intent to commit theft, etc.

Note.—The gist of the offence lies in *intention*, not *knowledge*. A man may run a leaky vessel ashore, though he knows full well the people there are likely to commit theft of the cargo. He is not liable if his intention was to prevent the sinking of the vessel.

440. Whoever commits mischief, having made preparation for causing to any person death, or hurt, or wrongful restraint, or fear of death or of hurt, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Mischief committed after preparation made for causing death or hurt.

OF CRIMINAL TRESPASS.

441. Whoever enters into or upon property in the possession of another, with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property : or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass."

Criminal trespass

For commentary, see Part II., Chapter X., § 189, at p. 725.

442. Whoever commits criminal trespass, by entering into, or remaining in, any building, tent, or vessel used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass."

House-trespass.

Explanation.—The introduction of any part of the criminal trespasser's body in entering is sufficient to constitute "house-trespass."

For commentary, see Part II., Chapter X., § 190, at p. 741

443. Whoever commits house-trespass, having taken precautions to conceal such house-trespass from some person who has a right to exclude, or eject, the trespasser from the building, tent, or vessel which is the subject of the trespass, is said to commit "lurking house-trespass."

Lurking house-trespass.

444. Whoever commits lurking house-trespass after sunset and before sunrise is said to commit "lurking house-trespass by night."

Lurking house-trespass by night

445. A person is said to commit "housebreaking" who commits house-trespass, if he effects his entrance into the house, or any part of it, in any of the six ways hereinafter described ; or if, being in the house or any part of it for the purpose of

Housebreaking.

committing an offence, or having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say —

First — If he enters, or quits, through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass

Secondly — If he enters, or quits, through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance, or through any passage to which he has obtained access by scaling, or climbing over, any wall or building.

Note. — Therefore, a conviction was sustained when the prisoner

law in England is not the same as under the Code,

Thirdly. — If he enters, or quits, through any passage which he, or any abettor of the house-trespass, has opened, in order to the committing of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened

Note. — Pulling down the sash of a window was construed to be breaking in, *Haines, R. & R. 451*. For other instances in, regard to windows, see *Hyams, 7 C. & P. 441*; *Hall, R. & R. 353*. Entry effected by taking out a glass from a door, *Smith, R. & R. 417*; by getting down a chimney, *Brice, R. & R. 436*, by breaking a pane of glass, *Perkes 1 C. & P. 300*, *Tucker, 1 Cox. 70*; pulling out the shutters by inserting the hand through a broken pane of glass *Robinson, 1 Mood. 327*; getting out of a cellar by lifting up a heavy flap, *Russell, 1 Mood. 377* have all been held to be house-breaking.

Fourthly. — If he enters, or quits, by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass:

Note — Even if a party has got admission into a house through an open door, break, or unlock, or otherwise, towards other room. not constitute would punishable under s. 401. could be

Fifthly.—If he effects his entrance, or departure, by using criminal force, or committing an assault, or by threatening any person with assault.

Note —See Weir I. 530

Sixthly.—If he enters, or quits, by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself, or by an abettor of the house-trespass.

Note.—Lifting a latch would fall under this clause. In re *George and Goldsmiths Association*, L. R. [1899], 1. Q. B. 595.

Explanation.—Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Illustrations.

(a) A commits house-trespass by making a hole through the wall of Z's house and putting his hand through the aperture. This is housebreaking.

(b) A commits house-trespass by creeping into a ship at a porthole between decks. This is house-breaking.

(c) A commits house trespass by entering Z's house through a window. This is housebreaking.

(d) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(e) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is housebreaking.

(f) A finds the key of Z's house-door which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is housebreaking.

(g) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is housebreaking.

(h) Z, the door-keeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is housebreaking.

Note.—For remarks on this Explanation, see Part II., Ch. X., § 190, at p. 745. The explanation in its scope is limited to this section and has no application to ordinary cases of house-trespass, or lurking house-trespass, etc., not involving the element of house-breaking.

446. Whoever commits housebreaking after sunset and before sunrise, is said to commit Housebreaking by night. "housebreaking by night."

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to five hundred rupees, or with both. Punishment for criminal trespass.

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, which may extend to one thousand rupees, or with both. Punishment for house-trespass.

Note.—A sentence for being a member of an unlawful assembly under s. 144 renders unnecessary a separate sentence under this section. 3 W. R. (Cr.) 54.

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine. House-trespass in order to commit offence punishable with death.

Note.—A charge under ss. 449, 450, or 451, must allege and prove an intent to commit an offence punishable in the degrees mentioned therein. Otherwise nothing but the offence of house-trespass remains. 16 W. R. (Cr.) 53. [63.]

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine. House-trespass in order to commit offence punishable with transportation for life.

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

House-trespass
in order to commit
offence punishable
with imprisonment.

destine intrigue with a widow or unmarried girl in the house, it would be no offence. 19 M. 240. Weir I 536; 1903 P. R. (Cr.) 28=2 Cr. L. J. 420, 6 C. 579, 1901 P. R. (Cr.) 14. But where a husband, persisted in charging the accused, with intent to commit theft, which was found to be false, and refused to charge him with the true intent, the High Court declined to interfere with an order of discharge. 5 M. H. C. R. Appx. 5 3 Sind L. R. 93=10 Cr. L. J. 310=3 Ind. Ca. 995 When the entry was found to be for purposes of intrigue with a woman of the household, but there was no evidence whether the woman had an husband or not, the High Court held an intent to insult or annoy may be presumed to support a conviction. Weir I. 535 But where the woman happened to be the complainant's widowed mother the High Court declined to raise any such presumption in Weir I. 537 4 C. L. J. 169=4 Cr. L. J. 144. When the complainant suggested the intent was theft, and the Magistrate guessed without any evidence it must have been for an intrigue with a woman, and there was not any evidence the woman was in the house at the time, or was likely to be found there, a finding the entry must

the accused intended to commit It is enough if the evidence an offence. Weir I. 533, use should amount to a owner professes to be an house to commit an offence where there is an entry with the intent, etc., specified, but since the entry is with leave and license, there is no trespass. Weir I. 534.

The charge must specify the offence with the intention of committing which the accused entered, such offence being one that

satisfies ss. 441 & 40 *supra*, and not being punishable with death or transportation for life (ss. 449 & 450). 16 W. R. (Cr.) 53; [63], 3 Sind. L. R. 86=10 Cr. L. J. 410=3 Ind. Cas. 895, but if the specific offence cannot be made out, but it is found the intent to commit

... so, 21 M. J. 453=

insidered to com- an order

under s. 106, Cr. P. C., cannot be made on conviction. 4 L. B. R. 277 = 8 Cr. L. J. 476; 4 M. L. T. 468=9 Cr. L. J. 88, where 29 M. 190 is followed and 7 C. W. N. 25 distinguished

452. Whoever commits house-trespass, having made

House-trespass after preparation for hurt, assault or wrongful restraint	preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
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Note.—A person who, with a forged warrant of arrest, goes into a house and takes away one of the inmates thence against her will under the authority of his warrant, has put that inmate in fear of wrongful restraint. 12 W. R. (Cr.) 33

453. Whoever commits lurking house-trespass, or

Punishment for lurkinghouse-trespass or house-breaking.	housebreaking, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.
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Note—One who commits an offence under this section and also theft or any other offence, should be dealt with under s. 457 *infra*, and not punished separately under this section and say s. 240 *supra*. 6 W. R. (Cr.) 39 (F. B.).

454. Whoever commits lurking house-trespass or

Lurking house-trespass or house-breaking in order to commit offence punishable with imprisonment.	housebreaking in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine;
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and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

Note.—The latter part of the definition covers cases which have actually been described in ss 307; 2 A. 644; 6 B.

455. Whoever commits lurking house-trespass, or housebreaking, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall

Lurking house-trespass or house-breaking after preparation for hurt, assault or wrongful restraint.

be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

456. Whoever commits lurking house-trespass by night, or housebreaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Punishment for lurking house-trespass or house-breaking by night.

Note.—The various elements of criminal trespass (s 441) must first be made out. 2 M. 30. Thus running into a house to evade being arrested cannot be treated as an act of entry into the house with an intent to commit an offence under s 224 *supra*, and consequently, the accused is not liable under this section. 1891 A. W. N. 64.

One single aggravated offence must not be split up into separate minor offences, e.g., lurking house-trespass in order to commit theft under s. 457 into lurking house-trespass under s. 456, & theft under s. 380., B. L. R. Sup. Vol. 438—6 W. R. (Cr.) 39 (F B), 2 A. 644. Nor is it necessary in a charge under this section to allege specifically that the offender had any of the intentions which enter into the definition of criminal trespass by s. 441; entry at night by scaling a wall is punishable under this section, 2 W. R. (Cr.) 83. But if he is found in the apartments where a woman usually slept, he may be charged under s. 457, 18 C. 537;

1905 P. R. Cr. 18=1905 P. L. R. 127; 2 Cr. L. J. 279, 1881 P. R. No. 14 but if the husband of the woman does not choose to allege a specific intent to commit adultery, it is better to convict under this section, 29 A. 46; 16 C. P. L. R. 182; 5 M.H.C.R. Appx. 5. When, however, the specific intent charged, under s 457 *infra* is found against, the Court is not entitled to fall back upon some general intent and convict under this section, 16 C. W. N. 696 = 13 Cr. L. J. 224 = 14 Ind. Ca. 320; (1891-1901) 1 U. B. R. 335. If the charge is made under s 457, the intention must be alleged, 22 C. 391 & 991, 1882, P. R. No. 41, 1901 P. R. No. 31. If the accused pleads the intention with which he entered was an innocent one, the *onus* is on him to make good the plea, as it is a matter specially within his knowledge, 29 A. 46 - 3 A. L. J. 652 = 1906 A. W. N. 279 - 4 Cr. L. J. 231.

457. Whoever commits lurking house-trepass by night, or housebreaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years

Lurking house-trepass or housebreaking by night, in order to commit offence punishable with imprisonment

Note.—When the entry is with intent to commit adultery, the

P. R. No. 5. The intention has to be gathered mainly from circumstances, 1883 P. R. No. 14. Where the door of a shop was found broken open the conviction should be for housebreaking by night and not under lurking house-trepass by night, 4 W. R. (Cr.) 19. When a man commits housebreaking to steal as also theft and mischief by effecting the entry whether he could be separately sentenced for each of the three offences (ss 457, 390 & 426) see 12 M. 352; 2 Bur. L.T. 19 = 1 Cr. L.J. 537; and notes on s. 71 *supra* & ss. 35 & 235, Cr. P. C. If separate sentences are awarded, the aggregate should not exceed the magistrate's sentencing power, 8 Bom. L. R. 850, and the sentence prescribed for the graver offence, Ratanlal 95 & 228. But a double conviction should not be encouraged and has often been set aside as improper 1883 A.W.N. 228. This is the proper section to be resorted to when an accused is charged with housebreaking and theft, 1 Bom L. R. 69. Separate sentences are illegal, Weir II. 31.

458. Whoever commits lurking house-trespass by night, or housebreaking by night,

Lurking house-trespass or house-breaking by night, after preparation for causing hurt to any person.

having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

459. Whoever, whilst committing lurking house-trespass or housebreaking, causes

Grievous hurt caused whilst committing lurking house-trespass or housebreaking

grievous hurt to any person, or attempts to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

460. If, at the time of the committing of lurking

All persons jointly concerned in lurking house-trespass or house-breaking by night punishable where death or grievous hurt caused by one of them

house-trespass by night, or house-breaking by night, any person guilty of such offence shall voluntarily cause, or attempt to cause, death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night, or house-breaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

461. Whoever dishonestly, or with intent to commit

Dishonestly breaking open receptacle containing property.

mischief, breaks open, or unfastens, any closed receptacle which contains, or which he believes to contain, property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Note.—The section applies not only to rooms, but to a part of a room or even a box such as the brake-van of a train, *Weir* l. 436, or sealed packet, 6 N. W. P. H. C. R. 301. But opening a coffin which has been nailed down is not an offence, as the corpse is not property, 25 A. 129. Double convictions under this section and s. 380 *supra*, have been upheld, 1896 A. W. N 194, see 10 A. 146 & 10 B. 493.

462. Whoever, being entrusted with any closed receptacle which contains, or which he believes to contain, property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open, or unfastens, that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both

Punishment for same offence when committed by person entrusted with custody

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS.

463. WHosoever makes any false document, or part of a document, with intent to cause damage, or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

Making a false document

464. A person is said to make a false document—

First—Who dishonestly, or fraudulently, makes, signs, seals, or executes a document, or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed by, or by the authority of, a person, by whom, or by whose authority, he knows that it was not

made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed; or,

Secondly.—Who, without lawful authority, dishonestly, or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or,

Thirdly.—Who dishonestly, or fraudulently, causes any person to sign, seal, execute, or alter, a document, knowing that such person, by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practised upon him, he does not, know the contents of the document, or the nature of the alteration.

Illustrations.

(a) A has a letter of credit upon B for Rupees 10,000, written by Z. A, in order to defraud B, adds a cypher to the 10,000, and makes the sum 100,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(b) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B, and thereby of obtaining from B the purchase money. A has committed forgery.

(c) A picks up a cheque on a Banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand rupees. A commits forgery.

(d) A leaves with B, his agent, a cheque on a Banker, signed by A, without inserting the sum payable, and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand rupees. B commits forgery.

A draws a Bill of Exchange on himself in the name of B, without B's authority, intending to discount it as a genuine bill with a Banker, and intending to take up the bill on its maturity. Here, as A draws the bill with intent to deceive the Banker by leading him to suppose that he had the security of B and thereby to discount the bill, A is guilty of forgery.

(f) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B, and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(g) A endorses a Government Promissory Note and makes it payable to Z or his order, by writing on the bill the words "Pay to Z or his order," and signing the endorsement. B dishonestly erases the words "Pay to Z or his order," and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(h) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(i) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and by representing Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(j) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

(k) A, without B's authority, writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery, inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an expressed or implied contract for service.

Explanation 1—A man's signature of his own name may amount to forgery.

Illustrations

(a) A signs his own name to a Bill of Exchange, intending that it may be believed that the bill was drawn by another person of the same name. A has committed forgery.

(b) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a Bill of Exchange drawn by B upon Z, and negotiate the bill as though it had been accepted by Z. A is guilty of forgery, and if B knowing the fact draws the bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(c) A picks up a Bill of Exchange payable to the order of a fictitious person, and negotiates the bill in his own name, knowing that the bill was endorsed by the fictitious person. A has committed forgery.

(d) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate in collusion with Z, executes a lease of the estate to Z at a nominal rent and for a long period, and dates the lease six months prior to the seizure, with intent to defraud A, and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery by antedating it.

(e) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit and with intent to defraud his creditors, and in order to give a colour to the transaction writes a Promissory Note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2 — The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration.

A draws a Bill of Exchange upon a fictitious person, and fraudulently accepts the bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

Note — For commentary, see Part II, Ch. XI, § 192, at p. 756.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for forgery

466. Whoever forges a document, purporting to be a record or proceeding of or in a Court of Justice, or a Register of Birth, Baptism, Marriage, or Burial, or a Register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official

Forgery of a record of Court or of public Register, etc.

capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power-of-attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Note.—The elements of fraud or dishonesty as understood in the code must be present in the mind of the accused to bring his act

understood the section is confined in its entirety to books and documents ordinarily maintained by public servants. All registers of birth, baptism, marriage or burial are within the section, no matter whether they be public, or private in the sense of a Register of marriage kept by a Muhammadan Kazi, 9 C. W. N. 69, Weir I. 541; similarly as regards special and general powers of attorney.

The illegibility of the seal and signature on a forged document purporting to be made by a public servant in his official capacity, will not render a conviction under this section, or s. 471 void. 5 W. R. (Cr), 95.

467. Whoever forges a document which purports to be a valuable security, or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest, or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Note.—The
appears to be a
authorize the
referred to in

this section, 5 B. H. C. R. (Cr. Ca.) 56. Of course, if the document purported to bear the signature of any public officer, authenticating it as a true copy, the forgery of his signature might be an offence under s. 465. A fraudulent alteration of a Collectorate *challan* is within this section. 1864. W. R. (Cr.) 22. As to what is a valuable security, in addition to cases noted at p. 14 under s. 30 *supra*, see

limitation of action, and a *Hundi* was held to be within this section, and Weir. I. 551, where a certified copy of a decree was held to be not within this section. But an offence may be committed with regard to a promissory note on an unstamped paper even though the statute prohibits the stamp to be affixed afterwards, *Morton*, 2 East P. C. 955; *McIntosh*, 2 Leach 883 = 2 East, P. C. 942.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Forgery for
purpose of cheat-
ing

document forged shall be used for the
purpose of cheating, shall be punished
with imprisonment of either description
for a term which may extend to seven
years, and shall also be liable to fine

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ruling in 1876 P. R. No. 15, where cheating having preceded falsification, the latter act done with a view to conceal the former was held not to fall within this section.

469 Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Forgery for
purpose of harm-
ing reputation.

document forged shall harm the repu-
tation of any party, or knowing that it
is likely to be used for that purpose,
shall be punished with imprisonment of
either description for a term which may extend to three
years, and shall also be liable to fine.

Note.—Thus, a person who forged a draft petition, with the intention of using it as evidence, and which contained false statements calculated to injure the reputation of a person, was held guilty of an offence under this section. 2 B. L. R. A. (A. Cr.) 12 = 10 W. R. (Cr.) 61. The expression 'to harm the reputation' is advisedly used rather than the word *defame* so as to exclude the operation of the Exceptions to s. 499. No one is entitled to do wrong so that good might come out of it. Even if a public servant is a notoriously corrupt person that would not justify a public-spirited citizen to forge a letter purporting to be a demand from the public servant of a bribe.

Forged document

470. A false document made wholly or in part by forgery is designated "a forged document."

Using as genuine a forged document

471. Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

Note.—For commentary on this section, see Part II., Ch. XI, § 193, at p 773. This section does not prescribe any punishment. On a conviction under this section, recourse must therefore be had to ss. 465 or 466 or 467 for the appropriate sentence, and the conviction should be under one of those sections coupled with this section 3 W.R. (Cr.L.) 8; 1 W.R. (Cr.L.) 10 8 W.R. (Cr.L.) 7 6 B.H.C.R. (Cr.Ca.) 43, 8 C.P.L.R. 1. The using of a forged document, must be punished under this section and not under s. 196, *supra*, 5 C 717, where the contrary dictum in 3 W.R. (Cr.) 17 is explained.

472. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or possessing counterfeit seal, etc., with intent to commit forgery punishable under section 467.

Note.—Where possession of counterfeit on the part of the accused is established and he is unable to give a satisfactory explanation of them, criminal intention may be inferred, 2 W.R. (Cr.) 5. If several seals are found, the possession of each seal would constitute a separate offence. 13 W.R. (Cr.) 16.

473. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than section 467, or with

Making or possessing counterfeit seal, etc., with intent to commit a forgery punishable otherwise.

this section, 3 B. H. C. R. (Cr. Ca.) 56. Of course, if the document purported to bear the signature of any public officer, authenticating it as a true copy, the forgery of his signature might be an offence under s. 465. A fraudulent alteration of a Collectorate *challan* is within this section. 1864. W. R. (Cr.) 22. As to what is a valuable security, in addition to cases noted at p. 14 under s. 30 *supra*, see 15 W. R. (Cr.) 19, where a blank paper or a bond barred by limitation was held to be not one of the documents within this section, and 1910 P. R. (Cr.) 31 = 11 Cr. L. J. 639 - 8 Ind. Ca. 389, where a *Hundi* was held to be within this section, and Weir. I. 551, where a certified copy of a decree was held to be not within this section. But an offence may be committed with regard to a promissory note on an unstamped paper even though the statute prohibits the stamp to be affixed afterwards, *Morton, 2 East P. C. 955*; *McIntosh, 2 Leach 883* - 2 East, P. C. 942.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Forgery for
purpose of cheat-
ing

Note.—See 18 W. R. (Cr.) 46 where account-books were falsified with a view to induce accused's master to deliver property; this was held to be an offence within this section. Contrast this with the ruling in 1876 P. R. No. 15, where cheating having preceded falsification, the latter act done with a view to conceal the former was held not to fall within this section.

469 Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Forgery for
purpose of harm-
ing reputation

Note.—Thus, a person who forged a draft petition, with the intention of using it as evidence, and which contained false statements calculated to injure the reputation of a person, was held guilty of an offence under this section. 2 B. L. R. A. (A. Cr.) 12 = 10 W. R. (Cr.) 61. The expression 'to harm the reputation' is advisedly used rather than the word *defame* so as to exclude the operation of the exceptions to s. 499. No one is entitled to do wrong so that good might come out of it. Even if a public servant is a notoriously corrupt person that would not justify a public-spirited citizen to forge a letter purporting to be a demand from the public servant of a bribe.

Forged document

470. A false document made wholly or in part by forgery is designated "a forged document"

Using as genuine a forged document

471. Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document

Note.—For commentary on this section, see Part II, Ch XI, § 193, at p 773 This section does not prescribe any punishment On a conviction under this section, recourse must therefore be had to ss 465 or 466 or 467 for the appropriate sentence, and the conviction should be under one of those sections coupled with this section 3 W.R. (Cr.L.) 8; 1 W.R. (Cr.L.) 10 8 W.R. (Cr.L.) 7 6 B.H.C.R. (Cr.Ca.) 43. 8 C.P.L.R. 1 The using of a forged document must be punished under this section and not under s. 196, *supra*, 5 C 717, where the contrary dictum in 3 W. R. (Cr) 17 is explained

Making or possessing counterfeit seal, etc with intent to commit forgery punishable under section 437.

472. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Note.—Where possession of counterfeit, on which is established and he is unable to give explanation of them, criminal intention may be inferred If several seals are found, the possession of them may constitute a separate offence. 13 W. R. (Cr)

of the necessary explanation (Cr.) 5 could

Making or possessing counterfeit seal, etc, with intent to commit a forgery punishable otherwise.

473. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any other chapter other than section 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

of the necessary explanation (Cr.) 5 could

this section, 5 B. H. C. R. (Cr. Ca.) 56 Of course, if the document purported to bear the signature of any public officer, authenticating it as a true copy, the forgery of his signature might be an offence under s. 465. A fraudulent alteration of a Collectorate *challan* is within this section. 1884. W. R. (Cr.) 22 As to what is a valuable security, in addition to cases noted at p 14 under s. 30 *supra*, see 15 W. R. (Cr.) 19, where a blank paper or a bond barred by limitation was held to be not one of the documents within this section, and 1910 P. R. (Cr.) 31 = 11 Cr. L. J. 639 = 8 Ind. Ca. 389, where a *Hundi* was held to be within this section, and Weir. J. 551, where a certified copy of a decree was held to be not within this section. But an offence may be committed with regard to a promissory note on an unstamped paper even though the statute prohibits the stamp to be affixed afterwards, *Morton, 2 East P. C. 955; McIntosh, 2 Leach 883 = 2 East, P. C. 942.*

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Forgery for
purpose of cheat-
ing

Note.—See 18 W. R. (Cr.) 46 where account-books were falsified with a view to induce accused's master to deliver property, this was held to be an offence within this section. Contrast this with the ruling in 1876 P. R. No. 15, where cheating having preceded falsification, the latter act done with a view to conceal the former was held not to fall within this section.

469 Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Forgery for
purpose of harm-
ing reputation

Note.—Thus, a person who forged a draft petition, with the intention of using it as evidence, and which contained false statements calculated to injure the reputation of a person, was held guilty of an offence under this section. 2 B. L. R. A. (A. Cr.) 12 = 10 W. R. (Cr.) 61. The expression 'to harm the reputation' is advisedly used rather than the word *defame* so as to exclude the operation of the Exceptions to s. 499. No one is entitled to do wrong so that good might come out of it. Even if a public servant is a notoriously corrupt person that would not justify a public-spirited citizen to forge a letter purporting to be a demand from the public servant of a bribe.

470. A false document made wholly or in part by forgery is designated "a forged document"

Forged document

471. Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

Using as genuine a forged document

Note.—For commentary on this section, see Part II, Ch. XI., § 193, at p 773 This section does not prescribe any punishment. On a conviction under this section, recourse must therefore be had to ss. 465 or 466 or 467 for the appropriate sentence, and the conviction should be under one of those sections coupled with this section 3 W R (Cr.L.) 8; 1 W R (Cr.L.) 10 8 W R. (Cr.L.) 7. 6 B H.C.R. (Cr.Ca.) 43. 8 C.P.L.R. 1 The using of a forged document, must be punished under this section and not under s 196, *supra*, 5 C 717, where the contrary dictum in 3 W. R (Cr.) 17 is explained

472. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under section 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Making or possessing counterfeit seal, etc with intent to commit forgery punishable under section 467.

Note.—Where possession of counterfeits on the part of the accused is established and he is unable to give a satisfactory explanation, it may be inferred, 2 W R (Cr.) 5. The possession of each seal would be a separate offence, (Cr.) 16.

Whoever makes or counterfeits any seal, plate, or other instrument for making any impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any section of this chapter other than

such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

474. Whoever has in his possession any document,

Having possession of document described in s 466 or 467, knowing it to be forged and intending it to be used as genuine

knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in section 466, be punished

with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, and, if the document is one of the description mentioned in section 467, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

For commentary on ss. 474—476, see Part II, Ch XI., § 193, at p. 778.

475. Whoever counterfeits upon, or in the substance

Counterfeiting device or mark used for authenticating documents described in section 467, or possessing counterfeit marked material

of any material, any device or mark used for the purpose of authenticating any document described in section 467, intending that such device, or mark, shall be used for the purpose of giving the appearance of authenticity to any document then forged, or thereafter to be forged, on such material, or who with

such intent has in his possession any material upon, or in the substance of which, any such device, or mark, has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

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476. Whoever counterfeits upon, or in the substance of, any material, any device, or mark, used for the purpose of authenticating any document other than the documents

wrong
is a non-counterfeiting spirited or mark the public-authenti-

ating documents other than those described in section 467, or possessing counterfeit marked material

described in section 467 of this code intending that such device, or mark, shall be used for the purpose of giving the appearance of authenticity to any document then forged, or thereafter to be

forged, on such material, or who with such intent has in his possession any material upon, or in the substance of which, any such device, or mark, has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

477. Whoever fraudulently, or dishonestly or with

Fraudulent cancellation, destruction, etc., of will, authority to adopt or valuable security

intent to cause damage or injury to the public or to any person, cancels, destroys, or defaces, or attempts to cancel, destroy, or deface, or secretes, or attempts to secrete, any document which is or

purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

Note.—The words "purports to be" bring this section within the English decisions which lay down that a document which is unstamped, and, therefore, not admissible as evidence, may still be a valuable security 7 M. H. C. R. Appx. 26, 12 M. 148. A Puttash is a valuable security for the purposes of this section 3 W. R. (Cr.) 38. So also a Promissory Note, 12. M. 51, or a rough account showing accused's liability, 12. M. 148. A person tearing to pieces a Registered conveyance was held liable under this section no matter whether the document was invalid for want of consideration or for any other reason, Weir I 554, provided the accused does the act with the intent specified in the section, 4 W. R. (Cr.L.) 2.

477A. Whoever, being a clerk, officer or servant,

Falsification of accounts

or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys,

alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been

485. Whoever makes, or has in his possession, any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

486. Whoever sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(b) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(c) that otherwise he had acted innocently,

he be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Note.—The gist of the offence lies (1) in the fact that the mark used is counterfeit as defined in s. 28 *supra*, so that no offence under this section is committed where on goods manufactured the complainant's mark was put with his permission but on his declining to take delivery the accused sold at the consignor's request, 32 C. 989; (contrast this with 1902 P. R. No. 35 where complainant was selling a cloth as 'K. 68' and the accused imported similar cloth bearing Number 'H. 68'.) (2) An actual sale or expo-

sure or possession for sale, so that when goods bearing counterfeit trade mark are seized from the way to the consignor to the accused no offence has been committed as the possession contemplated by this section is actual and not constructive, 1902 P. R. No. 32. Where, however, the accused employed a label which in general resembled the complainant's label, applied to the same class of goods, he was adjudged guilty under this section quite irrespective of the circumstance the registered trade mark of the one was different from the trade mark of the other, 16 Bom L. R. 78

The offence of having possession of goods with counterfeit marks may be tried in any jurisdiction within which such goods are possessed by a person who intends to sell the same or to

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.....
right of user of the marks exists, proceedings should be stayed
rights settled in a civil suit.
411-8 C. W. N. 307 11 C. W.
N. 85=13 Cr. L. J. 175=13
27=14 Cr. L. J. 68=18 Ind

Ordinarily, an infringement of a trade mark or property mark gives rise only to a civil action just like the infringement of any other right of property. But the Legislature to afford parties a speedy remedy as explained in 22 M 488 has introduced these penal provisions coupled with the safeguard that if the accused proves absence of fraudulent intention (s 482) or the circumstances enumerated in cl- (a) & (b) or (c) of this section, he shall not be answerable in a criminal court. But this in no way affects his civil liability for infringement. If a man's right to the exclusive use of a mark or name is infringed, it is of small account to him as explained by Bhisham Iyengar, J., in 15 M. L. J. 45 at 60, 77, whether the invasion comes from a purpose to deceive or from ignorance, or inadvertence, or an honest misconception of the relative rights of the parties; and the law ought not to permit and will not permit the continuance of the invasion whatever may have been its origin.

487. Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such receptacle contains goods which it does not contain, or that it does not contain goods which it does contain, or that the goods contained in such

Making a false mark upon any receptacle containing goods.

receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

488. Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section

Punishment for making use of any such false mark

489. Whoever removes, destroys, defaces or adds to any property mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Tampering with property marked with intent to cause injury

Note.—This section is restricted to property mark. There can be no possible object in tampering with a trade mark unless it be out of pure mischief or to facilitate counterfeiting for both of which other provision has been made in the Code

OF CURRENCY-NOTES AND BANK-NOTES

489A. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Counterfeiting currency-notes or bank-notes

Explanation —For the purposes of this section and of sections 489B, 489C, and 489D, the expression "bank-note" means a promissory note or engagement for the payment of money to bearer, on demand, issued by any person carrying on the business of banking in any part of the world, or issued by or under the authority of any State or Sovereign Power, and intended to be used as equivalent to, or as a substitute for, money.

489B. Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Using as genuine forged or counterfeit currency-notes or bank-notes

489C. Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Possession of forged or counterfeit currency-notes or bank-notes

489D. Whoever makes, or performs any part of the process of making, or buys or sells or disposes of, or has in his possession, any machinery, instrument, or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for forging or counterfeiting any currency-note or bank-note, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Making or possessing instruments or materials for forging or counterfeiting currency-notes or bank-notes

For notes on ss 499A—489D, see Part II., Ch. XI., §191, at p. 756.

CHAPTER XIX

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

490. WHOEVER, being bound by a lawful contract to render his personal service in conveying or conducting any person, or any property, from one place to another place, or to act as servant to any person during

Breach of contract of service during a voyage or journey.

a voyage or journey, or to guard any person, or property, during a voyage or journey, voluntarily omits so to do, except in the case of illness or ill-treatment, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine, which may extend to one hundred rupees, or with both.

Illustrations.

(a) A, a palanquin-bearer, being bound by a legal contract to carry Z from one place to another, runs away in the middle of the stage. A has committed the offence defined in this section.

(b) A, a cooly, being bound by lawful contract to carry Z's baggage from one place to another, throws the baggage away. A has committed the offence defined in this section.

(c) A, a proprietor of bullocks being bound by legal contract to convey goods on his bullocks from one place to another, illegally omits to do so. A has committed the offence defined in this section.

(d) A, by unlawful means, compels B, a cooly, to carry his baggage. B, in the course of the journey, puts down the baggage and runs away. Here, as B was not lawfully bound to carry the baggage, he has not committed any offence.

Explanation—It is not necessary to this offence that the contract should be made with the person for whom the service is to be performed. It is sufficient if the contract is legally made with any person, either expressly or impliedly, by the person who is to perform the service.

Illustration

A contracts with a Dāk Company to drive their carriage for a month. B employs the Dāk Company to convey him on a journey and during the month the Company supplies B with a carriage which is driven by A. A in the course of the journey voluntarily leaves the carriage. Here, although A did not contract with B, A is guilty of an offence under this section.

Note.—"This section does not apply to servants hired by the month, and under a continuing implied contract to serve until the engagement is terminated by a month's notice." *Weir I. 559*. Nor to a servant engaged in Madras at a monthly salary who absconded after arriving at Cuddipah. *Weir I. 559*. Abandoning service before an advance of wages has been worked off is no offence in itself, in the absence of proof that the accused, omitted to per-

form some one of the acts mentioned in the section. **On Sc. 87.** It has been held in **6 W. R. (Cr) 80** that the words "during a voyage or journey" govern the whole of this section, and, therefore, that breach of a contract to carry indigo from the field to the vats is not punishable under this section. See **9 W. R. (Cr) 12, Ratanlal 608.** The section is limited to contract for personal services. A contract to act as a butler on occasions when the duties of his master required him to go into camp, is not a contract to act as a servant within the meaning of this section. **Weir I. 560.** Nor does this section apply to a contract to supply carts, and work them for a certain period. The scope of the section, in this respect, is restricted to a contract to take particular goods or a particular load of goods from one specified point to another. **Ratanlal 349.** The contract contemplated is one of personal service, **9 W. R. (Cr.) 12**, and probably to travellers. The section makes no distinction whatever as to the nature of the contract beyond the requirements that it must be lawful, and that it must be to act during the journey. It does not matter if the servant is paid a lump sum for the whole voyage or journey or so much per week or month (**1892 96) I. U. B. R 288.** Whether mere abuse amounts to ill-treatment is a question of fact. But fear of ill-treatment is no excuse.

491 Whoever, being bound by a lawful contract to

Breach of contract to attend on and supply the wants of helpless persons

attend on, or to supply the wants of, any person who, by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless, or incapable of providing for his own safety, or of

supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, which may extend to two hundred rupees, or with both.

Note.—This section does not apply to an ordinary cook in a family who is not bound by a contract to attend on or to supply the wants of any helpless person. **Ratanlal 354**

492. Whoever, being bound by lawful contract in writ-

Breach of contract to serve at distant place to which servant is conveyed at master's expense

ing to work for another person as an artificer, workman, or labourer, for a period not more than three years, at any place within British India, to which, by virtue of the contract, he has been, or is to be, conveyed at the expense of such other,

voluntarily deserts the service of that other during the

continuance of his contract, or without reasonable cause refuses to perform the service which he has contracted to perform, such service being reasonable and proper service, shall be punished with imprisonment of either description for a term not exceeding one month, or with fine not exceeding double the amount of such expense, or with both; unless the employer has ill-treated him or neglected to perform the contract on his part.

Notes.—The words “artificer, workman, or labourer” in s. 492 are the same as are found in s. 2 of *The Workmen’s Breach of Contract Act*, XIII. of 1859, see Appx VIII. As to these, the Bombay High Court said in *Ratanlal 204* “A person who in the ordinary course would himself take part in the work he contracted for is an artificer, workman, or labourer within the scope of Act XIII. of 1859.” *rett, M.R.*,
in *Morgan, v. 1* “ : : :
collier, *Weaver* “ : : :
Thus a
Lovekin,
Ell & Bl 584 or a frame work knitter, *Moorhouse v. Lee, 3 F. & F.*
354, is an artificer, but a barber is not, *Palmer v. Snow, [1900] 1 Q.B.*
725. The words artificer, workman or labourer include labour skilled and unskilled, such as that of a plantation cooly, 3 M. H. C R Appx 25. 8 W R (Cr.) 6 or a silk spinner in a factory, 14 W. R. (Cr.) 29. They do not apply to contracts to serve

to render to him “service for agricultural and other purposes” for one year, 7 B. 379, or to any person who does not undertake personally to do the work, but who only contracts to get it done by some one else, 7 M. 100, 10 B. 96; *Sharman v. Sander, 13 C. B. 165=22 L. J. (C.P.) 86*, or to an actor in a theatrical company, whose work belongs to the department of fine arts. The terms, artificer, workman and labourer have reference to occupations in which manual labour, i.e., the use of muscles and sinews, is an essential element. The essential ingredient of an actor’s work is his use of the intellect: otherwise, a vakil who is taken down to a mofasil station to conduct a case, may find himself within this section 1904 P. R. (Cr.) 28=1 Cr. L. J. 1103.

In all three sections the essence of the breach of contract is that it should be done voluntarily, that is intentionally (*Ante*, s. 39.) Of course there is no offence where there is a legal justification for not carrying out the contract. (*Ante* s. 79; per Blackburn, J. in *Unwin v. Clarke, L. R. 1 Q. B. 417 at 424*; *O’Neil v. Armstrong, [1895] 2 Q. B. 70 & 418*.) A man who, under a mistake of fact, believes that he has given a notice to quit, which, if given, would dissolve the contract, is not liable. *Rider v. Wood, 29 L. J.*

(M. C.) 1, see per *Blackburn, J*, L. R., 1 Q. B. at 424. A man who leaves before his contract has expired, because he is wrongly advised that he is entitled to go, is liable *Cooper v. Simmonds*, 31 L. J. (M. C.) 138 at 144=7 H. & N. 707

But coolies recruited for tea gardens in Assam by a contractor are labourers, though their employment is contracted for by a third person, 8 W. R. (Cr.) 6.

Under the English *Master and Servant Acts*, 4 Geo. IV., c. 34, and 30 & 31 Vict., c. 14, it has been repeatedly held that an absenting from service, followed by the infliction of a penalty, does not cancel the agreement, and that a renewed or continued absenting can be punished by the infliction of a fresh penalty. *Ex parte Baker*, 7 E. & B. 697=25 L. J. (M. C.) 193. *Unwin v. Clarke*, L. R., 1 Q. B. 417. *Cutler v. Turner*, L. R. 9 Q. B. 502. These cases were decided upon the construction of Statutes which contain a procedure before the Magistrate, part of which provides for his cancelling the agreement if he thinks fit. This power is not given by Act XIII of 1859. Accordingly, in 21 G. 262, the Calcutta High Court decided that a labourer who was punished for absenting himself from service, and who did not return to it, could not be punished again for his continued absence. If, however, the party returned to service, and so treated the contract as still subsisting, and then broke it again, I do not see why he should not be punished again under Act XIII of 1859, or under this Chapter of the Code.

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

493 EVERY man who, by deceit, causes any woman who is not lawfully married to him, to believe that she is lawfully married to him, and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage

For commentary, see Part II., Ch. XII, § 203, at p. 221.

494. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment

Marrying again during the life-time of husband or wife

sonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—The section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts, so far as the same are within his or her knowledge.

For commentary, see Part II., Ch XII, § 204, at p. 823

495. Whoever commits the offence defined in the last preceding section, having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted

Note.—A woman who contracts a second marriage sixteen months after she has lived with her first husband without disclosing that fact to the second husband or taking any steps to ascertain the whereabouts of the first husband is liable under this section, 4 W. R. (Cr.) 25 But where the accused happened to be a young girl of ten and where the marriage was negotiated by her mother, she was given the benefit of s. 83, Ratanlal 876

496. Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Marriage ceremony fraudulently gone through without lawful marriage

Note.—This section applies only when there is a show of marriage to attain some ulterior and fraudulent purpose, 10 C W N 982 = 4 Cr. J. 152. But if the ceremony gone through is the usual marriage ceremony and capable of inducing the status of matrimony, but for the pre-existing marriage, s. 494 and not this section would apply, Ratanlal 77; 1864 W. R. (Cr.) 13. Where dishonest or fraudulent intent is absent, it is no offence to go through a sham marriage, 16 K. L. R. 57 = 3 Cr. L. 438.

497. Whoever has sexual intercourse with a person who is, and whom he knows or has reason to believe to be, the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

For commentary, see Part II, Ch. XII, § 205, at p. 839.

498. Whoever takes or entices away any woman who is and whom he knows, or has reason to believe, to be the wife of any other man from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent, any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary, see Part II, Ch. XII, § 206, at p. 915.

CHAPTER XXI.

OF DEFAMATION.

499. WHOEVER, by words either spoken or intended to be read, or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing, or having reason to believe, that such

imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2.—It may amount to defamation to make an imputation concerning a company, or an association, or collection of persons as such

Explanation 3.—An imputation in the form of an alternative, or expressed ironically, may amount to defamation.

Explanation 4—No imputation is said to harm a person's reputation, unless that imputation, directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person or causes it to be believed that the body of that person, is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations.

(a) A says, "Z is an honest man; he never stole B's watch;" intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the exceptions

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the exceptions.

(c) A draws a picture of Z running away with B's watch intending it to be believed that Z stole B's watch. This is defamation unless it fall within one of the exceptions.

First Exception.—It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Imputation of truth which public good requires to be made or published.

Second Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no farther

Third Exception.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question and respecting his character, so far as his character appears in that conduct, and no farther.

Illustration

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception —It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Explanation —A Justice of the Peace, or other officer holding an inquiry in open Court, preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth Exception —It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1—It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2—It may amount to defamation to make an imputation concerning a company, or an association, or collection of persons as such.

Explanation 3.—An imputation in the form of an alternative, or expressed ironically, may amount to defamation.

Explanation 4—No imputation is said to harm a person's reputation, unless that imputation, directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person or causes it to be believed that the body of that person, is in a loathsome state, or in a state generally considered as disgraceful.

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Illustrations.

(a) A says, "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no farther.

(b) But if A says, "I do not believe what Z asserted at that trial because I know him to be a man without veracity" A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's conduct as a witness.

Sixth Exception—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author, so far as his character appears in such performance, and no farther.

Explanation.—A performance may be submitted to the judgment of the public expressly, or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z, "Z's book is foolish, Z must be a weak man. Z's book is indecent, Z must be a man of impure mind." A is within this exception if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z's character only so far as it appears in Z's book, and no farther.

(e) But if A says, "I am not surprised that Z's book is foolish and indecent, for he is a weak man and a libertine," A is not within this exception, inasmuch as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh Exception—It is not defamation in a person having over another any authority, either conferred by law, or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates

Censure passed
in good faith by
person having
lawful authority
over another

Illustration

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court; a head of a department censuring in good faith those who are under his orders, a parent censuring in good faith a child in the presence of other children, a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils, a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier—are within this exception

Eighth Exception—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of the accusation.

Accusation pre-
ferred in good faith
to authorized
person

Illustration.

If A in good faith accuses Z, before a Magistrate, if A in good faith complains of the conduct of Z, a servant, to Z's master, if A in good faith complains of the conduct of Z, a child, to Z's father, A is within this exception

Ninth Exception—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good

Imputation
made in good faith
by person for pro-
tection of his or
other's interests

Illustration .

(a) A, a shopkeeper, says to B, who manages his business, "Sell nothing to Z unless he pays you ready-money, for I have no opinion of his honesty" A is within the exception if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith and for the public good, A is within the exception

Tenth Exception.—It is not defamation to convey a

Caution intended for good of person to whom conveyed or for public good

caution in good faith to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good

Note.—For commentaries, see Pt. II., Ch. XIII., §§ 207–223, at p. 851 *et seq.*

500. Whoever defames another shall be punished with

Punishment for defamation

simple imprisonment for a term which may extend to two years, or with fine, or with both.

501. Whoever prints or engraves any matter, know-

Printing or engraving matter known to be defamatory

ing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to

two years, or with fine, or with both.

Note.—This is another instance of an abetment being made punishable as a substantive offence, 1889 P. R. No. 18.

502. Whoever sells, or offers for sale, any printed or

Sale of printed or engraved substance containing defamatory matter

engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which

may extend to two years, or with fine, or with both

Note.—This section is more favourable to the seller than the corresponding provision of the English law, as the section requires knowledge on the part of the seller that the printed substance sold contains defamatory matter—*per* Plowden, J., 1891 P. R. No. 8.

On conviction, under ss. 501 or 502, the Court may order the destruction of all copies of the thing in respect of which the conviction was obtained. s. 521., Cr. P.C.

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT, AND ANNOYANCE.

503 Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation

Explanation —A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section.

Illustration.

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

Note —For commentary, see Part II., Ch. XIII, § 224, at p. 924.

504 Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

For commentary, see Part II., Ch. XIII, § 225, at p. 930.

505. Whoever makes, publishes or circulates any statement, rumour or report,—

(a) with intent to cause, or which is likely to cause, any officer, soldier or sailor in the army or navy of Her Majesty, or in the Royal Indian Marine, or in the Imperial Service Troops, to mutiny or otherwise disregard, or fail in his duty as such; or

(b) with intent to cause, or which is likely to cause, fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity ; or

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community ,

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception —It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.

on, see s 196, Cr. P.
' Cr. L. J. 353. When
in Nepal circulated
a report among garden coolies that a war will soon break out between the British Government and Nepal and that Nepaulese soldiers had been moved to the Frontier, that the coolies will be killed by the British, with the result that about 150 coolies ran away from the estate, held a conviction under cl. (b) of this section was unsustainable as the coolies were not induced to commit any offence against the state or against the public tranquillity. 3 C. W. N 1.

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ; and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

508. Whoever voluntarily causes, or attempts to cause, any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing, or attempting to induce, that person to believe that he, or any person in whom he is interested, will become, or will be rendered by some act of the offender, an object of divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

Illustrations

(a) A sits dhurna at Z's door with the intention of causing it to be believed that, by so sitting, he renders Z an object of divine displeasure. A has committed the offence defined in this section.

(b) A threatens Z that, unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of divine displeasure. A has committed the offence defined in this section.

Note.—For commentary, see Part II, Chap XIII, §224, at p 924.

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or

intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

For commentary, see Part II., Chap. XIII, § 226, at p. 931.

510. Whoever, in a state of intoxication, appears in any public place, or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine, which may extend to ten rupees, or with both

Misconduct in public by a drunken person.

CHAPTER XXIII.

OF ATTEMPTS TO COMMIT OFFENCES.

511. WHOEVER attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Punishment for attempting to commit offences punishable with transportation or imprisonment.

Illustrations.

(a) A makes an attempt to steal some jewels by breaking open a box, and finds, after so opening the box, that there is no jewel in it. He has done an act towards the commission of theft, and therefore, is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket. A is guilty under this section.

Note.—For commentary, see Part II., Chapter XIV, § 227, at p. 933.

CONTENTS OF PART II.

CHAPTER I

Preliminary.

	PAGE.
1. Origin and Development of Criminal Law	1
2. Notion of crime as an offence against the State is of modern growth ..	2
3. The Presumption of Innocence ..	4
4. Circumstances under which the presumption of innocence is easily displaced	5
5. Exact significance of the Rule that the prisoner should have the benefit of any doubt ..	6
6. Mens rea ..	8
7. Intention ..	10
8. Motive ..	11
9. Knowledge ..	12
10. Liability of master for acts of servant ..	16
11. Liability for failure to discharge statutory obligations, even when guilty intention or knowledge is absent	18

CHAPTER II

The Applicability of the Code to Offences within and beyond British India

A—TO OFFENCES WITHIN BRITISH INDIA

12. Application of Penal Code to British India ..	24
---	----

B—TO OFFENCES OUTSIDE BRITISH INDIA.

13. Nature of extra-territorial application	25
14. Exact nature of the jurisdiction over the territorial waters ..	27
15. Extent of jurisdiction over Merchant Ships entering territorial waters ..	30
16. Foreign Public Ships are exempt from the operation of the Code ..	31
17. Code applies to offences in British Cantonments in Native States ..	34
18. Code extends to Civil Stations in Native States ..	36
19. Code extends to some extent to British Railways running ..	37
20.	40
21. commit	42
22. The right to oust Native States' jurisdiction examined ..	44
23. Jurisdiction to deal with offences committed in a Foreign State rests entirely on a statutory basis ..	47
24. Jurisdiction over Natives of India is absolute and unlimited ..	50
25. History of Admiralty Jurisdiction	51

V—JUDICIAL ACTS.

PAGE

53.	English law regarding judicial immunity from civil suits ..	138
54.	English law as to criminal liability of judges for acts done in the discharge of their official duty ..	142
55.	Law in India as to judicial immunity ..	145

VI—IMMUNITY FOR MINISTERIAL ACTS.

56.	Extent of immunity granted to Ministerial officers ..	149
-----	---	-----

VII—ACCIDENT.

57.	There is general immunity for accidental consequences of acts	154
-----	---	-----

VIII—CHOICE OF EVILS.

58.	Immunity by reason of choice of evils ..	157
-----	--	-----

IX—INFANCY.

59.	Infancy as a plea in defence ..	160
-----	---------------------------------	-----

X—INSANITY.

60.	Misconception as to the real nature of insanity as a plea in defence ..	162
61.	Exact scope of the plea as embodied in the Penal Code ..	164
62.	<i>McNaghten's Case</i> and the Law as laid down by the English judges ..	165
63.	" " " " " crime ..	170
64.	" " " " " exempt from ..	172
65.	" " " " " ..	179
66.	" " " " " ..	182
67.	Cases of running amuck ..	184
68.	Procedure at the trial of insane persons ..	186

XI—DRUNKENNESS.

69.	Drunkenness, how far it would be a good plea in defence ..	187
-----	--	-----

XII—CONSENT.

70.	Consent of the injured, how far is a valid plea in defence ..	190
-----	---	-----

XIII—COMPULSION.

71.	Immunity for acts done under compulsion ..	199
-----	--	-----

XIV—RIGHT OF PRIVATE DEFENCE.

72.	The legal bases of the right of private defence ..	202
73.	Limitations to the exercise of the right ..	202
74.	Extent of the right of private defence ..	217
75.	When right of private defence of person may or may not extend to killing ..	218
76.	When right of private defence of property may or may not extend to killing ..	221
77.	Acts that are offences, can alone evoke the right of private defence ..	225
78.	Commencement and continuation of the right of defence of person ..	230
79.	Commencement and continuation of right of defence of property ..	231
80.	How far one may go to defend another ..	231

V—JUDICIAL ACTS.

PAGE

53.	from civil suits ..	139
54.	judges for acts done ..	142
55.	..	143

VI—IMMUNITY FOR MINISTERIAL ACTS.

56.	Extent of immunity granted to Ministerial officers ..	149
-----	---	-----

VII—ACCIDENT.

57.	There is general immunity for accidental consequences of acts ..	151
-----	--	-----

VIII—CHOICE OF EVILS.

58.	Immunity by reason of choice of evils ..	157
-----	--	-----

IX—INFANCY.

59.	Infancy as a plea in defence ..	160
-----	---------------------------------	-----

X—INSANITY.

60.	Misconception as to the real nature of insanity as a plea in defence ..	162
61.	Exact scope of the plea as embodied in the Penal Code ..	164
62.	<i>McNaghten's Case</i> and the Law as laid down by the English judges ..	165
63.	Uncontrollable impulse, whether a justification for crime ..	170
64.	Analysis of the mental state which alone would exempt from liability on the ground of insanity ..	172
65.	<i>Proof of insanity</i> ..	179
66.	<i>Question of inferential insanity discussed</i> ..	182
67.	<i>Cases of running amuck</i> ..	184
68.	<i>Procedure at the trial of insane persons</i> ..	185

XI—DRUNKENNESS

69.	Drunkenness, how far it would be a good plea in defence ..	187
-----	--	-----

XII—CONSENT

70.	Consent of the injured, how far is a valid plea in defence ..	190
-----	---	-----

XIII—COMPULSION

71.	Immunity for acts done under compulsion ..	199
-----	--	-----

XIV—RIGHT OF PRIVATE DEFENCE.

72.	The legal bases of the right of private defence ..	202
73.	Limitations to the exercise of the right ..	202
74.	Extent of the right of private defence ..	217
75.	When right of private defence of person may or may not extend to killing ..	218
76.	When right of private defence of property may or may not extend to killing ..	221
77.	Acts that are offences, can alone evoke the right of private defence ..	225
78.	Commencement and continuation of the right of defence of person ..	230
79.	Commencement and continuation of right of defence of property ..	231
80.	How far one may go to defend another ..	5

	PAGE
26. Exact scope of Admiral's Jurisdiction.. ..	55
27. Question of Concurrent Jurisdiction in Admiralty and Common Law Courts	56
28. Persons subject to the Admiralty Jurisdiction	58
29. Law applicable in Indian Courts at trials for crimes committed on High Sea	69

C—EXTRADITION.

30. Extradition	76
31. Extradition as between British India and Foreign States ..	77
32. Extradition demands made on British Indian authorities by Native States	83
33. Rendition of Fugitive offenders as between British India and some other part of the British Dominions	85

CHAPTER III.

General Exceptions.

34. Nature of General Exceptions	87
--	----

I—ACTS DONE UNDER THE AUTHORITY OF GOVERNMENT.

A—IN ORDINARY COURSE OF GOVERNMENT.

35. The exact significance of the maxim, the King can do no wrong	88
36. The position of the Indian Executive as to suits is different ..	91
37. Statutory immunity from certain suits and indictments is conferred on certain Indian officials	93

B—IN EMERGENCY.

38. Power of the Executive to deal with riotous assemblies ..	96
39. Nature of Martial Law	100
40. Legal basis of Martial Law	102
41. Justification of Martial Law in respect of Loyal subjects ..	111
42. Exact significance of the expression "Acts of State" ..	114
43. Certain dealings of the Indian Government with Native States resembles Acts of State.. ..	115
44. Acts in respect of newly acquired territory	119
45. Treaties	121
46. In normal times there can be no Act of State between the Sovereign and his own subject	124
47. Acts done under the orders of a Foreign Sovereign	125

II—ACT OF LAWFUL CORRECTION

48. Justification of Acts done by way of lawful correction or urgent necessity	127
--	-----

III—ACTS OF A WIFE UNDER THE ORDERS OF HER HUSBAND.

49. Under the Code, a wife acting under the orders of her husband, enjoys no special immunity	129
---	-----

IV—MISTAKE.

50. " " " " " " " " of fact	125
51. " " " " " " " " " "	135
52. " " " " " " " " will be treated as	137

V—JUDICIAL ACTS.

PAGE

53.	English law regarding judicial immunity from civil suits ..	138
54.	English law as to criminal liability of judges for acts done in the discharge of their official duty ..	142
55.	Law in India as to judicial immunity ..	145

VI—IMMUNITY FOR MINISTERIAL ACTS.

56	Extent of immunity granted to Ministerial officers	149
----	--	-----

VII—ACCIDENT.

57. There is general immunity for accidental consequences of acts 154

VIII—CHOICE OF EVILS.

58. Immunity by reason of choice of evils 157

IX—INFANCY.

59 Infancy as a plea in defence 160

X-INSANITY.

60 Misconception as to the real nature of insanity as a plea in
defence 162

61	Exact scope of the plea as embodied in the Penal Code	164
----	---	-----

62	McNaghten's Case and the Law as laid down by the English judges	165
----	---	-----

63.	crime	170
-----	-------	-----

64 rempt from

172

65		179
66	Question of differential inequality discussed	180

66	Question of inferential insanity discussed	..	..	182
67	Cases of running amuck			184

67. Cases of running amuck	..	..	184
68. Procedure at the trial of insane persons			186

66	Procedure at the trial of insane persons	160
----	--	----	----	-----

XI—DRUNKENNESS.

69 Drunkenness, how far it would be a good plea in defence .. 187

XII—CONSENT

70 Consent of the injured, how far is a valid plea in defence .. 190

XIII—Compulsion.

71. Immunity for acts done under compulsion	199
---	----	----	-----

XIV—RIGHT OF PRIVATE DEFENCE.

71. The legal bases of the right of private defence 203

73	Limitations to the exercise of the right	202
----	--	----	----	-----

74.	Extent of the right of private defence ..	217
75.	Right of private defence of man or woman ..	217

75	When right of private defence of person may or may not extend	
76	to killing	218

76.	When right of private defence of property may or may not extend to killing	221
-----	--	-----

77. Acts that are offences, can alone evoke the right of private defence

78. Commencement and continuation of the right of defence of

79. Commencement and continuation of right of defence of property 230
80. How far owner is to defend another 231

80. How far one may go to defend another	232
---	----	-----

CHAPTER IV.

Complicity with Crime.

PAGE

81.	Various modes of complicity with crime	..	237
82.	Joint Acts .. .. .	..	237
83.	Abetment .. .. .	..	241
84.	Abetment by conspiracy .. .. .	..	247
85.	Abetment by aiding .. .. .	..	250
86.	Concealment of offences .. .. .	..	253
87.	Harbouring .. .. .	..	260
88.	Screening offenders .. .. .	..	266
89.	Corrupt restitution of property .. .. .	..	271

CHAPTER V

Offences of a Public Character

OFFENCES AGAINST THE STATE.

90	Persons within the scope of Ch. VI, I. P. C	274
91	Waging war against the king	277
92	Offences against the Foreign Enlistment Act	295
93	Conspiring against the king	287
94	Nature of evidence required to make out a charge of conspiracy	290
95	Seditious language	293
96	Truth of the language alleged to be seditious is irrelevant to the charge	302
97	Liability of Printer or Publisher of Seditious language	304
OFFENCES AGAINST THE PUBLIC TRANQUILITY		
98.	Unlawful assembly	303
99.	The five classes of common object	314
100.	Rioting	322
101.	Turbulent assembly	323
102.	Affray	327
103.	Promoting Class Enmity	328

CHAPTER VI

Contempt of the Lawful Authority of Public Servant.

104	The officer issuing process must be legally competent to issue the summons, etc	329
105.	The process issued must be one legally binding on the person whose attendance is desired	331
106	To establish liability, strict proof of service is essential	332
107	Disobedience to an order promulgated by a public servant	335
108.	The Act prohibited need not necessarily be an illegal Act	339
109.	The principle of maintaining tranquility at the sacrifice of liberty examined	344
110	The essential elements of the offence under s. 183, I. P. C	345

CHAPTER VII

Offences against Public Justice

I—FALSE EVIDENCE.

111.	False evidence	351
112.	Perjury	354

	PAGE
113. There is no perjury where the Court or authority is not competent to record statement on Oath ..	354
114 The Evidence must be false	357
115 Guilty Knowledge	359
116 Contradictory Depositions	360
117 Fabrication of false evidence	365
118 Judicial Proceeding	372
119. Proof of False Statement	379
120. Using False Evidence	384
121 False Certificates and Declarations	386
122 Causing disappearance of evidence, or giving false information	389

II—FRAUDULENT TRANSFERS AND SUITS.

123 Transfers that are Fraudulent	392
124 Fraudulent Gifts	398
125 Transactions on the eve of Insolvency	400

III—FALSE INFORMATION TO PUBLIC SERVANTS AND FALSE CHARGES.

126 False Information to Public Servant	407
127 False Charge	413

CHAPTER VIII.

Acts affecting the Public Health and Safety.

I—ACTS OF NUISANCE.

128. Public Nuisance and Private Nuisance distinguished ..	429
129 Acts that would amount to indictable nuisance ..	430
130 Pleas in defence of an act of nuisance examined ..	436
131. Provisions of the Code dealing with special classes of nuisance	439

II—CRIMINAL NEGLIGENCE.

132. Negligence in Law involves more than mere carelessness ..	442
133 Provisions of the Code as to negligence in certain special cases	448
134 Whether liability is on owner or occupier	451
135 Injury resulting from the negligent control of one's animal	454
136 Liability arising from Non-natural Use of One's Own Property	458
137 Statutory Liability of Corporations, etc.	461

CHAPTER IX.

Offences affecting the Human Body.

138 Division of the Chapter	464
-----------------------------------	-----

I—OF OFFENCES AFFECTING LIFE.

139. Offences affecting life	464
140. Causing death by act or illegal omission	469
141. Acceleration of death is causing of death	475

	PAGE
142. Person causing injury causes death if death results from neglect of ordinary treatment of the injury ..	475
143. Legal basis of the division of culpable homicide into murder, and culpable homicide not murder ..	477
144. Culpable Homicide is not murder if the act is within cl. (b) of s. 299 but not within cls. (2) or (3) of s. 300 ..	482
145. Culpable Homicide is not murder if act being within cl. (c) of s. 299 is not within cl. (4) of s. 300 ..	484
146. First Exception—Provocation ..	489
147. Exceeding the limits of self-defence ..	497
148. <i>Bona fide</i> Act in excess of the Powers of a Public Servant ..	500
149. Sudden Fight ..	501
150. Homicide by Consent.—Exception 5 ..	503
151. Classification of the various forms of culpable homicide not murder ..	509
152. Evidence of Death ..	510
153. Burden of Proof ..	513
154. That Act was done under orders of a superior is not ordinarily a defence ..	516
155. That person killed was guilty of contributory negligence is no defence ..	517
156. Killing a person other than the one really meant ..	518
157. Killing by rash and negligent acts ..	519
158. Suicide ..	520
159. Attempt to commit murder, culpable homicide not murder and suicide ..	530

II—CAUSING MISCARRIAGE, INJURIES TO UNBORN CHILDREN, EXPOSURE OF INFANTS, AND CONCEALMENT OF BIRTH.

160. Miscarriage and offences against unborn children ..	533
161. Exposure of children ..	532
162. Concealment of birth by secret disposal of dead body ..	545

III—VOLUNTARY HURT.

163. Hurt ..	549
--------------	-----

IV—WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT.

164. Wrongful restraint and wrongful confinement ..	554
---	-----

V—CRIMINAL FORCE AND ASSAULT.

165. Criminal force and assault ..	559
------------------------------------	-----

VI—KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR.

166. Kidnapping ..	564
167. Abduction ..	578
168. Slave dealing ..	583
169. Forced Labour ..	585
170. Dealing in Prostitution ..	586

VII—RAPE.

171. Rape ..	592
--------------	-----

VIII—UNNATURAL OFFENCES.

172. Unnatural Offences ..	601
----------------------------	-----

CHAPTER X

PAGE

Offences against Property.

173	Division of the Chapter	606
-----	---------------------------------	-----

I—THEFT.

174	The elements of theft analysed	607
175.	Theft as between Husband and Wife	624
176.	Theft in a Building, tent or vessel	627
177.	Theft by Clerk or Servant	629
178	Evidence of Theft	631

II—EXTORTION

179	Extortion	635
-----	-------------------	-----

III—ROBBERY AND DACOITY

180.	Robbery and Dacoity	641
------	-----------------------------	-----

IV—CRIMINAL MISAPPROPRIATION.

181.	Criminal Misappropriation	646
------	-----------------------------------	-----

V—CRIMINAL BREACH OF TRUST

182.	Criminal Breach of Trust	652
183.	Offences by persons in Special fiduciary relationship	664

VI—RECEIPT OF STOLEN PROPERTY

184.	Receiving or Retaining Stolen Property	668
185	Aggravated Forms of Receipt or Retention	681

VII—CHEATING.

186.	The offence of Cheating Analysed	683
------	--	-----

VIII—FRAUDULENT DEEDS AND DISPOSITION OF PROPERTY

IX—MISCHIEF .

187	Mischief	714
188	Mischief by causing diminution of water for agricultural purposes	722

X—CRIMINAL TRESPASS.

189	Criminal Trespass	725
190	House Trespass	741

CHAPTER XI.

Offences of Falsification.

I—COINING

191	Offences relating to coins	748
-----	------------------------------------	-----

II—FORGERY

192	Forgery analysed	756
193	Using false documents as genuine	773

III—OFFENCES RELATING TO TRADE, PROPERTY AND OTHER MARKS

194.	Fraudulent marks on merchandise	780
195	Trade-marks	783
196.	Trade names	787
197.	Trade descriptions	788

	PAGE
198 Remedies for fraudulent passing off	790
199. Burden of proof	793

CHAPTER XII.

Offences relating to Marriage.

200. General provisions relating to marriage ..	796
201	810
202	816
203	821
204 Bigamy	823
205 Adultery	839
206 Taking or enticing away a married woman ..	845

CHAPTER XIII.

A—Defamation

I—WHAT IS DEFACTION.

207. Law of Criminal Defamation	851
208 Defamation by injuring the reputation of the dead (EXPLANATION I)	861
209 Defamation of a company or a collection of persons (EXPLANATION II)	862

II—PUBLICATION

210 Publication essential to constitute the offence	864
---	-----

III—CIRCUMSTANCES IN WHICH IMPUTATIONS *prima facie*
DEFAMATORY ARE NOT PUNISHABLE

211. Exceptions—their nature and scope ..	873
212	885
213	896
214	899
215 public ..	904
216	906
217	910
218 Sixth Exception—Opinion on performance subjected to public judgment	911
219. Seventh Exception—Censure by a superior on the conduct of subordinate	913
220 Eighth Exception—Complaint made to superior touching	914
221. ' .. interest ..	915
222 good of information ..	919

IV—PROVINCE OF JUDGE AND JURY.

223 Province of judge and jury	921
--------------------------------------	-----

B—Criminal Intimidation, Insult and Annoyance.

224. Criminal intimidation	924
225. Intentional insult to provoke a breach of the peace ..	930
226 Insult to female modesty	931

CHAPTER XIV.

Attempts to Commit Offences

227. Attempt	933
--------------------	-----

PART II.

CHAPTER I.

PRELIMINARY.

1. Origin and Development of Criminal Law.—

Criminal law is the modern equivalent for the law of revenge, by which men protected themselves when there was no one else to protect them. It still survives in the practice of duelling in Europe. Before society existed, every man carried his life in his hands. He was liable at any moment to be attacked in his person or his property, and could only resist by overpowering his opponent. He generally did so by killing him. It was the simplest and most effectual method. The maxim, "A tooth for a tooth, an eye for an eye, a life for a life," though apparently rude, marks a distinct step towards criminal justice. It indicates a sense of proportion and a certain degree of restraint in the dealing between man and man. Still, even this principle could not be enforced without violence, and had the further defect that it generally left bitterness behind it, and gave birth to consequences, such as the *vendetta* in Corsica and the blood feud among the Pathans. A further advance was made when the injured party agreed to accept some valuable compensation, in full discharge of all his rights to kill or maim his opponent. The advantages of this system were readily seen, and it developed until a regular sliding scale was fixed as satisfaction for each of the ordinary offences. Even in the case of murder the vengeance of the relatives might be bought off by paying blood money, which, of course, varied according to the importance of the victim.

When matters had got so far, it is evident that the rudiments of a system of criminal law had been reached. Public opinion had begun to act in a recognized direction and according to recognized rules. The next step, viz., that the execution of these rules should be taken

out of the hands of individuals and entrusted to State officials, was a very long one, and often was not taken for a very long time. Among the Jews, it does not seem to have been taken at the period of their history described in Leviticus and Deuteronomy. A man who is injured makes his complaint to the elders. The men of the city carry the offender to the gate and stone him to death. The procedure is exactly the same as prevails to-day in America in the mining districts of the Far West, where justice is administered by a Vigilance Committee, and executed by Lynch law. On the other hand, the modern system was in full force in India, so early as the time to which *Manu* may be attributed. He lays down with perfect distinctness, that the allegiance and revenue which the king claims from his subjects are only the equivalent for the protection which he is bound to extend to them (viii., §§ 302—310). Every day he is to take his seat in his court of justice, and there to decide causes under the eighteen principal titles of law. If he is too busy to do so himself, he is to depute in his place a chief judge and assessors (viii., §§ 1—10). The case is decided, and the punishment awarded by the king or his deputies. When the criminal is condemned to a money payment, this does not go as compensation to the injured person, but as a fine to the king.

2. Notion of Crime as an offence against the State is of Modern Growth.—The modern distinction between civil and criminal law is obviously of later growth. In early society, what we call civil law hardly exists. What a man complains of are direct and deliberate injuries to his person or his property, or to himself in his conjugal relations. The injury is generally attended with violence, and is visited with vindictive and often barbarous punishment. As society becomes more complex, men enter into dealings with each other, and fail to perform their promises. They acquire various rights, and in the exercise of them they come in conflict with the rights of others. There is still an injury which requires redress, but it is felt that there is a difference between a mere injury and a crime. In the latter case, the offender commits an act which he knows to be

wrong, which shows that he is a danger to society, and which makes it necessary that society should treat him as one who has done a wrong to it as well as to the complainant. In the former case, the dispute is one between the individuals concerned. If they require it, the State is bound to decide their dispute and enforce its decision, but they may pass the matter over, or patch it up as they like. Hence the broad distinction is established, that in the case of crimes, it is the duty of the State to undertake the prosecution of the offender, and to sentence him on conviction in a way that may operate as a punishment to him and as a warning to others. In the case of civil injuries, the dispute may safely be left in the hands of the parties affected by it, and the object of the ultimate decision is not punishment, but compensation and redress.

When this distinction is once established, the number of crimes will increase with the opportunities for them, and also according to the objects which the State proposes for itself. *Manu* recognizes as crimes, assaults and slander, robbery and other violence, false evidence, theft, criminal breach of trust, cheating, adultery, and rape (VIII, §§ 6, 119, 191, 193, 352, 364). The numerous other offences which fill the Indian Penal Code were either unknown at that early period, or were of such rare importance as not to call for notice. Had they arisen, they would, no doubt, have been punished in the same summary way as others. In modern times, however, and especially within the last century, crimes, or offences treated as if they were crimes, have multiplied in an extraordinary manner from the changed view which the

moral or social duties, and to impose upon them legal restrictions or obligations in the management of their business, and in the treatment of persons dependent on them. These statutes bring the persons affected by them into a completely new relationship to the State, and are enforced by the only machinery at the disposal of the

State, viz., that of criminal procedure. This has effected an entire revolution in the conception of criminal law. Formerly, and with some few exceptions, chiefly for the protection of the revenue, it dealt only with acts wrong in themselves and to the knowledge of everybody. At present, criminal law may be said to embrace every act, the doing of, or abstaining from, which the State chooses to enforce by the methods and penalties of criminal procedure. Much of the difficulty which has been felt by the English courts in many recent cases, has arisen from an attempt to adapt to the later system the rules which were framed under the former system. The rest of this chapter will be devoted to an examination of some of these rules

3. The Presumption of Innocence.—The rule that everyone is presumed to be innocent till he is proved to be guilty, is peculiar to the administration of criminal law though there are analogous principles in other branches of jurisprudence. The rule means, that a person who is accused of a crime is not bound to make any statement, or to offer any explanation of circumstances which throw suspicion upon him. He stands before the court as an innocent man till he is proved to be guilty. It is the business of the Crown to prove him to be guilty, and he need do nothing but stand by and see what case has been made out against him. As far as the case for the Crown is concerned, he cannot be called upon to take part in the proceeding, except in so far as, for his own protection, the court may question him under § 342 of the Criminal Procedure Code. If there is a piece of evidence against the prisoner which might be cleared up one way or the other by a word from him, he is not bound to say that word. He is entitled to rely on the defence that the evidence, as it stands, is inconclusive, and that the Crown is bound to make it conclusive without any help from him. For instance, where a woman was indicted for the murder of her child, and it appeared that she was seen with the child at 6 p.m., and arrived at another place without it at 8 p.m., having in the meantime passed a river, and that in that river was found the body of a child,

which could not be identified as hers, it was held that she could not be called upon to account for the child till the death was proved, because till then the prosecution had not offered the minimum of evidence necessary for a conviction *R v Hopkins*, 8 C. & P., 591, (see Ch IX *infra*.) Further, in making out their case, the prosecution have to get rid of every presumption against it, and, to a certain extent, there is a presumption in favour of innocence. The great majority of mankind manage to get through life without committing a crime, and those who assert that a particular person has committed a crime are asserting a fact against which there is a presumption, which may range from something almost insuperable to something evanescent. Probably no amount of evidence would convince a jury that the Commander-in-Chief, or the Chief Justice, had picked a pocket. In the case of a member of the thieving classes it would be the most natural thing in the world.

4. Circumstances under which the presumption of innocence is easily displaced.—When the case for the Crown has closed, it is for the prisoner or his advisers to consider whether any case which he need answer has been made out against him. This will depend on the nature of the charge. The definition of every offence must be satisfied by proof, and if this proof fails as regards any necessary item, the whole fails. Assuming the minimum of proof to be supplied, the Crown has offered evidence which may be sufficient for a conviction. The question is, whether it is sufficient. As to this the Evidence Act provides by § 114, "the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case." As an instance, *illus. (a)* states that the court may presume that a person who is in possession of stolen goods, soon after the theft, is either the thief or a guilty receiver, unless he can account for the possession. So, if a man is found at night in another man's house where he has no business to be, the court may assume any particular criminal motive to

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which the facts may point, without specific evidence of motive, **22 C. 391**. It may be that the evidence is unworthy of belief, or that, if believed, it is consistent with the innocence of the prisoner, in either of which cases he ought to be acquitted. It may be, however, that it is believed it is sufficient for a conviction, and then it will be necessary either to contradict it or to explain it away. When matters have reached this point, it is evident that the presumption of innocence has vanished. There is no presumption in favour of the existence of any particular fact which is necessary to make out innocence. If it is necessary for a man's defence to establish an *alibi*, he must prove it. (Ev. Act, § 103, illus. (b)) Where a man does an act, which is *prima facie* criminal, but which may be explained away, it is his business to offer the explanation, and to supply the evidence which will prove it. (Ev. Act, § 106) If he relies on the existence of circumstances bringing his case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, it equally lies upon him to prove that the circumstances exist, and till this proof is offered the court will assume that they do not exist. (Ev. Act, § 105)

5. Exact significance of the Rule that the prisoner should have the benefit of any doubt.—It is a common remark in directing a jury, that if upon the whole case the jury feel any reasonable doubt upon the guilt of the prisoner, they should give him the benefit of the doubt. If this remark goes beyond a truism, it requires to be carefully scrutinized. The nature of proof is defined as follows by the Evidence Act, § 3 —

A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man

ought, under the circumstances of the particular case, to act upon the supposition that it does not exist

A fact is said not to be proved when it is neither proved nor disproved

It is evident that the whole question turns upon this: When should a prudent man act upon the supposition that a fact exists, when he only considers its existence to be probable? This depends, as the Act says, upon the circumstances of the case. Where a man's own interests only are concerned, a prudent man may act upon very slight evidence, where the interests of others are concerned, he will probably require stronger evidence. A prudent man who is asked to take into his service a person who lies under a suspicion of theft, will probably act upon the supposition that the charge was true, and refuse to employ him. If the charge is first made after the man has entered his service, he will require stronger evidence to dismiss him on account of it, and still stronger to charge him with the theft. What is the amount of probability upon which a prudent man should act when he is sitting upon a jury? Here, I think, there is a difference between a civil and a criminal case. In a civil case, the interests of two parties are in conflict, and the jury is called in to decide the issue of the conflict. They must decide one way or the other, and they cannot decide either way except upon the balance of evidence. Whichever way they decide, they must injure one party just as, and generally to the same extent as, they benefit the other. The decision of the issue may involve an imputation of perjury to one side or forgery to the other, but the issue itself is merely whether the plaintiff is the owner of a particular piece of land, or whether the defendant signed a promissory note. The facts may be so balanced that each case seems equally probable or improbable, and then the jury simply say that the plaintiff has not satisfied them that he has made out his case. But if there is a substantial preponderance of evidence on either side, though the case may still be full of doubt, the jury must decide as the scale inclines. In a criminal case there is no conflict of interests. The Crown does not wish to convict the

prisoner. It only wishes to ascertain whether he has been rightly charged with the offence for which he is tried. It is the interest of justice that if he is guilty he should be convicted, but it is not the interest of justice that he should be convicted unless his guilt is fully and clearly made out. It has often been said that it is better that ten guilty men should escape, than that one innocent man should be convicted. Before accepting the abstract proposition, one would like to know what the guilty men had done, and what was the evidence against the innocent one. But of this I have no doubt, that it is better that ten guilty men should be acquitted, than that one guilty man should be convicted upon insufficient evidence, or by a lax procedure. The only protection to the innocent is that no one, however apparently guilty, should be convicted except in conformity with the strictest rules of law. When, therefore, it is asked what degree of probability will authorize a jury to convict, I would answer, that they cannot demand such absolute certainty as will exclude every possible doubt, and negative every possible theory, but they should have arrived at such a degree of moral certainty as will warrant them, in the interests of justice, in taking the risk of being mistaken. That risk, under our system of law, I believe to be quite infinitesimal. No innocent man who is fairly and properly tried can be convicted, except under a combination of adverse circumstances against which no precautions can guard.

6. Mens rea.—It is an almost unmemorial commonplace of English judges to state that there can be no conviction on a criminal charge, unless the prisoner has a *mens rea*, or guilty mind. The maxim which lays down this doctrine (*actus non facit reum nisi mens sit rea. Non est reus nisi mens sit rea*) has been traced by Sir James Stephen backwards through Lord Coke to the laws of Henry I. (2 Steph. Crim. L., 94, n.) Its meaning was discussed with great elaboration in two English cases, (*R. v. Prince*, L. R., 2 C. C., 154; and *R. v. Tolson*, 23 Q. B. D., 168), where the judges differed completely as to its application. In the last case, Stephen, J., with characteristic independence, expressed an opinion that

the maxim itself was not of much practical value, and was not only likely to mislead, but was absolutely misleading, and in this opinion, *Manisty, J.*, who agreed with him in nothing else, most heartily concurred. When the maxim originated, criminal law practically dealt with common law offences, none of which were defined. The law gave them certain names, such as treason, murder, burglary, larceny, or rape, and left any person who was interested in the matter to find out for himself what these terms meant. To do this he had to resort to the explanations of text-writers and the decisions of judges. There he found that the crime consisted, not merely in doing a particular act, such as killing a man, or carrying away his purse, but in doing the act with a particular knowledge or purpose. The super-added mental state was generalized by the term *mens rea*, and the assertion that no one was a criminal unless he had the *mens rea*, really came only to this, that nothing amounted to a crime which did not include all its necessary ingredients. (2 Steph. Crim. L., 95); *Cundy v. Le Cocq*, 13 Q. B. D., 207; *R. v. Tolson*, 23 Q. B. D., 168 at p. 187; *Bank of N. S. Wales v. Piper* [1897], A. C., 383. Of course the mental state which had to be established to make out a crime varied with the crime itself. The maxim that every criminal must have a *mens rea* was generally true, but was always valueless. The real question was, whether in each case the accused had the particular *mens rea* which proved him a criminal.

Under the Penal Code such a maxim is wholly out of place. Every offence is defined, and the definition states not only what the accused must have done, but the state of his mind with regard to the act when he was doing it. It must have been done knowingly, voluntarily, fraudulently, dishonestly, or the like. And when it is stated that the act must be done with a particular knowledge or intention, the definition goes on to state what he must have known, or what he must have intended. These elements of the crime will be discussed fully hereafter in reference to the special offences of which they form part. It may, however, be material to make some remarks here in regard to intention, motive and knowledge.

7. Intention.—When a man is charged with an offence, he frequently says that he did not intend to commit it, and apparently supposes that the answer, if believed, would be complete. Does he mean that, in doing the act charged against him, he did not intend to commit a crime: or does he mean that he did not intend to do the act which the law declares to be a crime? In the latter case the plea would generally be a good one. In the former case it would always be bad. It would only mean that he had formed a wrong opinion as to the legal aspect of his conduct, or as to the consequences to himself that might flow from it (*See 2 Steph. Crim. L.*, 113) e.g. a man is charged with killing a person by firing a gun at him. He says that he did not intend to kill him. If he means that the gun went off by accident, this is a good defence independent of § 80 of the Penal Code, as it shows that he never fired the gun. If he means that he fired at the man to frighten him, and did not believe the gun would carry so far, this, if a reasonable belief, would negative the criminal intention necessary under § 299, but would be no answer to a charge under § 304A, which involves no intention to injure. If he means that he fired at him, mistaking him for another person whom he had no right to kill, this is no defence whatever, as it is merely a description of the offence defined by § 301. If he means that he fired at him in his house at night, honestly believing him to be a burglar, this would be a good defence under § 79, as it shows that he has committed no offence. If he means that he fired at him, intending to wound, but not intending to kill him, this again would be no defence, if the natural result of hitting the man would be to kill him (§ 299). To say that he intended to do a particular act, but did not intend that the ordinary consequences should follow from it, is merely to say that he expected that the laws of nature would be suspended in the particular instance for his convenience. It is a "universal principle that when a man is charged with doing an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act"—*See R. v. Dixon* [1814], 3 M. & S., 11 per Lord Ellenborough, C. J., at p. 15; *R. v. Hicklin*,

L. R., 3 Q. B., 360 at p. 375; *Miles v. Hutchings* [1903], 2 K. B., 714 and cf *R v. Meade* [1909], 1 K. B., 895 (see Ch XIV *infra*)

8. **Motive.**—Intention must not be confounded with motive. Intention shows the nature of the act which the man believes he is doing. If he fires at a tiger, and the ball glances off and kills a man, he intends to kill the tiger, he neither intends to kill the man nor to do any act which could have that result. Motive is the reason which induces him to do the act which he intends to do and does. If his act is absolutely legal, the motive which leads him to do it cannot make it illegal. If a man sinks a well in his own land, or sets up a shop next door to one of the same sort, or carries goods at an unremunerative rate, his act does not become unlawful because his motive is to drain the current of water which supplies his neighbour's well, or to undersell and ruin a competitor. *Bradford v Pickles* [1894], 3 Ch. 53 at p. 68; *affd.* [1895], A. C., 587; *Mogul Steamship Co. v. McGregor* [1892], A. C., 25; *Ajello v. Worsley* [1898], 1 Ch., 274; *Allen v Flood* [1898], A. C., 1; *Hubbuck v. Wilkinson* [1899], 1 Q. B. D., 86, see per *Mellor, J.* *Daukins v. Ld. Paulet*, L. R., 5 Q. B., 94 at p. 111. An executioner who sought the office for the purpose of gratifying his spite by hanging his enemy, would still be doing a perfectly legal act, if he hung him in a proper way. If the act intended is absolutely illegal it cannot become lawful by being done for an excellent motive. A man who steals the goods or takes the life of another in order to save himself from starving, is not the less committing a criminal offence (see Ch. III *infra*). A man who libels another from the loftiest motives is just as criminal as if he had done so for spite. *Per Ld. Coleridge, C. J.*, in *Bouen v. Hall* (6 Q. B. D., 333 at p. 343; *Capital and Counties Bank v. Henty*, per *Blackburn, J.*, 7 A. C., 741 at p. 777.) On the other hand, motive is sometimes important as evidencing a state of mind, which is a material element in the offence charged, per Lord Watson, in *King v. Henderson* [1898], A. C., 720 at p. 732. If a person kills another under the pretext of self-defence, it is essential to consider

whether his real motive was to save his own life, or to take a cruel revenge upon a man whom he found in his power (see Ch III *infra*.) If provocation is set up as an extenuation of what would otherwise be murder, the motive under which the act was done is material, as bearing upon the question whether the provocation had deprived the prisoner of self-control (see Ch. IX *infra*.) So the motive which induces a man to take goods which belong to another will be very material, as showing that he believed the goods were his own, or that he had the owner's consent to taking them. It will be utterly immaterial if it only shows that he took them to prevent the owner making what he considers an improper use of his own property (see Ch XI *infra*.)

9. Knowledge.—Where knowledge of a particular fact is an essential element in an offence, as, for instance, under § 497 of the Penal Code, it must necessarily be proved. So, also, where a fraudulent or dishonest intent is an ingredient, there must be a knowledge of the facts which make the act a fraudulent one. Hence there can be no theft where the property is taken under a *bona fide*, though mistaken, claim of right (see Ch XI *infra*.) Probably some such knowledge is always required in regard to all crimes properly so called, that is, acts which cannot be done without a sense that it is wrong to do them. There is, however, a large and growing class of statutory offences, where acts previously innocent are forbidden, or acts previously optional are commanded, simply because the State considers such legislation necessary for its own interests, or for the protection of some particular class of the community. Here the object of the State is merely to compel the adoption of a particular line of conduct, and the penalties that are imposed are intended, not for punishment, but for prevention, as the only means which the State has at its disposal for the enforcement of its laws. Now, in regard to such cases, questions have frequently arisen, whether a person is punishable under the statute, when he has violated its provisions in ignorance of the fact on which the violation depends. In some cases of this sort, the judges, influenced by the *mens rea* doctrine, have sought to solve the

question by inquiring whether the proceeding was really a criminal proceeding or not. *Atty-Gen v. Siddon*, 1 Cr. & J., 220; see *Cooper v. Simmons*, 31 L. J. M. C., 138, per *Martin, B.*, p. 144. It is now, however, settled that the true test is, "to look at the object of each Act that is under consideration, to see how far knowledge is of the essence of the offence created." Per *Stephen, J.*, *Cundy v. Le Cocq*, 13 Q. B. D., 207; *Bank of N. S. Wales v. Piper* [1897], A. C., 383. In arriving at this decision, it has been held material to inquire (a) Whether the object of the statute would be frustrated, if proof of such knowledge was necessary (b) Whether there is anything in the wording of the particular section which implies knowledge (c) Whether there is anything in other sections showing that knowledge is an element in the offence, which is omitted or referred to in the section under discussion

Hence, upon the first of these grounds, it was held that knowledge was immaterial, where a statute imposed a penalty on any one who shall represent any dramatic production without the consent of the author, *Lee v. Simpson*, 3 C. B., 871=16 L. J. C. P., 105=4 D. & L., 66=11 Jur. 127, or where the acts forbidden were "selling to the prejudice of the purchaser any article of food or drug, which is not of the nature, substance, or quality of the article demanded by such purchaser," *Betts v. Armistead*, 20 Q. B. D., 771, or "having in his possession and intended for food, meat which was unsound and unfit for man," *Blaker v. Tillstone* [1894], 1 Q. B., 345. So, where a statute provided that "It shall not be lawful for any person to receive two or more lunatics into any house, unless such house shall have been registered under this Act," a conviction was supported, where it appeared that several persons had been received into an unregistered house, who were in fact lunatics, but whom the defendant, honestly and on reasonable grounds, believed not to be lunatics, *R. v. Bishop*, 5 Q. B. D., 259; see cases cited by *Wright, J.*, in *Sherras v. De Rutzen* [1895], 1 Q. B., 918 at p. 922. So where an Act prohibited the removal of salt in contravention of a license, knowledge on the

part of the accused was held to be immaterial, 28 B., 346 following *Emery v. Nolloth* [1903], 2 K. B., 264.

As instances of the second ground, it has been held, that where a penalty is imposed upon any one who "allows," or "permits" or, "suffers" a prohibited act to be done, this implies knowledge of the nature of the act, *Massey v. Morris* [1894], 2 Q. B., 412; *Somerset v. Wade* [1894], 1 Q. B., 574. So it was held that a person could only be convicted of "unlawfully killing pigeons" when he knew the facts which made it unlawful to kill them, *Taylor v. Newman*, 4 B. & S., 69 = 32 L. J. M. C., 186 = 9 Cox, 314 = 8 L. T., 424 = 11 W. R., 752. The words "knowingly and wilfully" merely mean that a man did the act, being quite aware what he was about, and what consequences would follow from it, *Daniel v. Janes*, 2 C. P. D., 351. A statute which provides that everyone who sends dangerous goods by railway shall distinctly mark their quality outside, assumes the knowledge which would enable such a description to be given. Therefore it was held that a person could not be convicted who had merely forwarded goods received from their owner with an untrue description upon them, and who had used proper precautions to find out their true character, *Hearne v. Garton*, 2 E. & E., 66 = 28 L. J. M. C., 16 = 33 L. T., 256 = 5 Jur. N. S., 648.

As illustrating the third ground a statute passed for the protection of Government stores, made criminal by § 1 the concealing, and by § 2 the possession, of stores marked with the broad arrow. The defendant was charged under § 2 with the possession of such stores, which were found on his premises in casks which he had lately received, and which had not been opened. There was no evidence that he knew of their contents. It was held that he could not be convicted. Hill, J., said. "The possession in the second section is put in precisely the same category with the concealing, which is a positive act done by the individual, in order to constitute the crime." He also considered that any other construction would reduce the statute to an absurdity, *R. v. Cohen*, 8 Cox, 41; Followed *R. v. Sleep*, L. & C., 44;

=8 Cox, 472. On the other hand, where a person was charged under § 13 of the Licensing Act, with "selling intoxicating liquor to a drunken person," and it was proved that the person was in fact drunk, but did not appear to be so, and was not believed to be drunk by the person who served him, the conviction was upheld. *Stephen, J.*, relied upon the presence of the word "knowingly" in other sections, and its absence in § 13, and also on the general policy of the Act, to put upon the publican the responsibility of determining whether his customer is sober, *Cundy v Le Cocq*, 13 Q. B. D., 207. See *Brooks v Mason* [1902], 2 K. B., 743, where the word "knowingly" in the beginning of a section was held not to apply to an exception in the end of the same section. In two later cases, where the circumstances were very similar, a different conclusion was arrived at. In one *Sheras v De Rutzen* [1895], 1 Q. B., 918, the defendant was convicted under § 16 (2) of the *Licensing Act* for having unlawfully supplied liquor to a constable while on duty. He had presented himself without his armlet on, and had been served with liquor without enquiry, but under the *bona fide* belief that, as he had no armlet on, he was not on duty. The conviction was set aside. In this case the sub-section (2) on which he was convicted did not contain the word 'knowingly' which was found in the previous sub-section. *Day, J.*, said. "In my opinion the only effect of this is to shift the burden of proof. In cases under sub-section (1) it is for the prosecution to prove the knowledge, while in cases under sub-section (2) the defendant has to prove that he did not know." *Wright, J.*, said: "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals, and both must be considered." "The principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of *Lush, J.*, in *Darics v. Harrey*, L. R., 9 Q. B., 433, are not criminal in any real sense, but are acts

which, in the public interest, are prohibited under a penalty." "Another comprehends some and perhaps all public nuisances." "Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right." "But, except in such cases as these, there must in general be a guilty knowledge on the part of the defendant, or of someone whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence." So it was held that a person could not be convicted under § 27 of the *Sale of Food and Drugs Act*, 1875 (38 & 39 Vict., c. 63), for giving a false warranty as to food, when he did not know and had no reason to believe that the warranty was false, *Derbyshire v Houlston* [1897], 1 Q. B., 772; see 14 M., 342; *R. v. Pearson*, No. 2 [1898] 72 J. P., 451; *R. v. Key*, [1909] 52 Sol. Jo., 784. These questions will generally arise upon special and local Acts. There are, however, a few sections of the Penal Code in which the prohibition to do an act appears to be absolute, irrespective of the knowledge of the offender as to the facts which make it unlawful (See §§ 137, 188, 226, 292, 293, 340 to 344, 13 B., 376.) It must be remembered also that, where ignorance is a defence, the proof rests on the person alleging it. (Ev Act, § 106.) In many cases, as in the *Merchandise Marks Act* IV of 1889, §§ 6, 7, 8, or the *Madras Forest Act* V of 1882, § 56, the onus of proving certain facts is expressly thrown upon the prisoner.

10 Liability of Master for acts of Servant.—It is a general rule of criminal law that a master is not responsible for the unauthorised acts of his servants. *Per Pollock, B., Budd v. Lucas* [1891], 1 Q. B. 408 at p. 412; *per Blackburn, J., R v Stephens*, L. R., 1 Q. B., at p. 710, 6 A. L. J., 1324. Where, as in most serious crimes, the charge involves proof of a certain state of mind in the person accused (*ante* ¶¶ 6, 7), it is evident that this cannot be supplied by proof of its existence in the mind of any other person, unless that person was acting in concert with, or under the orders, or at the instigation of, the accused. In an old case, *R. v. Huggins*,

2 Ld. Raymond [1574], at p. 1580, Barnes and Huggins were indicted for the murder of a prisoner in the Fleet Prison by placing and keeping him in an unwholesome room. The acts were done by Barnes, the deputy warden of the Fleet. Huggins, the warden, was once present, and saw the deceased in the room, and turned away. Barnes was held by all the judges to be guilty, and Huggins not. They said.

"Though he was warden, yet, it being found that there was a deputy, he is not, as warden, guilty of the facts committed under the authority of the deputy. He shall answer as superior for his deputy civilly but not criminally. It has been settled that, though a sheriff must answer for the offences of his gaolers civilly, i.e. he is subject to make satisfaction to the party injured, yet he is not to answer criminally for the offences of his under sheriff. He only is criminally punishable who immediately does the act or permits it to be done. So that if an act is done by an under officer, unless it is done by the command, or direction, or with the consent of the principal, the principal is not criminally punishable for it."

As regards the liability of a master for his servant at civil law, "the general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit though no express command or privity of the master be shown." *per Willes, J., Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259, p. 265. And provided it was done in the course of his employment it makes no difference that the act of the servant was not only a civil wrong but a criminal offence—*Dyer v. Munday* [1895], 1 Q. B., 742; *Boyle v. Smith* [1906] 1 K. B., 432. If the servant acts for his own personal benefit, the master would not be liable.—*Anglo-American Oil Co., Ltd. v. Manning* [1908] 1 K. B., 536. In order to make a master criminally liable, it is necessary to go further, and to show that the injury resulting from the act of the servant can be traced to some personal misconduct or criminal negligence of the master, e.g., a master who puts a servant whom he knows to be incompetent to manage an animal, or a machine, or to discharge any other duty, upon which the safety of others depends, is criminally responsible for the result, as it is one which

he ought to have known would probably follow.—*R. v. Lowe*, 3 C. & K. 123; *R v Spence*, 1 Cox, 352. Where a baker was indicted for supplying unwholesome bread, and it appeared that it was made by his foreman, who used alum to the knowledge of his master, the latter was held to be properly convicted *Bayley, J.*, said: "If a person employed a servant to use alum or any other ingredient, the unrestrained use of which was noxious, and did not restrain him in the use of it, such a person would be answerable if the servant used it to excess, because he did not apply the proper precautions against its misuse." *R v. Dixon*, 3 M. & S. 11, p. 14. So, where a person fraudulently kept smuggled tobacco, and his manager, upon a search being made on the premises, produced a permit which related to other tobacco, the master was held liable for the wrongful use of the permit. The ground of the decision appears to have been that the master by employing his servant to commit one fraud on the revenue, authorized him to commit any other fraud that might be required to conceal it.—*Atty.-Gen. v Siddon* 1 Cr. & J., 220, 24 B., 423=2 Bom. L. R., 52; 26 B. 609 at 614; 31 B. 611 at 627-28. But if the servant does something outside the scope of his employment the master would not be liable criminally, 34 A. 146. Where, however, a master employs a proper person to do a proper act, he is not criminally responsible if the precautions which he had reason to suppose would be taken are neglected *R. v. Allen*, 7 C. & P. 153; *Dickenson v Fletcher*, L. R. 9 C. P., 1 43 L. J. M. C. 25=29 L. T. 540.

11. Liability for failure to discharge statutory obligations, even when guilty intention or knowledge is absent.—In many cases the law imposes upon the owner of property the obligation of managing it, so that it shall not injuriously affect any one else or the public, or requires or forbids the dealing with it in some particular way. In such cases, where the breach of obligation is punishable criminally, the owner cannot free himself from liability by delegating the management to someone else on his behalf. This, no doubt, was the principle on which it was held that the proprietor of a newspaper could be

indicted for a libel published in it, though he was living at a distance, and knew nothing about the libel till he read it in the paper. *R. v. Gutch, Moo. & M., 433*; this has since been altered in England by 6 & 7 Vict. c. 96, § 7. The test to be applied in each case is, whether on a true construction of the Statute, the master is intended to be made criminally responsible for acts done by servants in violation of the Statute and in the ordinary course of their employment. *Coppen v. Moore* [1898] 2 Q. B. 306, 9 C. 849; 9 Bom. L. R. 967=6 Cr. L. J. 240. The same rule exists in regard to public nuisances. The defendant, who was the owner of a quaiy, was indicted for a nuisance caused by the refuse being discharged into a river. It appeared that he was, through age, unable to superintend the works, which were carried on by a manager, and that he and his sons had repeatedly told the workmen to put the rubbish where it could cause no harm. At the trial, *Blackburn, J.*, told the jury that such evidence was immaterial if the nuisance was in fact caused as alleged. This direction and the consequent conviction were sustained by the Court of Crown Cases Reserved, on the ground that the proceeding was not of a strictly criminal nature. *Blackburn, J.*, said.—

“I only wish to guard myself against it being supposed that either at the trial or now, the general rule, that a principal is not criminally answerable for the acts of his agent, is infringed. All that it is necessary to say is that where a person maintains works by his capital, and employs servants, and so carries on the works as in fact to cause a nuisance to a private right, for which an action would lie; if the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment, the evidence which would maintain the action would also support the indictment.” *R. v. Stephens*, L. R. 1 Q B, 702; *R. v. Medley*, 6 C. & P. 292. See as to the employment of Contractors, *Hardaker v. Idle* [1896], 1 Q B, 335; *Holliday v. National Telephone Co.*, [1893] 1 Q B, 221, 2 Q B, 392.

Prima facie a general authority to an agent to conduct a lawful business must be taken to mean an authority to conduct it according to law.—*Thwaites v. Coulthwaite* [1896], 1 Ch., 496. The presumption may of course be negatived by showing that the principal had appointed an agent whom he knew to be likely to act in an unlaw-

he ought to have known would probably follow.—*R. v. Loece*, 3 C. & K. 123; *R. v. Spence*, 1 Cox, 352. Where a baker was indicted for supplying unwholesome bread, and it appeared that it was made by his foreman, who used alum to the knowledge of his master, the latter was held to be properly convicted. *Bayley, J.*, said: "If a person employed a servant to use alum or any other ingredient, the unrestrained use of which was noxious, and did not restrain him in the use of it, such a person would be answerable if the servant used it to excess, because he did not apply the proper precautions against its misuse." *R. v. Dixon*, 3 M. & S. 11, p. 14. So, where a person fraudulently kept smuggled tobacco, and his manager, upon a search being made on the premises, produced a permit which related to other tobacco, the master was held liable for the wrongful use of the permit. The ground of the decision appears to have been that the master by employing his servant to commit one fraud on the revenue, authorized him to commit any other fraud that might be required to conceal it.—*Atty.-Gen. v. Siddon* 1 Cr. & J., 220, 24 B., 423=2 Bom. L. R., 52; 26 B. 609 at 614; 31 B. 611 at 627-28. But if the servant does something outside the scope of his employment the master would not be liable criminally, 34 A. 146. Where, however, a master employs a proper person to do a proper act, he is not criminally responsible if the precautions which he had reason to suppose would be taken are neglected. *R. v. Allen*, 7 C. & P. 153; *Dickenson v. Fletcher*, L. R. 9 C. P., 1 43 L. J. M. C. 25=29 L. T. 540.

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ful manner, or that he had continued to employ him after he had so acted, or that the business was in fact conducted in an unlawful manner for the benefit of the employer, in a way which justified an inference that the latter knew of or connived at it — *R. v. Holbrook*, 4 Q. B. D., 42 p. 62=48 L. J. Q. B. 113=39 L. T. 536=27 W. R. 313; *Massey v. Morris*, [1894] 2 Q. B. 412; *Atty.-Gen v. Siddon*, 1 Cr. & J., 220=1 Tyr. 41. In the absence of such special circumstances, an employer is not in general answerable criminally for the acts of his servant. There are, however, cases in which a statute expressly orders or forbids the doing of a particular act, and imposes a penalty for disobedience. The great majority of such statutes relate to the mode in which a particular business is to be conducted. In construing such statutes, the liability of an employer for the act of his agent depends upon exactly the same considerations as those already discussed, in regard to the liability of a man in respect of matters of whose existence he was ignorant (*ante* ¶ 9). Assuming that the employer was not aware that the agent was doing, or likely to do, the act complained of, it is evident that the same question of knowledge arises in a slightly different form. Accordingly, in an English statute which provided that "if the carrier have any pheasant in his possession he shall be convicted," and where the possession was that of one of his servants, it was held unnecessary to aver or prove that he had it in his possession "*knowingly*" *Abbot, C. J.*, said. —

The statute has no such word. If it were necessary to aver that the defendant had actual knowledge, it would cast on the prosecutor a burthen of proof which could not be easily satisfied, particularly as the carriers themselves, usually residing in one place, cannot have any actual knowledge of that which may be done by their servants in the course of a long journey. I am of opinion that it is not a sufficient defence for a carrier in any case of the description, to show that he did not know that the participant be a good defence servant for his own fraud of his master.

H. v. Mars, 2 B. & C., 717; *Collman v. Mills* [1896], 1 Q. B. 1396. *Spicer and A'Court v. Bennet* [1896] 2 Q. B., 63

In 38 C. 415=15 C. W. N. 390=13 C. L. J. 335=12 Cr. L. J. 89=9 Ind. Cas. 480, a servant drove a motor car at excessive speed contrary to rule 4 under Bengal Act III of 1903 which was to the effect "No person shall drive or have charge of or cause or permit to be used any motor-car contrary to rule 20." The master had given strict orders to the chauffeur not to drive contrary to rules and was not himself present when the rule was violated, but all the same he was held liable for the act of his servant whom he permitted to drive his car. On the other hand, where the Merchant Shipping Act subjected to a penalty, "Any owner or master who allows the ship to be loaded so as to submerge it below a particular line," the owner was held not to be liable for the act of the master done without his knowledge and assent. *Massey v Morris* [1894], 2 Q. B., 412. Here the word "allow" implied an exercise of personal discretion, and the words "or master" showed that the statute contemplated a case where the master might allow the forbidden act, though the owner did not. The same question has frequently arisen upon the *Licensing Acts* by which the management of public-houses is controlled. The principle of these Acts was stated by *Cave, J.*, in the last-named case, as follows —

Licenses to keep ale-houses are only granted to persons of good personal character; and it is obvious that the object of so restricting the grant of licenses would be defeated if the licensed person could, by delegating the control and management of the house to another person who was altogether unfit to keep it, free himself from responsibility for the manner in which the house was conducted.

Accordingly, where an Act imposed a penalty on any licensed person who "supplies any liquor to a constable on duty without authority from his superior officer," the defendant, who was a licensed person, was convicted on proof that his servant had supplied liquor in violation of the clause. *Archibald, J.*, relied on the absence of the word "knowingly," which was contained in the previous clause; *Blackburn and Quain, JJ.*, on the principle that otherwise the Act would be rendered futile.—*Mullins v.*

Collins, L. R. 9 Q. B., 292; *Commissioners of Police v. Cartman* [1896], 1 Q. B., 655; *Coppen v. Moore* [1898], 2 Q. B., 306. The words "suffer" or "permit" are construed as implying personal knowledge. In reference to clauses containing such words, it has been held that where the householder is present, exercising personal control over the premises, he is not liable for acts which take place without his knowledge or connivance, even though they are known to a servant, upon whom no duty is cast in consequence of such knowledge. *Emery v. Nollath* [1903] 2 K. B., 264. If, however, he places another person in complete charge of the premises, or any part of them, then he substitutes that person for himself, he accepts liability for his acts, and the knowledge of that person is his knowledge, and he is responsible as if he had suffered or permitted whatever his delegate suffers or permits. Accordingly, it was held that the landlord, who was busily engaged in another part of the house, could not be convicted for "suffering gaming on licensed premises" when it took place without his knowledge in another room, although a waiter occasionally entered the room to supply drink to the persons who were gaming -- *Somerset v. Hart*, 12 Q.B.D., 360. On the other hand, where the gambling took place in a skittle alley attached to the premises, which was placed in entire charge of a servant who managed it and attended upon those who frequented it, and the gambling took place with his knowledge and assent, the landlord was held liable, though he did not know of it, and had instructed the manager to prevent it -- *Bond v. Evans* 21 Q.B.D., 249; following *Redgate v. Haynes* 1 Q.B.D. 89, where the landlord went to bed leaving the hall-porter in charge.

A corporation aggregate can only act through its servants or agents and it is only through the acts and defaults of such persons that it can be made criminally liable. A corporation aggregate may be made liable in its corporate capacity for a crime, for the punishment of which a fine may be awarded, if the corporation fails to perform a duty imposed by Common Law, Charter or Statute, or commits by its servants or agents, acting in the course

of their employment, an offence which does not involve criminal intent—*Halsbury IX* § 503, *p* 235.

Sections 154 and 155 of the Penal Code impose a penalty upon the owner of land in certain cases where a breach of duty is committed by his agent or manager. In these cases the owner or occupier of the land may be convicted, though he may be in entire ignorance of the acts or intentions of his agent or manager. 28 C. 504.

CHAPTER II.

**THE APPLICABILITY OF THE CODE TO
OFFENCES WITHIN AND BEYOND
BRITISH INDIA.**

- A. To offences within British India. * 12.
- B. To offences outside British India. * 13—29.
 - (i) to offences committed within Territorial Waters. * 14—16.
 - (ii) to offences committed in Cantonments and Civil Stations situated in and Railways running through Native States. * 17—19.
 - (iii) to offences committed in Native States * 20—22.
 - (iv) to offences committed in Independent Foreign States. * 23—24.
 - (v) to offences on the High Seas. * 25—29.
- C. Extradition. * 30—33.

A—To offences within British India.

12. Application of Penal Code to British India.—So far as India and the persons resident therein are concerned, the primary intention of the Legislature is to substitute the Code for the criminal law which previously existed. That law, however, is not repealed, except by implication, and in cases to which the provisions of this Code apply. The frame of these clauses is thus explained by the Commissioners in their Second Report, 1847, §§ 536—538.

"We do not advise the general repeal of the Penal laws now existing in the territories for which we have recommended the enactment of the Code. We think it will be more expedient to provide only that no man shall be tried or punished (except by a Court-Martial) for any acts which constitute any offence defined in the Code, otherwise than according to its provisions. It is possible that a few actions which are punishable by some existing law, and which the Legislature would not desire to exempt, may have been omitted from the Code. And, in addition to this consideration, it appears to us that actions which have been made penal on special temporary grounds, ought not to be included in a general Penal Code intended to take its place amongst the permanent institutions of the country."

The object is c
 within the term
 Every person of
 India is subject to the Code—*De Jager v. Att.-Gen. of Natal*, [1907] A. C. 326 at 328; 25 A. 31. Protection and allegiance are co-extensive—*R v Lopez* D. & B. 525 = 7 Cox, 431 = 27 L. J. M. C., 48 = 4 Jur. N. S., 98. *R. v. Anderson*, L. R. 1. C. C. R. 161; *R. v Esop*, 7 C. & P. 456; 2 M. H. C. R. 444. The only exception to the universality of the Code, as regards places in British India, is that introduced by the *Scheduled Districts Act*, XIV of 1874. As regards persons, there are certain Statutory exceptions in favour of the Governor-General, Presidency Governors, etc., for which see Chapter III. Other well-known exceptions recognised by International Law, such as, the sovereign, foreign sovereigns, ambassadors and their suite, public ships, alien enemies, foreign armies, etc., are not of sufficient practical importance to be dealt with here. Formerly an abetment in British India of an offence outside, was not punishable under the code. 7 B. H. C. R. Cr. Ca. 89 at 118; 19 B. 105. But gradually exceptions were introduced until finally by § 108-A, it was made of general application to abetment of all offences. But a foreigner who by acts done out of British India, abets the Commission of an offence in British India is not liable to be punished under this Code by British Indian Courts, 10 B. H. C. R., 356, even if he afterwards be in British India, 1878, P. R. (Cr). 20.

B—To offences outside British India.

13. Nature of extra-territorial application.—With regard to offences committed beyond those territories, the Code is less clear. S. 3 enacts that where a person might, by virtue of any Act of the Imperial Legislative Council, be tried in British India for an offence committed out of British India, he is to be dealt with according to this Code. S. 4 contains a similar provision as to Native Indian subjects of His Majesty who commit offences in any place without and beyond British India and as to British subjects, and servants of the King, (whether British subjects or not), who commit offences within the dominions of any Native Prince or Chief

in India. But neither of these sections covers an equally important class of cases, that, namely, of persons who are not servants of the King, and who are triable in British India, not by virtue of any Act of the Viceroy's Legislative Council, but under Acts of Parliament. These will be governed by the law contemplated by the Act of Parliament which gives jurisdiction over them in India.

Further it must be remembered that the Indian courts are essentially courts of local jurisdiction, and have no power to try any person for a crime committed out of India, unless it be by some special provision authorizing them to do so. When such a crime has been committed, and the offender is within Indian jurisdiction, it is necessary to enquire (a) what courts can take cognizance of the offence, (b) what persons are triable by those courts; and (c) what law is to be applied to ascertain the offence, and to determine its penalty. Where it is doubtful whether the offence is committed in British or Foreign territory, the question of jurisdiction cannot be fully determined unless the Magistrate proceeds with the investigation and states what in his opinion is proved by the evidence **9 W. R. (Cr.) 29**. Again, different considerations apply according as the offence has been committed on land or on sea. As regards offences committed by servants of the King and by European British subjects within the allied Native States, and by native Indian subjects anywhere, the Code applies. (§ 41 P. C. and § 188 Cr. P. C.) The same rule would apply to all offences committed on board a ship which could properly be considered as being, at the time the offence was committed, within the limits of an Indian district, by reason of its being within a port, harbour, river-mouth or a land locked bay. **Perry's Orient Ca. 577; 11 Bom. L.R. 211**. (See * 27) It will be observed that the stat 12 & 13 Vict. c. 96, § 1 and the *Merchant Shipping Act 1894*, §§ 636, 687, all assume that the Indian courts would have jurisdiction, apart from those statutes, over offences committed on a ship which was lying in the inland waters of British India. Such jurisdiction would, of course, be exercised according to the law of the country in which the ship was.

found (see * 15). The only difficulty arises in regard to offences cognizable by virtue of the Admiralty jurisdiction extended by statute, or by the special provisions contained in the series of *Merchant Shipping Acts*. This question requires to be examined with some closeness, as the decision in **14 E. 227** has cut the knot in a manner which seems to be more summary than satisfactory.

(1) *Offences committed within Territorial Waters*

14 Exact nature of the jurisdiction over the Territorial Waters.—Although no English country, and therefore no Indian district, extends on the seashore beyond low-water mark, a usage has sprung up in modern times of attributing for some purposes a quasi-territorial jurisdiction to every nation over the waters bordering on its coast, to a distance which is now generally spoken of as extending to a cannon shot, or one maritime league from the shore. A well-known international recognition of this doctrine is the rule which prohibits acts of hostility to be carried on by one belligerent against another within three miles from a neutral shore, and which requires that prizes captured within that distance should be given up. The origin, extent, and application of this marine jurisdiction were discussed exhaustively, especially by *Cockburn, C. J.*, in the great case of *R. v. Keyn*, **2 Ex. D., 63**. There *The Franconia*, a German vessel, was fired upon by a British gunboat, and three persons were killed and three wounded. The offence was caused by the firing of a shot under the circumstances amounting to manslaughter. The captain of *The Franconia*, a German, was tried for the offence under the Admiralty jurisdiction in the Central Criminal Court, and was convicted by the jury, the question of jurisdiction being reserved. The case was twice argued; on the second time before fourteen judges, of whom eight held that the conviction was bad, and six that it was good. The minority considered that within three miles from shore the sea was actually English territory, over which the Admiralty jurisdiction extended to foreigners as well as British subjects. The majority held that the comity of

nations recognized certain undefined rights over such portion of the sea. That those rights did not amount to absolute ownership, so as to give the courts of the country jurisdiction, *de jure et de facto*, over foreigners for breaches of English law, but that they did authorize legislation which might create such a jurisdiction, if Parliament thought fit. The result of this decision was the passing of *The Territorial Waters Jurisdiction Act, 1878* (41 & 42 Vict., c. 73).

It provides by § 2 that "an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board, or by means of, a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly."

Proceedings in India for the trial of any person who is not a subject of His Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in India except with the leave of the Governor-General or Governor of any presidency, and on his certificate that it is expedient that such proceedings should be instituted (§ 3).

The jurisdiction of the Admiral in the above sections includes all Admiralty jurisdiction described as such in any Act of Parliament referring to India. And for the purpose of arresting a person charged with an offence triable under this Act, the territorial waters adjacent to any part of India are to be deemed within the jurisdiction of any judge, magistrate, or other officer who is authorized to issue warrants for arresting, or to arrest persons charged with committing offences within his jurisdiction (§ 7).

For the purposes of this Act, the open sea within the territorial waters of His Majesty's dominions is to include any part of the open sea within one marine league of the coast measured from low-water mark. But the offences triable by virtue of this Act are limited to acts, neglects, or defaults such as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force (§ 7).

It was suggested by Holloway, J., in *R. v. Irvine*, 1st Mad. Sess., 1867, that the Penal Code operated to the distance of three miles under § 1, which directs that it should extend throughout the whole of the territories

vested in His Majesty. This view was based on the principle loosely laid down in books on International Law, that territorial jurisdiction extended so far. Since the discussion in *R v Keyn* a distinction must be drawn between territorial jurisdiction and jurisdiction over territory. Jurisdiction under a local statute does not operate three miles from shore on the ground that the territory of the State extends so far, but every State has, for its own protection, a right to pass laws for certain purposes which will be recognized by other nations, and of course acted on by its own tribunals. See 2 Ex. D. 63 at pp. 90, 138 & 208. *Cockburn, C J*, says at p. 206:

"Then how stands the matter as to usage? When the matter is looked into, the only usage found to exist is such as is connected with navigation, or with revenue, local fisheries, or neutrality, and it is to these alone that the usage relied on is confined. Usage, as to the application of the general law of the local State to foreigners on the littoral sea, there is actually none. No nation has arrogated to itself the right of excluding foreign vessels from the use of its external littoral waters for the purpose of navigation, or has assumed the power of making foreigners in foreign ships passing through these waters subject to its law, otherwise than in respect of the matters to which I have just referred. Nor have the tribunals of any nation held foreigners in these waters amenable generally to the local criminal law in respect of offences. It is for the first time in the annals of jurisprudence that a court of justice is now called upon to apply the criminal law of the country to such a case as the present."

There is no doubt that the Legislatures of India or the colonies have, within the limits imposed upon them at their creation, the power to bind persons domiciled within their jurisdiction up to three miles, and even foreigners to the extent recognized by International Law. In *Rolet v. The Queen*, L. R., 1 P. C., 198, the Judicial Committee held that the customs ordinances of *Sierra Leone* bound foreigners on a foreign ship within the territorial waters. In 1851, Sir J. Harding, the Queen's advocate, advised that foreigners might lawfully be prevented from whale and seal fishing within three miles of *The Falkland Islands*. In 1853, the same officer, and Sir A. Cockburn and Sir R. Bethell, Attorney and Solicitor-General, advised similarly as to the validity of the legislation of *British Antigua*. For-

syth, 24. Where express legislation created, or applied to offences within the territorial waters, I suppose no reference to the Governor-General or Governor would be necessary under *The Territorial Waters Jurisdiction Act*. It would certainly be necessary, if it was desired to punish a foreigner on a foreign ship for anything contrary to the Penal Code. If an Englishman in an English ship lay within these waters, he would be punishable for any offences committed on that ship under the Acts already discussed, and could only be punished by English Law. Suppose, for instance, that an English vessel on its way from Liverpool to Calcutta lay a mile off the shore at *Bimlipatam* to discharge cargo, and that a passenger on board then and there committed an act of adultery; I imagine it would hardly be contended that he could be tried for it in India. But it might be very different if the offender was a person who, being domiciled or resident in India, and thereby personally subject to the Penal Code, went from shore to the vessel, committed the act there, and then returned. In **8 B. H. C. Cr. Ca. 63 at p. 67**, it was held that the removal of fishing stakes fixed in the sea within three miles of the shore was an offence under §§ 425 and 427 of this Code, and punishable in India under 12 and 13 Vict. c. 96. The decision was based on the view that the territories of India extended to three miles from the shore, and therefore that the Penal Code applied under §§ 1 and 2. This seems not to be well founded. The decision itself is probably maintainable on the ground that the defendant was subject to the Penal Code by domicile, and did not escape from it till beyond three miles from shore. At the date of the decision the Act XXI of 1879 had not become law.

15. Extent of Jurisdiction over Merchant Ships entering Territorial waters.—The rule that a merchant ship on the high seas is floating territory of its own nation, is qualified when it enters any foreign river or harbour which is completely a part of that foreign territory. In such a case, while the national jurisdiction remains, the territorial jurisdiction attaches to the ship and all on board of it, to a very large extent exactly as it would to a

merchant or seaman who landed for trade or any other purpose — *Per Marshall, C. J., The Exchange v. McFaddon*, 7 Cranch, 116 at p. 144. Accordingly, in *Cunningham's case*, Bell C. C. 72 = 28 L. J. M. C., 50, Americans on board an American ship in the Bristol Channel were convicted of wounding one of the crew of the vessel, and this offence was tried in *Glamorganshire*, as having been committed in the body of the county (see ¶ 27). The French jurisprudence, however, recognizes a distinction between the offences committed on the ship, which only affect its internal discipline or the persons on board, and offences committed by a stranger on one of the crew, or *vice versa* in such a manner as to disturb the peace and good order of the port. As to the former, they decline jurisdiction, either taking no notice of the matter, or handing over the offender to his own Consul. In the latter case they deal with the offender themselves. Where their own merchant vessels are in a foreign port they recognize the jurisdiction of its tribunals, while authorizing their consular authorities to deal with the case, if the matter is not taken out of their hands. 1 *Phill. Int. L.*, 374-76, *per Boril, C. J.*, L. R. I. C. C., 163. Even in England the courts will not necessarily enforce statutory obligations upon foreign ships. It will be a question upon the construction of each statute, whether it was intended that the duties and penalties created by it should attach to foreigners, even within territorial waters. *The Eclipse*, 31 L. J. Adm., 201 = 15 Moo. P. C., 262 = 8 Jur. N. S. 315 = 6 L. T. 6 = 10 W. R. 431; *The Lady B. & L.* 19 = 32 L. J. Adm. 58 = 9 Jur. N. S. 208 = *Swal. Adm.* 40; *General Iron Screw-Collier Co. v. Schurmann*, 1 J. & H., 180 = 29 L. J. Ch., 879.

16. Foreign Public Ships are exempt from the operation of the Code.—Ships which are the property of the State, whether they are intended for peaceful purposes, such as mail steamers, stand on a different footing from merchant ships when they enter a foreign jurisdiction. By international custom, and in deference to the sovereign by whom they are commissioned, they retain their territorial character even in the

harbour of another State, and remain as much exempt from local jurisdiction as when they were on the high seas. This exemption does not arise from any predominant right in the sovereign to whom the ship belongs, but from a concession made by the sovereign whose dominions are visited and rests on the same principle of international courtesy which accorded a similar concession in favour of (a) foreign sovereigns.—*Mighell v. Sultan of Johore* L. R. [1894] 1 Q. B., 149; *Statham v. the Gaikwar of Baroda* [1912] P. D. 92 and (b) diplomatic Agents *Musurus Bey v. Gadban* L. R. [1894] 2 Q. B. 352. The concession is implied from the permission to enter the port, and may for sufficient cause be recalled or refused by anticipation —*The Exchange v. McFaddon* 7 Cranch, 116; *The Parliament Belge* 5 P. D., 197=42 L. T. 273=28 W. R. 642. The immunity extends not only to the ship itself, but to its officers and crew and all persons who have entered the domestic waters under its protection, and to its boats, tenders, and other appurtenances. It does not extend to offences committed on shore, though the commander of any such vessel is entitled to be informed of the cause for which any person under his authority has been arrested —1 *Phill. Int. L.*, 369. The commission of a foreign ship of war is sufficient to establish its character, and cannot be questioned. A French schooner, commissioned as a ship of war by the Emperor Napoleon, entered an American Port, where it was claimed by an American citizen. He contended that it had been his property, that it was wrongfully seized by the French for alleged breach of neutrality, and that it had never been lawfully condemned. It was held by Marshall, C. J., that no court could look beyond the commission, and that the evidence offered was inadmissible. —*The Exchange v. McFaddon* 7 Cranch., 116, followed by *Story, J.*, in *The Santissima Trinidad* 7 Wheaton 335. How far this exemption extends to persons other than those who accompanied the ship on its arrival in port rests rather on reasoning than on decision. If persons subject to the home jurisdiction went on board the vessel, and there committed a crime, it would certainly be the duty of the commander to surrender them, and if he did so, the power to punish them would not be affected by

the locality of the offence 2 *Steph. Crim. L.*, 48—52. In the United States it is considered that a writ of *habeas corpus* might be lawfully awarded to bring up a subject illegally detained on board a foreign ship of war in American waters. Sir Robert Phillimore thinks that the same doctrine would probably be held by the courts of Great Britain 1 *Phill Int. L.*, 372. Sir James Stephen discusses the right of fugitive criminals to seek asylum on board a ship of war, and decides against it, in conformity with the opinion of the French jurist, M. Ortolan 2 *Steph Crim L.*, pp 52—54. This is in accordance with International Law as regards the analogous case of an ambassador's residence. Attempts to afford such an asylum to subjects accused of high treason, who sought a refuge in the residence of the English Ambassador, were forcibly resisted by Spain in 1726, and by Sweden in 1747, and in each case the remonstrances of Great Britain were rejected, and, in Sir Robert Phillimore's opinion, rightly 2 *Phill, Int L.*, 212. The practice of Great Britain in allowing fugitive slaves to seek refuge on her ships of war is stated in two circulars of the year 1875 *Ann. Reg. of 1875*, pp. 224—226. They came substantially to this, that ships lying in foreign waters should not admit fugitive slaves unless their lives were in danger, or harbour them longer than such danger continued, except in places where slavery was by treaty with Great Britain rendered illegal. These circulars caused considerable outcry, which led to the appointment, in 1876, of a Royal Commission to investigate the subject. The reports of the Commissioners conceded that there was no legal right to receive a slave, merely because he wished to escape from slavery, and to protect him against the rights of a master legally existing at the place from which he escaped. On the other hand, they recognized a right higher than technical law to afford such protection in special cases where it was demanded in the interests of humanity. 2 *Steph. Cr L.*, p 43—58; *Ann. Reg. 1876* [91].

harbour of another State, and remain as much exempt from local jurisdiction as when they were on the high seas. This exemption does not arise from any predominant right in the sovereign to whom the ship belongs, but from a concession made by the sovereign whose dominions are visited and rests on the same principle of international courtesy which accorded a similar concession in favour of (a) foreign sovereigns.—*Mighell v. Sultan of Johore* L. R. [1894] 1 Q. B., 149; *Statham v. the Gaiikwar of Baroda* [1912] P. D. 92 and (b) diplomatic Agents *Musurus Bey v. Gadban* L. R. [1894] 2 Q. B. 352. The concession is implied from the permission to enter the port, and may for sufficient cause be recalled or refused by anticipation.—*The Exchange v. McFaddon* 7 Cranch, 116; *The Parliament Belge* 5 P. D., 197=42 L. T. 273=28 W. R. 642. The immunity extends not only to the ship itself, but to its officers and crew and all persons who have entered the domestic waters under its protection, and to its boats, tenders, and other appurtenances. It does not extend to offences committed on shore, though the commander of any such vessel is entitled to be informed of the cause for which any person under his authority has been arrested—1 *Phill. Int. L.*, 369. The commission of a foreign ship of war is sufficient to establish its character, and cannot be questioned. A French schooner, commissioned as a ship of war by the Emperor Napoleon, entered an American Port, where it was claimed by an American citizen. He contended that it had been his property, that it was wrongfully seized by the French for alleged breach of neutrality, and that it had never been lawfully condemned. It was held by Marshall, C. J., that no court could look beyond the commission, and that the evidence offered was inadmissible.—*The Exchange v. McFaddon* 7 Cranch., 116, followed by Story, J., in *The Santissima Trinidad* 7 Wheaton 335. How far this exemption extends to persons other than those who accompanied the ship on its arrival in port rests rather on reasoning than on decision. If persons subject to the home jurisdiction went on board the vessel, and there committed a crime, it would certainly be the duty of the commander to surrender them, and if he did so, the power to punish them would not be affected by

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(ii) *Offences Committed in Cantonments and Civil Stations situated in or on Railways running through Native States.*

17. Code applies to Offences in British Cantonments in Native States.—In this case the claim to exclusive jurisdiction arises out of local conditions, and extends to all persons whatever who are found within the localities affected by those conditions. *Ilbert (2nd Ed)* 393—396 As regards Cantonments, it has to be observed that in the treaties entered into with Native States in the earlier part of the last century, it is remarkable how strenuously they stipulate for absolute and even despotic authority within their own limits, and especially that the British jurisdiction shall not be introduced. *Oodeypore*, 3 *Aitch.*, 26; *Jeypore* 96; *Jodhpur*, 145; *Bundi*, 214; *Kotah*, 322; *Sindhia*, 4 *Aitch.*, 50, *Holkar*, 170, *Kutch*, 7 *Aitch.*, 19 But in the early days of the East India Company it was one of many powers which were constantly at war, and its alliance and aid were very valuable. The presence of its disciplined troops was eagerly sought, and forts, or tracts of ground on which forts could be built, were offered on a tenure which was to continue at least as long as it was required for that purpose. The troops necessarily brought with them their own sovereignty and their own laws which excluded all other authority within the limits of the Cantonment. It attracted Civilians, European or Native, who settled there for trade and protection. In the case of more important States it was the home of the Resident, who again carried with him the same elements of sovereignty and immunity. It is singular how barren the records are of any reference to the *imperium in imperio* which was thus growing up within the Native State in the British Cantonment. The only reference one can find to the subject in the twelve volumes of *Aitchison's Treaties and Sunnuds* is in regard to Mysore. It is laid down by Art. 9 of the *Instrument of Transfer*, 3 *Aitch.*, 479.

That the Maharaja of Mysore shall not object to the maintenance or establishment of British Cantonments in the said territories, whenever and wherever the Governor General in Council may consider such Cantonment necessary. He shall grant free of all charge, such land as may be required for such Cantonments, and shall renounce all jurisdiction within the land so granted

In pursuance of this agreement the Maharaja assigned *the Civil and Military Station of Bangalore* to the British Government, and renounced all jurisdiction within its limits. 12 M. 39. The preamble to the order in Council issued in June 1902 under *the Foreign Jurisdiction Act, 1890*, recites that by treaty, grant, usage, sufferance, and other lawful means, His Majesty the King has power and jurisdiction exercised on his behalf by the Governor-General of India in Council in India and in certain territories adjacent thereto. But except in Mysore there seems to be no grant or capitulation on the subject, and the jurisdiction in Military Cantonments must therefore rest on an implied assent evidenced by usage. As Dr Lushington observed in *The Laconia* 33 L. J. Adm., 11=2 Moo. P. C. (N. S.), 181=7 L. T. 164=12 W. R. 90 (P. C.)

It is true beyond all doubt that as a matter of right no State can claim jurisdiction of any kind within the territorial limits of another independent State. It is also true that between two Christian States all claims for jurisdiction of any kind, or exemption from jurisdiction must be founded on treaty, or engagements of similar validity. Any mode of proof by which it is shown that a privilege is conceded is, according to the principles of natural justice, sufficient for the purpose. The formality of a treaty is the best proof of the consent or acquiescence of parties, but it is not the only proof, nor does it exclude other proofs, especially in transactions with Oriental States. Consent may be expressed in various ways by constant usage, permitted or acquiesced in by the authorities of the State, active assent, or silent acquiescence where there must be full knowledge.

It must, however, be remembered that, as against the Native State, the jurisdiction is founded upon, and limited by, its assent, express or implied, and is not derived from either the Indian or Imperial Foreign Jurisdiction Acts, which start with the assumption that it already exists. 24 I. A., 137 at 145=25 C. 20 at 31, *post* * 19

18. Code extends to Civil Stations in Native States.—The case for exclusive jurisdiction within civil stations, which for various purposes have been established in Native States, is obviously weaker. When the State of *Rajkot* granted a site of 385 acres in 1863 to the Bombay Government for a civil station, the agreement laid down the following rules.—

"It is to be understood by both parties that the establishment of this Civil Station in the vicinity of *Rajkot* is not in any way to affect the civil jurisdiction of the *Rajkot* State, and that the inhabitants of *Rajkot* who may live in the Civil Station, or possess property in it, are not to be thereby entitled to assistance from the British authorities in cases in which the cause of action has arisen in the *Rajkot* territory. In the same manner the criminal jurisdiction of the *Rajkot* State is not in any way to be prejudiced or curtailed by the establishment of the Civil Station; but that State is to continue to enjoy the same privilege of civil and criminal jurisdiction that may be continued to other tributary States of equal rank and position. No person shall be enticed into the station, but once permanently residing there will cease to be subjects to the *Rajkot* Durbar. Such residence will not give any claim to the protection of the Agency regarding landed and other property within the jurisdiction of the *Rajkot* Durbar. Claims regarding robberies occurring within the station limits shall be disposed of according to the general custom of the country." 6 *itch*, 282, *its* 8, 9 16, 18.

This agreement is very artificial, and is of course only important as evidencing what, in the mind of the Political Agent, were the usual incidents of such an *enclave* in Native territory. The idea seems to have been that it became British soil, which ceased to be within the *Rajkot* jurisdiction, and residence in which would change the allegiance of a native of the country. All of its provisions are directed to guard against any overflow of the new jurisdiction to places, persons, or causes of action beyond the boundary. When, however, grants of land for Civil Stations were made by the State of *Wadwan* in 1864 and by *Gondal* in 1886, express provisions were inserted that inhabitants of the Native State, who reside or live in the new station, are not to be entitled thereby to any protection or assistance from the British Government. This negatives the idea that such residence caused any change of allegiance. It was

probably also intended to emphasize the declaration which preceded it, which provided that whereas all civil and criminal jurisdiction in respect of all causes of action that may arise, or of all crimes committed within the limits of the land assigned, should vest in the British Government, the jurisdiction as to causes of action or offences outside those limits should remain with the State. 6 *Aitch*, 285, 279.

19. Code extends to some extent to British Railways running through Native States.—In the progress of railway extension, it frequently happens, particularly in the north-west of India, that a British railway passes through a Native State. In such cases an agreement is generally made by which the State cedes the land in perpetuity to the British Government with full civil and criminal jurisdiction. *Sindhia*, 4 *Aitch*, 95; *Bhopal*, *ib*, 268, 271; *Kurvan*, *ib*., 295, *Samthar*, 5 *Aitch*, 109; *Taraon*, *ib*, 213, *Pahia*, *ib*, 214; *Alipura*, *ib*, 221, *Garauli*, 234; *Kathiawar*, 6 *Aitch*, 237, *Junagarh*, *ib*, 336; *Bhau-nagar*, *ib*, 240; *Gondal*, *ib*, 240, *Morri*, *ib*, 273, 277. *Khairaja*, 8 *Aitch*, 549; *Nandgaon*, *ib*, 552. Sometimes the grant is stated to be with full sovereignty, *Dhar*, 4 *Aitch*., 431, *Jhabua*, *ib*., 444, *Jobat*, *ib*, 446, *Rewa*, 5 *Aitch*, 268, *Baroda*, May 1856, 6 *Aitch*, 168. Sometimes there is an express reservation of its rights of sovereignty, *Dewas*, 4 *Aitch*, 213; *Baroda*, January, 1880, 6 *Aitch*, 168, *Junad*, *ib*, 241, *Nawanagar*, *ib*, 272. Sometimes the grant is said to be "of the necessary jurisdictional powers for the efficient working of the line, and for the disposal of the cases arising thereon" *Baroda*, 6 *Aitch*, 169, *Palanpur*, *ib*., 309. In the case of *Holkar* the British Government agrees to give up to him all Durbar offenders who, having taken refuge within railway limits, may be found there. It also states that, as a general rule, it will not object to deliver up to him all Durbar subjects who may have been convicted and sentenced by Government officials for offences committed within railway limits, 4 *Aitch*, 179. In any case the Native State agrees, not only that all residents within the limits of the railway, whether the subjects of the State or of the British Government, shall be con-

sidered under the jurisdiction of the Railway officers and of the British Government, but that all disputes between the officers and servants of the railway, and the subjects of the State shall be heard and settled by the Political Agent *Rutlam*, 4, *Aitch*, 370; *Sailana*, *ib.*, 373; *Seetamow*, *ib.*, 377; *Dhar*, *ib.*, 341; *Jhabua*, *ib.*, 444; *Ali Rajpore*, *ib.*, 445; *Beronda*, 5, *Aitch*, 192; *Nagode*, *ib.*, 275; *Maihar*, *ib.*, 284; *Sehawal*, *ib.*, 294; *Kotee*, 301. Baroda stipulates that the authorities exercising the jurisdiction ceded as aforesaid will liberally afford to the servants of the Baroda State all reasonable and practicable facilities in view to the prevention of crimes, the apprehension of criminals, the seizure of stolen property, and in view generally to the maintenance and promotion of peace and order. (6 *Aitch*, 168, 169.)

The exercise of this jurisdiction on the Hyderabad State Railway gave rise to a case of some importance which ultimately reached the Privy Council, 21 I. A., 137=25 C., 20. In that case the railway was constructed by and was the property of, the Nizam, and no cession of the soil had ever been made or asked for. In 1887 the British Resident addressed the Nizam's Government asking that full civil and criminal jurisdiction over the railway land might be granted to the British Government, to enable a Magistrate and Police officer recently appointed with the Nizam's assent, to perform their duties, in respect of which, and for want of such jurisdiction, their action was at present irregular. He summed up his demand as follows: "the jurisdiction is not assumed by the British Government in its own right, but is conceded by His Highness of his own free will, for the sake of legal and administrative convenience over an area limited by the railway fences, in which the difficulties that may occur are likely to be caused by Europeans. A good deal of correspondence followed in which the Resident undoubtedly minimised the object of the proposal he was making. Finally, the Nizam's Minister wrote: "I beg to state that His Highness' Government it is willing to accede to the wishes of the Government regarding the civil and criminal jurisdiction along the line of railway, as is the case on other lines running through independent States." Upon this a notification was issued by the Governor-General under § 5 of the Act XXI of 1879, by which he recited the grant of full jurisdiction by the Nizam to the British Government over the railway lands, and made specific arrangements for exercising the jurisdiction. What happened next was this: the appellant, a subject of the Nizam, and a resident of Hyderabad, went to Simla, and was alleged to have there attempted to bribe the Record-keeper of the Indian Foreign Office to disclose to him certain official informa-

tion relating to the Hyderabad State. He then returned to Hyderabad, and a warrant for his arrest was issued by the District Magistrate at Simla and transmitted for execution to the Resident, and by virtue of it the appellant was arrested at a station on the Nizam's Railway. The legality of this arrest was the question which came before the Judicial Committee. As to the effect of the notification, which had been much relied on in India, *Halsbury, L. C.*, after pointing out that the railway territory had never become part of British India, said. "The authority, therefore, to execute any criminal process must be derived in some way or another from the sovereign of that territory, and the only authority relied on here is the authority given in the correspondence, which constitutes the cession by the Nizam of jurisdiction to the British Government. It is important to observe that the notification upon which the learned Judges in India appear to have relied, could itself give no such authority. Even if in more extensive terms than in fact are included in the notification it had purported to give jurisdiction, as the stream can rise no higher than its source, that notification can only give authority to the extent to which the sovereign of the territory (the Nizam) has permitted the British Government to make the notification." The Lord Chancellor then examined the correspondence, and concluded as follows. "If that is the only jurisdiction which is given, and there is no evidence of any other jurisdiction whatever given by treaty, or usage, or otherwise, it is manifest that the jurisdiction conferred is a criminal and civil jurisdiction 'along the line of railway, as is the case on other lines running through independent States' the only question, therefore, that remains is, whether the act complained of in this case was one which can in any sense be regarded as coming within the jurisdiction 'along the line of railway.' It is not suggested that the particular offence charged was committed on the railway, or that it was in any way connected with the administration of the railway. What is suggested is that in another part of India (at Simla) an offence was committed in British territory, and, because the appellant was physically present on a portion of that line of railway over which jurisdiction is given for the purpose of civil and criminal jurisdiction, he was open to criminal procedure for an offence committed elsewhere. Their Lordships are of opinion that there is no foundation for any such claim, and that the arrest was illegal."

The substitution of an order in Council under the Foreign Jurisdiction Act, 1890, for an Act of the Indian Legislature has placed the extra-territorial jurisdiction of the Governor-General in Council on a wider and firmer basis and has removed many of the doubts and difficulties which arose from the limitations on the

powers of the Indian Legislature and from the language of the Statutes by which those powers were conferred. The language of the order is wide enough to include every possible source of extra-territorial authority. The powers delegated are both executive and legislative and are sufficiently extensive to cover all the extra-territorial powers previously exercised in accordance with Indian Act XXI of 1879 (*Ilbert, 2nd edition, p. 389*).

(iii) Applicability of the Code to offences committed within Native States.

20. The Code applies to certain offences in Native States.—§§ 3 and 4 of this Code and § 188 of the Cr. Pro. Code provide that certain offences committed by a limited class of persons within a Native State, shall be inquired into or tried in British India. Thus in § 333 it has been held that the High Court of Bombay had authority, under § 526 of the Cr. Pro. Code, to transfer for trial before itself a case of defamation pending before the Court of the Cantonment Magistrate of Secunderabad against a European subject.

§ 188, C. Pr. Code, declares that "when a native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or when any British subject commits an offence in the territories of any Native Prince or chief in India, or when a servant of the Queen, whether a British subject or not, commits an offence in the territories of any Native Prince or chief in India, he may be dealt with, in respect of such offence, as if it had been committed at any place within British India at which he may be found. Provided that no charge as to any such offence shall be inquired into in British India, unless the Political Agent, if there is one or the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India, and where there is no Political Agent, the sanction of the Local Government shall be required."

Act

tion & where the offence was committed in a Native State, which possesses a Political Agent, he must certify (p. 109) that the offence is one which ought to be inquired into in British India. Any proceedings taken thereupon in British India to proceedings for the same offence under a local law.

Chapter III of the *Extradition Act*, XV of 1903, in any territory beyond the limits of British India, exactly as they would have been if the offence had been committed in India. So far as Native Indian subjects are concerned §§ 3 and 4 of the Code and § 188 of the Cr P Code are purely enabling. The jurisdiction of the Native State or foreign country is in no way intended to be affected. 1910 P. R. Cr. 14=1910 P. W. R. Cr. 20=11 Cr. L. J., 390=6 Ind. Cas. 640.

As regards the persons triable by British Courts for offences committed by them in Native States, it has to be observed in the first place that the expression *British subject*, as used in § 4 of the Code and in § 188 Cr P. Code, is by no means synonymous with the expression "*European British Subject*" as defined in § 4 (1) (i) of the Cr Pr Code. Its ordinary meaning is that of a person who owes allegiance to the British Crown as opposed to a foreigner—*R. v Manning* 2 C. & K. 887 at p. 900. Accordingly upon the construction of a Criminal Statute 9 Geo IV C 31 § 7 the expressions "*His Majesty's Subject*" and "*British Subject*" were treated as synonymous in dealing with a native of *Malta* who murdered a watchman at *Smyrna*—*R v Azzopardi* 1 C. & K. 203=2 Moody 289. But in the Code the expression "*British Subject*" is used evidently in a limited sense in antithesis to a "*Native Indian Subject*". As regards the question—Who is a native Indian subject? the following case arose in *Bombay*. The family of the accused belonged to *Bakool*, in *Baroda*. His grandfather took service in British territory, at *Kalol*, retaining a house at *Bakool*, and having another, where he generally resided, at *Kalol*. The father of the accused lived almost entirely at *Kalol*, and was also in the service of the British Government. He married a wife from *Baroda*, and the accused was born there in the territory of the *Gaikwar*. The accused was educated partly in *Kalol*, and subsequently at *Baroda*, and he also entered the British service. He committed an offence in the allied State of *Cambay*, and being found in *Ahmedabad*, was tried there and convicted. His conviction was reversed. It was held upon these facts

that he was a natural-born subject of Baroda; that he had done nothing to alter his nationality; and that neither his residence in India, nor his service under the British Government, made him a *native Indian subject*. As a *servant of the Queen*, he would now be punishable under § 4 of the Penal Code: read with § 188 Cr. P. Code as it stands in the 1898 Code. **16 B. 178; 1 Morton, 371.** See also **1885 P. R. (Cr.) 1** where it was held, occasional residence in British India was not enough to confer jurisdiction on Indian Courts. For a statutory definition of "Natives of India" see 33 & 34 Vict. c. 3 § 6 (3)

21. Mode of dealing with British offenders when they commit offences and are found in Native States.—The above provisions relate to cases where the offender, having committed an offence in a Native State, is afterwards found within British India. Where the offender remains in the country where his offence was committed he must be dealt with under the Order in Council issued (under the *Foreign Jurisdiction Act 1890*, 53 and 54 Vict. c. 37) on 11th June 1902. See *Ilbert, 2nd Ed., p. 388*. This authorizes the Governor-General in Council to appoint in places out of British India Justices of the Peace, who shall have, in proceedings against European British subjects, or persons accused of having committed offences conjointly with such subjects, all the powers conferred by the Code of Criminal Procedure on Magistrates of the first class who are Justices of the Peace and European British subjects. The Governor-General in Council is by the same section authorized to direct to what Court having jurisdiction over European British subjects such Justice of the Peace may commit for trial. By Statute 28 & 29 Vict., c. 16, the Governor-General in Council was empowered to authorize any of the High Courts established under 24 & 25 Vict., c. 104, to exercise any such jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of such of the Princes and States of India in alliance with Her Majesty as the said Governor-General in Council may, from time to time, determine.

In pursuance of this power a Notification, No 178-J, was issued by the Governor-General in Council on the 23rd September, 1874, which allotted to the High Courts of Fort William, Madras, Bombay, and Allahabad the Original and Appellate Criminal Jurisdiction to be exercised over European British subjects of Her Majesty, being Christians, resident in the several Native States therein mentioned. To Madras was given jurisdiction over such persons resident in Mysore, Travancore, Cochin, Pudukottai, Banganapalle, and Sandur 12 M., 39. A later Notification to the same effect, No 119, was issued on the 9th August, 1875. See also 8 B. H. C. R. Cr. Ca. 92; 2 M. H. C. R. 444. By further Notifications of the same date, Nos 180, 181-J, it was directed that the Agents to the Governor-General in Rajputana and Central India should not exercise the powers of a High Court within the districts previously specified in cases where the accused were European Christian British subjects. There seems to be some difficulty as to the mode in which an offence committed by a European British subject residing in the above districts is to be dealt with, where the offence is one which, under §§ 446—449 *Cr P Code*, would be disposed of by committal to the Sessions Court, if the offender were resident in British India. By Notification, No 179-J (23rd September, 1874), the Governor-General directed that all Justices of the Peace within the districts above specified should commit to the High Courts respectively having jurisdiction under Notification 178-J, such European British subjects as are required by Act X of 1872 (now Act V of 1898) to be committed to a High Court. But no such subject need be committed to a High Court unless he is accused of an offence punishable with transportation or death. For minor offences, not within the competency of the committing Magistrate to punish himself, the course under the *Crim P. Code*, is to commit to the Sessions Court. For such cases no provision seems to be made by the existing notification. This difficulty was pointed out by the Madras High Court in 5 M. 33, and it was suggested that "inasmuch as this Court has been duly constituted a Court of Original Jurisdiction to take cognizance of offences committed by European British

subjects, being Christians, it may be that in the absence of any special direction a commitment to this Court would be a good commitment."

22. The right to oust Native States' Jurisdiction examined.—The power of the Council of the Governor-General to make laws for servants of the Government of India within the dominions of Princes and States in alliance with His Majesty is derived from the *Indian Councils Act, 1861* (24 & 25 *Vict.*, c. 67, § 22); this authority was extended by 28 *Vict.*, c. 17, § 1 to all British subjects of His Majesty within the above dominions, whether in the service of the Government of India or otherwise. As regards Native Indian subjects without and beyond, as well as within the Indian territories under the dominion of His Majesty, the same power of legislation was given by *Act 32 & 33 Vict.*, c. 98, § 1. As between the Government of India and its subjects outside its dominions, the above legislation is, therefore, effective in principle. As between the Government and those Native States which have full powers of criminal jurisdiction, the legislation is ineffective in principle, so far as it withdraws any of His Majesty's subjects, resident within their limits and offending against their laws, from their jurisdiction.

"Whatever rights, civil or otherwise, a man may have which may be affected by his domicile, it is, and must be, perfectly clear by the law of all nations that each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction; otherwise the criminal law could not be administered according to any civilized method"—*Per Pollock, B, R v Ganz*, 9 *Q. B. D.*, 93 at 100. In 1869 the State of Travancore pressed their rights upon this point upon the Government of India. *Sir H. Maine* recorded a minute in which he stated as his undoubted opinion that the Travancore State, so long as in any sense it is not part of British India, had jurisdiction theoretically to try European British subjects for offences committed within its boundaries, and that Parliament had not the power to

legislate away its jurisdiction. At the same time he was equally clear that the Statute, and the Government notification vesting criminal jurisdiction over such persons in the Madras High Court, was an intimation by Parliament and the Government of India of an opinion that Native States ought not to try European British subjects, or of a belief that, as a matter of fact, they did not try Europeans or claim to exercise their inherent jurisdiction over them. He expressed his opinion that they should not be allowed to do so, and that this view should be brought to the notice of the Travancore State. *Maine, Life and Speeches*, 400. The practice of all European nations in dealing with "pagan" States has been in accordance with this opinion. Without disputing their right, it has been the invariable incident of intercourse with such States, to insist that jurisdiction over the subjects of the Christian State shall be vested in its own officials. In 1863, before any of the legislation relied on by Sir H. Maine, the State of Bhopal had set up a claim to exercise criminal jurisdiction over European British subjects, and the claim had been rejected as inconsistent with the supremacy of the British Government and the obligation to act in subordinate co-operation with it, accepted by the State in the treaty of 1818. 4 *Aitch* (3rd Ed.), 253. See the treaty, *ib.*, 260. On the 10th July, 1861, the Nizam's Government issued a Sunnud which, after reciting that many Europeans, foreigners, and others, descendants of Europeans and born in India were resident in the territory of the Nizam, and that disturbances arise amongst themselves and the inhabitants of the said territory, directed that, in the event of any dissension or dispute arising among the classes above named within the said territory, except those employed by this Cuzar and its dependents, the Resident of Hyderabad, or any officer deputed by him, should be empowered to enquire into and punish the said offences. 8 *Aitch*, 368. As regards Mysore it is laid down by Art. 17 of the Instrument of Transfer (8 *Aitch*, 479) of 1881 that plenary criminal jurisdiction over European British subjects in the said territories shall continue to be vested in the Governor-General in Council, and the Maharaja of Mysore shall exercise only such jurisdiction

in respect to European British subjects as may from time to time be delegated to him by the Governor-General in Council. Mysore Courts have no power to enquire into or try charges against European British subjects even where the accused waives his special privileges as such, **5 Mysore C. C. R. 281**, but under the powers delegated to them by the Governor-General in Council, the police officers and magistrates in Mysore may, with respect to European British subjects, exercise the same powers as may be exercised with respect to European British subjects by police officers and magistrates who are not Justices of the Peace respectively in places in British India, beyond the limits of the presidency towns. In **26 M. 607**, it was held that a Magistrate of Mysore who is also a J P has jurisdiction to try and convict a European British subject for an offence which, by Mysore Regulation, is punishable in Mysore, though it is not an offence by Indian Law. It may be safely assumed, therefore, that the right of the British Government to exercise exclusive criminal jurisdiction over all its European British subjects, whether within or without its dominions, has become part of the common law of India, being based either upon express or implied assent, or upon submission arising from political pressure, which is itself based upon imperative necessity.

As regards Native subjects of British India residing in Native States, it is not the practice of the British Government to interfere with the Native jurisdiction, so far as it is exercised on proper occasions, in conformity with the law of the State, and according to principles of natural justice *Ilbert*, (2nd Ed) 392. It does not appear that there is any public pronouncement on the subject. *Sir William Lee Warner* is of opinion that the same rule would be adopted even in the case of a European British subject, who had taken service with a protected Prince, in whose dominions the offence was committed, subject to a right of intervention by the Political Officer if sufficient reasons were adduced for his intervention in the particular case. *Lee Warner*, 351.

As regards European foreigners within a Native State,

there has not been, and in theory probably could not be, any British legislation. If, however, a citizen of a European friendly State, resident in a Native State, were to be charged with an offence against its laws, and were to be arrested and committed for trial, it is probable the European State would object to the proceeding. It has, however, no diplomatic relations with any such State, and could only apply for assistance to the British Government. It obviously could not claim that its subject should be relieved from all jurisdiction, and it could not try him itself for want of evidence. The case has never, as far as I know, arisen. It is Sir Courtenay Ilbert's opinion, *Ilbert (2nd Ed.)* 393, 396, that in such a case the British Government would try and deal with the offender though not a British subject, he being a person for whose good behaviour it was responsible as regards the Native State, and for whom it was bound to secure just treatment as regards the European State.

(iv) *Applicability of the Code to offences in Foreign Independent States*

23. Jurisdiction to deal with offences committed in a Foreign State rests entirely on a Statutory basis.—It is now necessary to examine the cases in which the Indian courts have jurisdiction in respect of crimes committed out of India. By the common law of England, the courts in England have no jurisdiction over a British subject in respect of crimes committed by him on land out of England. The reasons appear to have been, because such an act could not be said to be done "against the peace of the King's realm, his Crown and dignity"; and also because the courts could only try a crime by means of a jury *de vicineto*, that is, summoned from the district in which the act took place. Subsequently various statutes were passed enabling the courts to try treason, murder, and manslaughter committed on land by a British subject abroad. The Court of King's Bench is also a statutory tribunal for the trial of abuse of official authority by persons acting under royal commission beyond the realm (2 *Steph. Cr. L.* 14). From about

the sixteenth century, commercial settlements and factories came to be established in non-Christian and partly civilized nations, and thereby treaty, usage or sufferance, the right to exercise civil and criminal jurisdiction over persons within the limits of such settlements or factories by means of local tribunals came to be recognized. See the remarks of Lord Stowell in *The Indian Chief* 3. C. Rob. Adm. Rep. 12 at p. 29, also per Dr. Lushington in *Papayanni v. The Russian S. N. Co.*, 2 Moo. P. C. (N. S.). 161 at 183=9 Jur. N.S. 1160. These tribunals have now received a Parliamentary sanction by the *Foreign Jurisdiction Acts* of 1843, 1865, 1866, 1878, which are now consolidated by the *Foreign Jurisdiction Act, 1890* (53 & 54 Vict., c. 37). Under an order in Council for courts of the dominions of the *Porte*, the courts of Constantinople and Egypt may, in special cases, forward natives of India for trial to Bombay. 2 Steph. Cr. L. 58—60. The Zanzibar Order in Council 1897 directs by §§ 11 and 12 that the Indian Penal Code, and the Indian Criminal Procedure Code shall apply to offences committed within the jurisdiction which it creates. Where it is necessary to commit an offender for trial the commitment is to be to the High Court at Bombay (§ 15) to which court also appeals, when allowable, are to be made (§ 24). In 19 B. 741 a Greek resident, who had placed himself under British protection, was convicted under the Penal Code for an offence he committed in Zanzibar. The East Africa Order in Council 1897 makes the same provision as to the law and procedure to be applied to offences (§§ 11, 14), but commitments and appeals are to be to the Zanzibar Court (§§ 15, 24.)

A further and special provision is contained in the *Slave Trade Act* (39 and 40 Vict., c. 46, § 1), which makes the commission, or abetment, of offences under §§ 367—370 and 371 I P C., punishable in the same way as if they had been committed in any place in British India within which the offender may be found, provided he was a subject of Her Majesty, or of any allied Indian Prince, even though the offence itself was committed on the high seas or in any part of Asia or Africa specified by Order in Council, 3 B. 334. Special

powers of issuing commissions to obtain evidence are given to the High Courts under § 3.

A special criminal jurisdiction was conferred upon the Indian Supreme Courts, and has now passed to the High Courts, by 9 Geo IV, c 74. These provisions have been left untouched by the *Statute Law Revision Acts, 1873 and 1874*.

This statute, by § 1, "shall extend to all persons and all places, as well on land as on the high seas over whom or which the criminal jurisdiction of any of His Majesty's courts of justice, erected or to be erected within the British territories under the government of the East India Company, does or shall hereafter extend." By § 56, "Where any person being feloniously stricken, poisoned, or otherwise hurt at any place whatsoever, either upon the land or at sea, within the limits of the charter of the said United Company, shall die of such stroke, poisoning, or hurt at any place without those limits, or being feloniously stricken, poisoned, or otherwise hurt at any place whatsoever, either upon land or sea, shall die of such stroke, poisoning, or hurt at any place within the limits aforesaid, any offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter, or of being accessory before or after the fact to murder or manslaughter, may be dealt with, inquired, tried, determined, and punished by any of His Majesty's courts of justice within the British territories under the government of the said United Company, in the same manner in all respects as if such offence had been wholly committed within the jurisdiction of the court within the jurisdiction of which such offender shall be apprehended or be in custody."

The application of § 56 is limited by § 1 to persons who, at the time of the committal of the offence, were subject to the original criminal jurisdiction of the court by which they are tried. In **7 M. I. A., 72**, some Burmese native subjects of the East India Company committed a murder on the Coco Islands, which are uninhabited islands in the Bay of Bengal, within the charter, which was held to mean the trading charter of the East India Company. They were convicted under the above statute by the Supreme Court of Calcutta, but this conviction was reversed by the Privy Council. It was held that the place in which the offence was committed was, but that the offenders personally were not, within the

jurisdiction conferred by the statute; that the object of the statute was "only to apply the law which had been lately enacted in England, as to an offence partly committed in one part and partly completed in another, to the East Indies, and not to make a new enactment rendering persons liable for a complete offence, who would not have been liable before" (p. 101). It was also laid down that "the words of the section do not apply to entire offences, begun and committed within the jurisdiction, but to those partly committed within and partly without, which are put on the same footing as if they had been wholly committed within the jurisdiction" (p. 103). The trading charter referred to in this statute was that of William III, dated 5th September, 1698, and extended from the Cape of Good Hope to the Straits of Magellan.

24. Jurisdiction over Natives of India is absolute and unlimited.—As regards offences committed out of India, Native Indian subjects of the Crown are punishable in India, wherever the offences might have been committed. **9 B. 288.** In **2 A. 218** a Native Indian was tried in Agra for a murder committed by him in Cyprus and in **13 B. 147** Indian subjects found in Ahmedabad were convicted there of the offence of breach of trust as carriers committed by them in Goa. See also **2 W. R. (Cr.) 60.** European British subjects are only punishable where the offence has been committed on land, if within the territories of the Native States in alliance with the Crown, which, though not India, are treated by our legislation as forming part of its suburbs. Where the offence is committed on land beyond those limits, no person, not being a Native Indian subject, is amenable to the Indian courts, unless his crime, being murder or manslaughter, can be brought within the provisions of **9 Geo IV., c. 74, § 56**, or unless it has been committed by a person within the scope of the *Merchant Shipping Act* of 1891, **§ 687**. No foreigner can ever be liable to any British jurisdiction for any offence committed by him on land out of British dominions, even though the act committed by him takes its operation within British territory. The question is, was the person, at

the time the act was done within the territory of British India? 1878 P. R. Cr. 20; 1889 P. R. Cr. 30; 28 A. 372; 1901 P. R. Cr. 1. See the discussion in 5 B. 338 (F.B.) See also 1894 P. R. Cr. 7; 4 B. H. C. R. Cr. Ca. 38; 1881 P. R. Cr. 37. Even the statutes which give a tribunal jurisdiction over an offender found within its limits, in respect of an act begun outside those limits which has produced its effect within the limits, does not apply to the case of a foreigner. Such statutes are merely rules of procedure, which enable a particular court to try an offender who, at the time he committed the act, was amenable in respect of it to some British court. *R v. Lewis*, 26 L. J. M. C., 104; 10 B. H. C., R. 356; 7 M. I. A., 72, p. 103; 1878 P. R. Cr. 20. Sir James Stephen thinks that *the Merchant Shipping Act*, 1854, § 267 (now § 687 of the Act of 1894), would give British courts jurisdiction over a foreigner who came within its terms in respect of acts done by him on foreign territory. 2 *Steph Cr L.* 12. The point was treated as doubtful, unless where the act was done on sea, by the judges in *R v. Anderson*, L. R., 1 C. C., 161.

(v). *Applicability of the Code to offences on the High Seas*

25. History of Admiralty Jurisdiction.—Jurisdiction in regard to offences committed at sea stood on quite a different footing. From the earliest times English ships were found in every part of the known world. Control over them and their crews, and those who had dealings with them, was vested in the Lord High Admiral, and he, by his local deputies or vice-admirals, took cognizance of all crimes committed on British ships. The objection to this was that proceedings in the Admiralty Court were governed by civil law, so that, unless the accused plainly confessed the charge laid against him, it must be proved by two witnesses who saw the offence committed. In general also the case was tried without a jury. This led to the passing of an Act, 28 Hen. VIII, c. 15, by which all offences cognizable by the admiral were to be dealt with according to the course of

the common law, as if they had been committed on land, in places within the realm, by commissions directed to the admiral or his deputy, and three or four other substantial persons named by the king. These persons were in practice judges of the common law courts. By 11 & 12 Will. III, c. 7, and 46 Geo. III, c. 54, the king was authorized to issue commissions to persons in any colony or foreign possession of the Crown to try any offence committed on the sea, according to the common course of the laws of this realm used for offences committed on land. Finally, in 1834, by the Central Criminal Court Act (3 & 4 Will. IV, c. 36, § 22), that court was empowered to try all offences committed within the jurisdiction of the admiralty, and in 1844 it was provided by the 7 & 8 Vict., c. 2, that all commissioners of *oyer and terminer, or gaol delivery*, should have all the powers which commissioners under the Act of Hen. VIII would have as to trial of offences committed at sea. *2 Steph. Crim. L.*, 16—21, *1 Russ* 31—47. It will be observed that none of these acts did away with admiralty jurisdiction. They merely directed that it should be exercised by particular persons or courts, and that the same law and procedure should be applied as if the acts complained of had been committed in an English county. *R v Keyn*, 2 Ex. D., 63 at pp. 169, 209.

Offences committed on the High Seas are triable by the Indian Courts in virtue of the Admiralty jurisdiction, and by a series of provisions which form part of the Merchant Shipping Code. Admiralty jurisdiction was originally conferred upon the Supreme Courts by their respective charters, and by 33 Geo. III, c. 52, § 156, and 33 Geo. III, c. 155, § 110, (5 B. H. C. R. O. C. J. 64; 10 B. H. C. R. 110; 6 B. L. R. 323 at 330), and was continued to the High Courts by 21 & 25 Vict., c. 104, § 9, and by §§ 32 & 33 of the *Letters Patent* of 1865. Under Act XVI, of 1891, § 2, the High Courts of Bengal, Madras, and Bombay, the Chief Court of Rangoon, the Court of the Resident at Aden and the District Court of Karachi are declared to be Colonial Courts of Admiralty, within the meaning of the Colonial Courts of Admiralty Act 1890, 53 & 54

Vict., c 27 The High Court of Allahabad has no such jurisdiction under its *Letters Patent* of 1866 The effect of these statutes is to confer upon those courts the same jurisdiction as is possessed by the Admiralty Court of England, in respect of all offences committed in all places and by all persons over whom that court would have had jurisdiction.

Till lately the Mofussil Courts have had no similar jurisdiction Now by the combined effect of the Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict c 96, and 23 & 24 Vict., c 88, § 1, it is enacted "That if any person in British India shall be charged with the commission of any treason piracy, felony, robbery, murder, conspiracy, or other offence, of what nature soever, committed upon the sea, or in any haven, river, creek, or place where the admiral has power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place shall be brought for trial to British India, then and in every such case all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in India shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of British India would and ought to have been had and exercised, or instituted and carried on by them respectively, if such offence had been committed, and such persons had been charged with having committed the same, upon any waters situate within the limits of British India, and within the limits of the local jurisdiction of the Courts of Criminal Justice Provided always, that if any person shall be convicted before any such court of any such offence, such person so convicted shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to, in case such offence had been committed, and were inquired of, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding" (12 & 13 Vict. c 96, §§ 1, 2)

Further provisions of a similar character are contained in the *Merchant Shipping Act*, 1894, 57 & 58 Vict., c. 60, which consolidated the former Acts on the same subject Of the following sections, § 686 embodies the

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provisions of 18 & 19 Vict., c. 91, § 31, and of 30 & 31 Vict., c. 124, § 11; and § 687 is identical with 17 & 18 Vict., c. 104, § 267.

§ 686. (1) Where any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas, or in any foreign port or harbour, or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the offence as if it had been so committed.

(2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict., c. 96.

§ 687. All offences against property or person committed in or at any place ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishment respectively, and be inquired of, heard, tried, and determined, and adjudged in the same manner, and by the same courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England, and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England. See as to such costs, *7 Geo IV., c. 64, § 27* and *7 and 8 Vict., c. 9, § 1*.

The preceding sections of the *Merchant Shipping Act, 1891*, viz., §§ 684 and 685, are limited to offences created by that Act. I call attention to their limited purpose, as the language of § 685, taken by itself, might seem to authorize everything that was attempted to be done in the *Franconia* case. Lastly, it is provided by § 3 of the *Colonial Courts Act* (37 and 38 Vict., c. 27) that

"When by virtue of any Act of Parliament, now or hereafter to be passed, a person is tried in a court of any colony (which includes India, § 2), for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by such Act,

such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any Act to the contrary notwithstanding: Provided always, that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment), as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England "

26. Exact Scope of Admiral's Jurisdiction.—Admiralty jurisdiction only takes cognizance of acts committed on the sea, and, in respect of crimes, only of those which become complete at sea. The admiral has no jurisdiction over murder, where the wounding was on sea but the death happened on shore. *1 Hale P C 17, 1 Comyn, Dig 498*. And so it was held in Madras that a master of a ship who received rice at Mangalore for conveyance to Calicut, and took his ship to Goa, where he sold the rice and embezzled the money, was not triable under 12 and 13 Viet, c 96, as he committed no offence upon the sea, nor any at all till he got on shore at Goa. **5 M. 23**. Conversely, where a
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was residing.

A gunner in St James's Port, at Barbadoes, fired a gun at a vessel which was leaving the port, for some supposed breach of the Custom rules. He killed one man and wounded another. The Attorney, and Solicitor-General, Sir Philip Yorke and Sir Clement Wearg, advised the Crown (in 1725) that the gunner could not be tried by any court of common law, but only by the Admiralty. *Forsyth, 219, following 1 Hawk P C, 254, § 16, Combe's case, 1 Leach, C C. 388; R v Keyn, 2 Ex. D., 63 at p. 102; per Rigby, L. J., Badische Anilin v. Henry [1897], 2 Ch. 322 at p. 349.*

Admiralty jurisdiction begins where the tide touches the shore, whether at low or high-water mark. *General Iron Screw Collier Co. v. Schumans, 29 L. J. Ch. 879=*

1 J. & H. 180. *The Eclipse*, 31 L. J. Adm. 201; *R. v. Carr*, L. R. 10 Q. B. D. 76; and extends all over the world, to the coast of every country, and up every bay, arm of the sea, and river, so far as great ships go. It is not necessary to show that the tide reaches the spot if it is accessible to ocean-going vessels, e.g., the admiral was held to have jurisdiction over offences committed in an English ship lying at *Wampu*, in China, twenty or thirty miles from the sea, *R. v. Allen*, 1 Moody. 494, and similarly, in another vessel lying in the *Garonne*, ninety miles from the sea. It makes no difference whether the ship is made fast to the bottom of the river by anchor and cable or to its side by ropes from the quay. *R. v. Anderson*, L. R., 1 C. C., 161; nor does it make any difference that the ship is actually within a foreign port. Admiralty jurisdiction has been held to apply to all on board an English ship which was moored to the quay at *Rotterdam*, and was as completely within the port as a ship would be if lying in the Pool below London Bridge, or in the Hooghly opposite Calcutta. *R. v. Carr*, 10 Q. B. D., 76; *R. v. Hilmen*, *ibid*, 86; *Lesley*, 29 L. J. (M. C.) 97 = *Ell C. C.* 220 = 8 Cox 269 = 6 Jur. N. S. 202 = 1 L. J. 452 = 8 W. R. 220. The place must, however, be part of the continuous navigable water which extends upwards from the open sea. Where an American ship was lying in an enclosed dock in *Havre*, into which the water was admitted at the will of the owners, Mr. Justice Story held that the Admiralty jurisdiction did not apply. He said, "The place where the ship lay was in no sense the high seas. The Admiralty has never held that the waters of havens, where the tide ebbs and flows, are properly the high seas, unless those waters are without low-water mark." *United States v. Hamilton*, 1 Mason, 152.

27. **Question of Concurrent Jurisdiction in Admiralty and Common Law Courts.**—The common law courts of England in early times claimed concurrent jurisdiction with the Admiralty in respect of offences committed upon the narrow seas, on the ground that they were actually within the realm of England. This was the ground on which the right to compel foreign ships of war to lower their flags before British flags in those

seas was asserted. Since the time of Edward III, however, it has been admitted that the common law courts had no jurisdiction beyond the limits of the county, which only extended to low-water mark. Beyond those limits the jurisdiction of the admiral was exclusive. *2 Hale, P. C. 12; R. v. Keyn, 2 Ex. D., pp. 67, 79, 162, 197, 239.* Where, however, a river, bay, or arm of the sea extended inland in such a manner that the space covered with water could properly be considered as an actual portion of England, then the counties on each side were considered to extend to the middle of the intervening water, and it made no difference that the water itself was tidal and navigable. In such a case it was held by Lord Coke and others that the jurisdiction of the admiral was ousted. *2 East, P. C. 803.* Lord Hale, however, was of opinion that even in such a case the Admiralty had concurrent jurisdiction with the common law courts—at all events, in cases of murder and maiming—and exclusive jurisdiction over piracy, which was not triable by any common law court, as being essentially an offence committed at sea, and recognized only by the civil law. *2 Hale, P. C. 16.* This view has been accepted in later times—*R. v. Keyn, 2 Ex. D., p. 168, per Cockburn, C. J.* The only question which can arise in regard to it is, when may it be said that such an intervening space is part of English territory? Lord Hale, in his treatise, "*De Jure Maris*," says, "That arm or branch of the sea which lies within the *fauces terra*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county." Hawkins, however, considers the rule more accurately confined by other authorities to such parts of the sea, where a man standing on the side of the land may see what is done on the other. *2 East, P. C. 804, 6 Bar. Abr. 166.* Probably no strict rule can be laid down, each case must be judged on its own facts. For instance, where an offence was committed in the Bristol Channel, at a point where it is ten miles from shore to shore, and where on a clear day one shore is visible from the other, it was held that the whole Channel was within the limits of the adjacent counties, and that the common law jurisdiction extended to a case of wounding committed on a ship lying there.

quarters of a mile from the county in which it was tried. Cockburn, C. J., said, "Does not the jurisdiction of the county of Glamorgan extend to the *medium filum aquæ* between Glamorgan and Somerset? Is not the whole of the Bristol Channel between those counties within the limits of England?"—*R. v. Cunningham*, 28 L. J. M. C., 66=8 Cox 104=5 Jur. N. S. 202=32 L.T. (O. S.) 287=7 W. R. 179; Bell, C. C. 72. See Perry's *orient*, Cas. 577; 11 Bom. L. R. 211. On the other hand, the Admiralty jurisdiction was maintained where a murder was committed on a ship within the body of a county, viz., in Milford Haven, eight miles from its mouth, and where it was only three miles from shore to shore.—*R. v. Bruce*, Leach 1093. A similar decision was given where the offence was committed in a bay within the county of Galway, *R. v. Mannion*, 2 Cox C. C. 158. In England the question of jurisdiction is practically unimportant; in India it may be a matter of considerable importance, as affecting the law by which the case will be governed.

28. Persons subject to the Admiralty Jurisdiction.—As regards persons, Admiralty criminal jurisdiction extends (a) to all British subjects at sea; (b) to all persons on any ship which by reason of nationality or situation was subject to British jurisdiction when the offence was committed, (c) to all persons charged with committing piracy *jure gentium*, irrespective of nationality or place.

(a) When we speak of a British subject committing an offence at sea, we mean, of course, on board some ship. In general, this would be a British ship. There is a remarkable absence of authority as to the jurisdiction over a British subject, for offences committed on a foreign ship out of His Majesty's dominions; as, for instance, if he committed an offence while he was on a British ship which took effect on a foreign ship; or if he left a British ship to which he was attached, committed an offence on a foreign ship, and then returned to his own. In the case of *United States v. Davis*, 2 Sumner, 482, the master of an American ship,

which was lying in harbour in one of the Society Islands, fired a gun from his own ship, and thereby killed a foreigner in a schooner which lay alongside. The schooner belonged to a resident of the Society Islands. The master was brought to trial in a court in Massachusetts. It was held that the American court had no jurisdiction. Story, J., following *Coombe's case*, 1 Leach, C.C. 388, considered that the offence was committed on the schooner, which was a foreign vessel, and subject to foreign jurisdiction, and that as the act was not a piratical act the prisoner was liable to no other jurisdiction. He declined, however, to remand him for trial to the foreign jurisdiction, saying that such a course was never pursued. Cockburn, C.J., commented upon this case in *The Franconia* case 2 Ex. D., p. 234, and doubted whether it was rightly decided. He suggested that a continuing act might be considered to be an offence equally in the jurisdiction in which it originated, and that in which it took effect. No such suggestion could be made if he left his own ship, and committed the entire offence on a foreign ship, though if he committed murder or manslaughter on land out of the Queen's dominions, he might be punished in any county or place in England or Ireland in which he might be in custody (24 and 25 Vict., c. 100, § 9). The ordinary Admiralty jurisdiction is supplemented as regards masters, seamen, and apprentices employed at the time of, or within three months before, the offence, on board a British vessel, by § 687 of the *Merchant Shipping Act*, 1894. It makes them punishable for any offence against person or property committed at any place afloat or ashore out of His Majesty's dominions (*ante* ¶ 25). This, of course, would cover the case just suggested. So the *Merchant Shipping Act*, 1894, § 686 (*ante* ¶ 25) gives jurisdiction over any British subject who commits any crime or offence on board any foreign ship *to which he does not belong*. A person belongs to a ship if he is one of the ship's company under the orders of the master. It seems very questionable whether a passenger does belong to it. So far as either belongs to the other, the ship belongs to him. If, therefore, an English passenger and an English engineer employed on a French steamer severally

committed offences on their way out to India, the former could on arrival be punished by a British court, the latter could not. He would have to be sent back to France for trial

(b) Every person who is found within a foreign State is subject to and punishable by its law. The English lawyers put this on the principle that a person who enters a State becomes entitled to the protection of its law, and is therefore bound to render it obedience. The more obvious reason is, that no State can tolerate the presence within it of a person who is not subject to some law, and no law can be administered to him but the law of the State. Every ship, so long as it is on the high seas, is part of the territory of the country whose flag it flies. So completely is this the case that a child born on an English ship is considered, for all legal purposes, as born in England. *Marshall v Murgatroyd*, L. R., 6. Q. B., 31. Hence a foreigner, who commits an offence upon an English ship, whether he is permanently or merely casually on board, is liable to the Admiralty jurisdiction. In the case of *R v Anderson*, L. R., 1 C. C., 161 an American citizen, serving on board an English ship, which was at the time in the Garonne on her way to Bordeaux, committed manslaughter upon another American citizen serving on the same ship. It was held that his offence was triable under the Admiralty jurisdiction, without reference to the provisions of the *Merchant Shipping Act, 1854*, § 267. A stronger case was that of *R v Carr*, 10 Q. B. D., 76. There some bonds had been stolen from an English ship while it was moored to a floating derrick attached to the quay at Rotterdam. The bonds in some manner, which was not explained, found their way to England, and were there received by the prisoner, who was charged with receiving them, knowing them to be stolen property. He could not be convicted, unless it was shown that the thief, who was probably some Dutchman who had come on board, could have been convicted by English law for the theft. It was held that if such a Dutchman had been carried away before he left the ship, he could have been convicted at the Central Criminal Court. The ship was still English

territory, though moored to the Dutch shore. Therefore English law, as exercised through the Admiralty jurisdiction, reigned on board it, and attached to everyone who entered it, and who, by placing himself under the protection of English law, became amenable to its jurisdiction and liable to its punishment.

British Ship—The mere fact that the ship has a certificate of registry as a British ship is *prima facie* evidence that she is such. But the presumption may be rebutted, as, for instance, by showing that her owner was an alien—*R v Bjornson*, 34 L. J. M. C., 180=10 Cox 74=12 L. T. 473=11 Jur. N. S. 589=13 W. R. 664. On the other hand, a ship may be shown by evidence to be a British ship, though she is not registered as such—*R v. Sten Seberg*, L. R., 1 C. C., 264; *Merchant Shipping Act 1854*, § 106. If, however, a ship appears to have had a foreign title, every step which is necessary to establish a lawful transfer to British ownership must be clearly made out. This was the ground of the decision in *R v Serra*, 2 C. & K., 53=1 Den. C. C., 104. There an English cruiser captured a slaver and put a prize crew on board. The prisoners rose on the crew and killed them. They were tried for murder in England. They were acquitted on the ground that under the treaties which were relied on to justify the capture, the slaver was not lawfully in British possession. There was, therefore, no territorial jurisdiction over the ship, and the prisoners, as foreigners, were in no other respect subject to British law.

Where a foreigner is confined on a British ship, under circumstances which would justify him in using violence to effect his escape, he is not punishable for acts done with that object, even though they would otherwise amount to murder. But in respect of acts not done for that purpose, he is liable under British law exactly as if he were voluntarily on board. The former point was raised, but not decided in the case of *R. v. Serra*. 2 C. & K. 53=1 Den. C. C. 104. The latter point was decided expressly, and the former inferentially, in the two following cases. In *R. v. Sattler*, D. & B., 529=

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territory, though moored to the Dutch shore. Therefore English law, as exercised through the Admiralty jurisdiction, reigned on board it, and attached to everyone who entered it, and who, by placing himself under the protection of English law, became amenable to its jurisdiction and liable to its punishment.

British Ship—The mere fact that the ship has a certificate of registry as a British ship is *prima facie* evidence that she is such. But the presumption may be rebutted, as, for instance, by showing that her owner was an alien—*R. v. Bjornson*, 34 L. J. M. C., 180=10 Cox 74=12 L. T. 473=11 Jur. N. S. 589=13 W. R. 664. On the other hand, a ship may be shown by evidence to be a British ship, though she is not registered as such—*R. v. Sven Seberg*, L. R., 1 C. C., 264; *Merchant Shipping Act 1854*, § 106. If, however, a ship appears to have had a foreign title, every step which is necessary to establish a lawful transfer to British ownership must be clearly made out. This was the ground of the decision in *R. v. Serpa*, 2 C. & K., 53=1 Den. C. C., 104. There an English cruiser captured a slaver and put a prize crew on board. The prisoners rose on the crew and killed them. They were tried for murder in England. They were acquitted on the ground that under the treaties which were relied on to justify the capture, the slaver was not lawfully in British possession. There was, therefore, no territorial jurisdiction over the ship, and the prisoners, as foreigners, were in no other respect subject to British law.

Where a foreigner is confined on a British ship, under circumstances which would justify him in using violence to effect his escape, he is not punishable for acts done with that object, even though they would otherwise amount to murder. But in respect of acts not done for that purpose, he is liable under British law exactly as if he were voluntarily on board. The former point was raised, but not decided in the case of *R. v. Serpa*. 2 C. & K., 53=1 Den. C. C. 104. The latter point was decided expressly, and the former inferentially, in the two following cases. In *R. v. Sattler*, D. & B., 529=

27 L. J. M. C. 48 = 7 Cox 431 = 4 Jur. (N. S.) 525, the prisoner, a foreigner, having committed larceny in England, escaped to Hamburg and put on board a British prisoner, who was in non-shot the officer who arrested of his wound. Lord Campbell, C. J., during the argument of the case, said "If a prisoner of war, who had not given his parole, killed a sentinel in trying to escape, it would not be murder." In giving the judgment of the full court (fourteen judges, among whom the heads of the three courts were present), he said.—

Here a crime is committed by the prisoner on board an English ship on the high seas, which would have been murder if the killing had been by an Englishman in an English county; and we are of opinion that under those circumstances, whether the capture at Hamburg, and the subsequent detention were lawful or unlawful, the prisoner was guilty of murder, and of an offence against the laws of England, for he was in an English ship, part of the territory of England, entitled to the protection of the English law, and he owed obedience to that law; and he committed the crime of murder—that is to say, he shot the officer, not with the view of obtaining his liberation, but from revenge and malice prepense. D & B., p. 547.

In the case of *Atty-Gen for Hong-Kong v. Kwok-A-Sing*, L. R. 5. P. C. 179, the prisoner was one of a number of Chinese coolies who, while on a voyage from China to Peru in a French emigrant ship, killed the captain and several of the crew and took the ship back to China. The Chief Justice of Hong-Kong released the prisoner on *habeas corpus* on the ground, *inter alia*, that the ship was a slave ship, and that the coolies were justified in killing the captain and crew for the purpose of obtaining their liberty. This finding was reversed on appeal by the Judicial Committee. Their Lordships said:—

There was evidence from which it might be inferred that some of the coolies had, by fraud or by threats on the part of other Chinese, been induced to go to the barracoons and embark on board the ship against their will. They appear, however, all to have professed to the Portuguese authorities at Macao that they were willing emigrants; and there was, in their Lordships'

opinion, no sufficient evidence upon the depositions that either the Portuguese authorities at Macao, or the French captain or crew, were any parties to compelling any of the coolies to leave China against their will

The Committee were accordingly of opinion that the offences committed by the prisoner, assuming the evidence to be true, were those of murder under the French municipal law, and piracy *jure gentium*. It will be observed that it was the fact that the murder was committed in such a manner as to amount to piracy *jure gentium* which gave the English court jurisdiction. Otherwise it would have had none. An American, on board an American vessel, inflicted injuries on a German, who died from them after the arrival of the ship in Liverpool, where the American was taken into custody. It was held that there was no jurisdiction to try the offence in England, even under 9 Geo. IV, c. 31, § 8, which gave the courts power to try a prisoner for murder, where the death ensued within its limits from an injury inflicted beyond them. *R. v. Lewis*, 26 L. J. M. C. 104=D. & B., 182=26 L. J. M. C. 104=7 Cox 277=3 Jur. (N. S.) 525.

As to the persons triable by the Indian Courts it will be observed that § 4 of this code and § 188 of the Cmm. P. C., and §§ 686 and 687 of the Merchant Shipping Act confer jurisdiction in certain cases over a "British subject," which is an ambiguous expression. (See ante ¶ 20.) It used to be employed in the earlier statutes relating to India in the same restricted sense as "European British subject." But its ordinary meaning is that of a person who owes allegiance to the British Crown by birth or naturalization, *R. v. Manning*, 2 C. & K., 887 at 900. Accordingly, upon the construction of a criminal statute, 9 Geo. IV, c. 31, § 7, the expressions "His Majesty's subject" and "British subject" were treated by the court as synonymous, in dealing with a native of Malta, who murdered a Dutchman in Smyrna,—*R. v. Azopardi*, 1 C. & K., 203=2 Moody, 289. It seems clear that the word *British*, when qualifying *subject*, in the *Merchant Shipping Act*, must mean the same thing as it does when qualifying *ship*, and in either case must be taken simply

as opposed to *foreign*. The restricted meaning of the term would become important for the first time when the question arose, what court in India was to try the prisoner? For instance, suppose an English sailor and a Malabar coolie, returning from the West Indies, join in robbing a passenger on board a British ship while it is in a foreign port, and are arrested when they reach India; both would be amenable to the jurisdiction of the Indian courts, as being in the general sense British subjects. But the Englishman, as being a British subject in the restricted sense, i.e., an European British subject, could, in general, only be tried before the High Court, while the coolie might be tried by any Court in the *Mofussil* within whose jurisdiction he was found, provided it was capable of taking cognizance of theft.

Where a person, charged under Act 12 & 13 Vict., c 96, has, and claims, the privilege of being tried by the High Court

The court exercising criminal jurisdiction shall certify the fact and claim to the Governor of such place, or chief local authority thereof, and such Governor, or chief local authority, shall thereupon order and cause the said person charged to be sent into custody to such one of the Presidencies as such Governor shall think fit, for trial before the Supreme (High) Court of such Presidency, and the said Supreme Court, and all public officers and other persons in the Presidency shall have the same jurisdiction and authorities, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed, or originally charged to have been committed, within the limits of the ordinary jurisdiction of such Supreme Court (23 & 24 Vict. c 88, § 2).

(c) *Piracy jure gentium* is an offence against all nations, which renders the offender punishable by his captors, wherever he may be found, to whatever nationality he may belong, and in whatever court having jurisdiction to try such offences he may be arraigned. 1 *Phill. Int. L.*, 379. (for a collection of definitions see *The United States v. Sutter*, 5 *Wheaton* 153 at 163n.). In the case of *Atty.-Gen. of Hong-Kong v. Kwok-A-Sing*, L. R., 5 P. C., p. 199, the Judicial Committee cited with approval the following definition of the offence given by Sir Charles Hedges in *Rex v. Dawson*: 13 St. Tr., 454.

Piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, tackle, apparel, or furniture, with a felonious intention, in any place where the admiral hath or pretends to have jurisdiction, this is also robbery and piracy.

In the case of the *Magellan Pirates*, Dr Lushington said: "If it was clearly proved against the accused that they had committed robbery and murder upon the high seas, they were adjudged to be pirates, and suffered accordingly. It was never deemed necessary to inquire whether the parties so convicted had intended to rob or to murder on the high seas indiscriminately. Though the municipal law of different countries may and does differ in many respects as to its definition of piracy, yet I apprehend that all nations agree in this, that acts such as robbery and murder on the high seas are piratical acts and contrary to the law of nations." 1 Phill Int L, 392.

These extracts, though perfectly adequate in reference to the cases to which they were applied, are not definitions, in the logical sense, of the term *piracy jure gentium*. They are at once too wide and too narrow. For instance, it has been repeatedly held by the most eminent Judges in the United States that, "the mere committal of robbery or murder by a person on board of or belonging to a vessel, which at the time, in point of fact as well as of right, is the property of the subjects of a foreign state, who have at the time, in virtue of this property, the control of the vessel, is not piracy *jure gentium*." It may be punishable as such by the nation which has jurisdiction over the ship, but not by other nations.—*Per Marshall, C J United States v. Klintock*, 5 Wheaton, 144, following a previous decision of his own,—*United States v. Palmer*, 3 Wheaton, 610, p. 643. Where such acts are done by those who are on board the vessel, they will become piracy *jure gentium*, if by overpowering the master they obtain possession of the vessel or its contents and it makes no difference whether the offenders are the crew or the passengers, or what the purpose may be for which they intend to use the ship, provided they are not acting *bona fide* under any justifying authority, or for any justifiable cause. In the case of *United States v. Pirates*, 5 Wheaton, 184, the crew of a properly

commissioned vessel rose upon their officers and proceeded on a piratical cruise. Johnson, J., said, "The decision in *Palmer's case* does not apply to the case of a crew whose conduct is such as to set at nought the idea of their acting under allegiance to any known power. From which it follows, that when embarked in a piratical cruise every individual becomes equally punishable, whatever may have been his national character, or whatever may have been that of the vessel in which he sailed, or of the vessel attacked." See *May 2 East P. C. 796*. So in *R. v. Ternan or Tivnan*, 33 L. J. M. C., 201= 5 B. & S., 643. the vessel was seized by passengers, who sent the master and crew adrift in a boat. Blackburn, J., said, "When the crime consists in having overpowered the ship, it becomes a crime under the jurisdiction of every civilized nation; but other cases of robbery on board a ship may be cases of piracy by the municipal law of a country, but not *de jure gentium*." In the case of *Atty-Gen of Hong-Kong v. Kwok-A-Sing*, L. R., 5 P. C., 180, the seizure of the ship by cooly emigrants was held to be piracy, though they intended to make no other use of the vessel than as a means of returning to their homes in China. But where the master of a vessel had goods at Rotterdam and caused it to be insured and on the voyage ran the goods ashore and burnt the ship with a view to defraud the owners and insurers, the offence was held to be only breach of trust and not piracy, *Mason 2 East P. C. 796*; *Richard Curling R. and R. 123*.

Where a ship is actually cruising as a pirate, any attack by it upon another ship would be punishable as piracy, whether successful or the reverse. And there seems no reason to doubt that the mere act of cruising for piratical purposes, by a crew acting in defiance of all law and acknowledging obedience to no Government whatever, is also punishable as piracy *de jure gentium*. *United States v. Klintock*, 5 Wheaton, 144; *United States v. Pirates*, 5 Wheaton, 184; 2 Steph. Crim. L., 28. No acts done by a ship regularly commissioned by a State, which is not itself a piratical State, and professing to act under that commission, can be treated as

piracy, though the commander of the ship exceeds his commission. 1 Phill, Int L., pp. 392—394. A privateer has only authority against the enemies of the belligerent by whom he is commissioned, or against neutrals who violate the laws of neutrality, and any intentional attack by him upon friendly powers is piracy.—*Per Sir Leoline Jenkins, cited* 1 Phill Int L., 393. Where a civil war has reached that height in which the rebels are recognized as belligerents, though they have not been recognized as independent, the acts of war carried on by such rebels cannot be treated as piracy. This was so laid down by Marshall, C. J., in *United States v Palmer*, 5 Wheaton, 610, during the rebellion of the Spanish colonies in South America. In *R v Ternan*, 33 L. J. M. C., 201=5 B. & S. 643, there was some reason to suppose that the persons who captured the American vessel were acting on behalf of the Confederates. Blackburn, J., said, "But looking at the evidence, what was done by the prisoners is either taking the ship for plunder, which would be piracy *jure gentium*, or an act of war, and consequently not triable anywhere. For although the Confederate States are not recognized as an existing power, yet they are as belligerents." Offences which are constituted piracy by municipal law, even by Act of Parliament, can confer no jurisdiction over foreigners, and it makes no difference that they are committed within the three-mile limit—*United States v Kessler*, Bald, 15. Foreign vessels seized under such Acts, unless sanctioned by treaty, must be released, and those who resist seizure are not punishable criminally. *The Louis* 2 Dodson, Adm. p. 239; *per* Sir W. Scott, *R v Serra*, 2 C. & K., 53=1 Den. C. C. 104.

As pirates are triable by any power into whose hands they fall, the jurisdiction over them attaches upon capture to the nation by whom they were captured, and cannot be transferred to any other nation. In 1852 some Chinese emigrants rose upon the captain and crew of an American vessel, murdered them, and carried away the vessel. An American officer captured some of the offenders, and brought them to Hong-Kong, where he desired that they should be tried by the Supreme Court. The

point was referred to the Queen's Advocate, Sir J. D. Harding, and to the Attorney and Solicitor-General, Sir Frederik Thesiger and Sir Fitzroy Kelly, who were unanimously of opinion "that no British authority could, consistently with the law of England, or with the law of nations, take cognizance of such a case as that described" *Forsyth*, 229 On the same principle, the English courts decided that an American who was charged with piracy committed on an American vessel, and who was in British custody, could not be surrendered under a treaty of extradition with the United States.—*R. v. Ternan*, 33 L. J. M. C., 201=5 B. & S., 643.

The Act 12 & 13 Vict, c 96, now extended to India, gives jurisdiction over cases of piracy committed within Admiralty jurisdiction to any court which could have tried the case, "if such offence had been committed, and such persons had been charged with having committed the same, upon any waters situate within the limits of such colony, and within the limits of the local Jurisdiction of the courts of criminal justice of such colony" In 1851 a question arose as to the power of the Commission Court of Honduras to try a case of piracy. It was referred to the law officers, Sir John Dodson, Queen's Advocate, and Sir John Romilly and Sir A. E. Cockburn, Attorney and Solicitor-General, and they reported against the jurisdiction. They stated as their opinion, "that the commission court, according to the stat. 59 Geo. III, c 44, and the Letters Patent of the Crown by which it is constituted, has no jurisdiction to try *eo nomine* for piracy, and that the subsequent imperial statute of the 12 & 13 Vict, c 96, which the Chief Justice of Honduras seems to think has given that jurisdiction to the court, only contemplated the trial by any colonial court of the same offences when committed on the high seas, which the same court might previously have tried if committed upon any inland waters." *Forsyth*, 227 From this opinion it would follow that piracy, as such, can only be tried in the High Courts of Bombay, Calcutta, and Madras. Over the robbery or murder which constitute the overt acts of the alleged piracy, the Mofussil courts would have jurisdiction, if

the offender was amenable to the British courts for such offences. If, however, he was a foreigner, who could only be tried at all as a pirate *jure gentium*, then it would seem that he would have to be committed to the High Court.

29. Law applicable in Indian Courts at trials for Crimes committed on High Sea.—Offences triable under the Admiralty jurisdiction, whether it was exercised by means of commissions issued to the colonial or foreign possessions of the Crown, or by means of the courts in England, were dealt with according to the ordinary course of the common law of England. As fresh statutory offences were created, power was given to the admiral to try them. All the Consolidation Acts of 24 & 25 Vict. contain such a clause. See as to accessories and abettors c. 94, § 9, as to larceny, c. 96, § 115, malicious injuries to property, c. 97, § 72, forgery, c. 98 § 50; offences against the coin, c. 99, § 36, offences against the person, c. 100, § 63. When the Supreme Courts were created in India, each of them was by its charter authorized to try crimes committed upon the high seas, "according to the laws and customs of the Admiralty in that part of Great Britain called England." Calcutta Charter, § 27; Madras, § 42, Bombay, § 54. Doubts which had arisen as to whether these charters gave Admiralty jurisdiction beyond the local limits of the courts were settled by 33 Geo. III, c. 52, § 156, and 53 Geo. III, c. 155, § 110, which declared that the courts had jurisdiction according to the laws and customs of the Admiralty of England over crimes committed upon any of the high seas. There can, of course, be no doubt that so long as the Supreme Courts continued, all Admiralty offences were determined according to the criminal law of England, as indeed all offences were.

The Penal Code was passed in 1860, and thereupon it took the place of English criminal law in the presidency towns. In 1861, Act 24 and 25 Vict., c. 104, was passed for establishing High Courts in India. By § 9 it is provided *inter alia* that the High Courts should possess all such Admiralty jurisdiction as was possessed by the late Supreme Courts, save as by such Letters Patent

was otherwise directed, and subject to the legislative authority of the Council of the Governor-General of India. The Letters Patent of 1862 contain two sections relating to criminal law

§ 29 That all persons brought for trial before the said High Court, either in the exercise of its original jurisdiction, or in the exercise of its jurisdiction as a Court of appeal, reference or revision, charged with any offence for which provision is made by Act No. XLV of 1860, called the Indian Penal Code, shall be liable to punishment under the said Act and not otherwise. § 32: That the said High Court shall have and exercise all such criminal jurisdiction as may now be exercised by the said Supreme Court as a Court of Admiralty.

It will be observed that the section which refers to the Penal Code does not include the Admiralty Court, and that the section which governs the Admiralty Court does not refer to the Penal Code. Obviously because it was intended to act in Admiralty cases under English law as it did before. The Letters Patent of 1865, § 33, simply continue the Admiralty jurisdiction as conferred by the Letters Patent of 1862. No doubt similar Admiralty jurisdiction was given by the charters of many of the leading colonial courts. In 1849 it was considered desirable to confer this jurisdiction upon all the colonial courts, instead of exercising it by commissioners specially appointed for that purpose. This was effected by Act 12 & 13 Vict., c. 96 §§ 1 & 2, extended to India by 23 & 24 Vict., c. 88, which provided for the mode in which offenders should be tried in the colonies, and for the application to their case of the same laws as would be applied, if the offence had been committed and tried in England, any law, statute or usage to the contrary notwithstanding. It may be suggested that § 2 only refers to the pains, penalties, and forfeitures which are to result from conviction. This, however, is clearly not the true sense of the section. The preamble recites that Admiralty offences used to be tried in the colonies by commissioners under the Act 10 & 11, Will. III, c. 7, "According to the civil law and the method and rules of the Admiralty," and afterwards by commissioners under Act 46 Geo. III,

c. 54, "According to the common course of the laws of this realm used for offences committed upon the land within this realm" It then recites that it is expedient to provide for the trial in the colonies of persons charged with the commission of *such offences*, that is offences by English Law Then § 1 provides that all *such offences* shall be tried in the colonies in the same way as if they had been committed in the colonial waters; and § 2 provides that whatever the law of the colony may be, the punishment shall be the same as would be awarded if the trial had been in England. If therefore the facts charged constitute no offence punishable in England, or an offence of a different character, the law of England must be looked to, and not that of the colony Of course it would have been much simpler to say that the substance of the offence must be dealt with according to the law of England, and the procedure for trying it according to the law of the colonies, but then simplicity is not the characteristic of English statutes It will be observed that the same phraseology is used in § 2 of the Penal Code, where the words must bear the same meaning as I have attributed to § 2 of Act 12 & 13 Vict., c. 96. Then comes the series of enactments under the *Merchant Shipping Code* § 267 of the Act of 1854 (*ante* ¶ 25) contains a perfectly distinct provision that the offences referred to in it may be tried by all courts which have Admiralty jurisdiction, but that they are to be deemed offences of the same nature respectively, and punishable in the same way as if committed within the Admiralty of England § 21 of the *Merchant Shipping Act* of 1855, and § 11 of the Act of 1867 contain no such provision, but each Act is to be read with the Act of 1854 of which it forms a part, and the former section makes special reference to the Act of 12 & 13 Vict., c. 96 These sections were re-enacted in the *Merchant Shipping Act*, 1894, as §§ 686 and 687 It may therefore fairly be assumed that clauses *in pari materia* were intended to be dealt with in the same way

If this is so, the whole current of legislation is reasonable and consistent Every Englishman is subject to the laws of his own country He is liable to become

subject to the laws of any other country which he visits, for any offence committed within that country, but not otherwise. If, then, Parliament directs that an Englishman who commits an offence on the high seas shall be tried for it in a colonial or Indian court at the other end of the world, one would expect that the court should try him for the offence which he committed at the time and place where he committed it. But the offence which he committed at such a latitude and longitude at sea was an offence at English law, or none at all. Otherwise, this remarkable result would follow, that if a person committed an improper act at sea, its criminality would depend on the direction in which the ship's head was turned. Suppose an English passenger in the Red Sea uses slanderous language which, by English law, would neither be punishable, civilly nor criminally, but which is defamation under the Penal Code; or, suppose he obtains the property of another by a representation which would not be a false pretence under English Law, but would be cheating by the Penal Code: if he was tried in the Central Criminal Court he must be acquitted. Could he be convicted in the High Court of Bombay? Can a man who has committed no offence at all on the 1st July in the Red sea, be convicted on the 1st August in Bombay, on the ground that, if he had done the same act a fortnight later in a different place, he would have been punishable under a code, to which he was not subject when he did the act which is complained of? It seems almost a *reductio ad absurdum*. In *Phillips v. Eyre*, L. R., 4 Q. B., at p. 239, Cockburn, C. J., said: "It appears to us clear that where, by the law of another country, an act complained of is lawful, such an act, though it would have been wrongful by our law, if committed here, cannot be made the ground of an action in an English Court." In the same case on appeal, L. R., 6 Q. B., 1 at p. 28, Willes, J., said. "In order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: first, the wrong must be of such a character that it would be actionable, if committed in England; secondly, the action must not have been justifiable by the law of the place where it was done." This ruling is a *fortiori* applicable

to criminal liability. So also *Machado v. Fontes* [1897], 2 Q. B., 231; *Cari v. Francis Times* [1902], A. C. 176.

With the exception of the Bombay decision in 14 B. 227, (see ¶ 13 *supra*), the decisions in the Indian courts have been in conformity with the above views. In 1 B. L. R. (O. Cr.), 1, the prisoner, a British subject, was charged under 1 Vict., c. 85, § 2, with feloniously cutting and wounding E. Ned, on the British ship *Scindia*, on the high seas, within the Admiralty jurisdiction, with intent to disable him. The jury negatived the felonious intent, and found him guilty of unlawfully wounding, which was a misdemeanour. This they were authorized to do by 14 & 15 Vict., c. 19, § 5. The court assumed jurisdiction under 18 & 19 Vict., c. 19, § 21 (*ante* ¶ 25). Peacock, C. J., said

The charge, then, has been preferred under English law, and it has been tried under the procedure of Indian law, and the punishment must be according to English law (p. 11). Macpherson, J., said "I am of opinion that the English law is the law by which the prisoner was triable, and upon that point I concur generally with the Chief Justice. There is no doubt that the English law was the law which originally applied to offences committed on the high seas on board British ships, and this was continued by the Merchant Shipping Act, 1854. The question is, whether by the Amendment Act of 1885, or by the 12 & 13 Vict., c. 96 (extended to this country by 23 & 24 Vict., c. 89), this state of things was changed, and the local law was substituted for the English. I think it was not. I do not think it can be said that in either Act there is anything which distinctly shows an intention to alter the law by which such cases are to be tried, except in matters of mere procedure. But I have no doubt that, under these statutes, the local procedure is the procedure which is to be followed" (p. 14).

In 7 Bom. H. C. Cr. Ca., 89. Harriot and Marks, the master and carpenter of a British ship, the *Auroa*, were indicted for wilfully destroying it by fire, on its voyage from Bombay to Liverpool, when it had proceeded about fifty miles on its way, and Elinstone and Whitwell, the brokers of the ship, were charged with instigating the offence. Westropp, C. J., in an elaborate judgment of the Full Court decided that the Penal Code could not be applied, either to the criminals on board the ship, or to

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In 7 Bom. H. C. Cr. Ca., 89. Harriot and Marks, the master and carpenter of a British ship, the *Aurora*, were indicted for wilfully destroying it by fire, on its voyage from Bombay to Liverpool, when it had proceeded about fifty miles on its way, and Elminstone and Whitwell, the brokers of the ship, were charged with instigating the offence. Westropp, C. J., in an elaborate judgment of the Full Court decided that the Penal Code could not be applied, either to the criminals on board the ship, or to

those in Bombay who instigated the commission of an offence on the high seas and more than three miles from the shore. He reviewed the series of statutes already referred to, and decided that they exhibited one uniform intention, that the English law should be the substantive law of decision in cases made cognizable by the local tribunals by virtue of those statutes. In *Thompson's case*, 1 B. L. R. (O. Cr.) 1, which he approved, the *Merchant Shipping Act* of 1867, § 11, was not referred to, as it had not reached India at the date of that decision. He said of it.

There is no recital or evidence of any intention in the stat. 30 & 31 Vict., c. 124, § 11 (*ante* * 25), to depart from the well-marked policy of the principal and amending Acts, in prescribing the English law as the substantive law by which cases should be decided. The word 'determine' is not, in our opinion, of itself any sufficient indication of such an intention, contrary as it would be to the Merchant Shipping Code, which the principal and amending Acts form. Recollecting that the stat. 30 & 31 Vict., c. 124, § 11, applies to all the colonies, as well as to India, we should not feel warranted in giving that phrase any such extensive effect as to substitute throughout Her Majesty's dominions other than the United Kingdom the local law of each colony or province for the law of England (p. 128).

In 21 C. 782, where a British seaman was tried for an offence committed on the high seas on a British ship, it was held that the offence must be treated as one against English law, though the procedure was to be that of the Criminal Procedure Code. This case followed 16 C. 238, where the same view had been tacitly assumed. Both these cases were subsequent to the stat. 37 & 38 Vict., c. 27 (*ante* * 25). That statute formed the ground of decision in 14 B., 227. This case was followed, though apparently not referred to, in 25 B., 636=3 Bom. L. R. 253 which remains to be considered. There the defendant, a native Indian subject, captain of a native boat, took on board at Alleppy, on the Malabar Coast, a cargo for delivery at Bombay. He fraudulently sold it, and scuttled his ship near Goa. Both offences probably, and the latter certainly, were committed beyond three miles from the shore of Goa. He was charged under §§ 407 & 437 of the Penal Code, and was tried and convicted in the

Sessions Court of Ratnagiri. On appeal it was argued that the Sessions Court had no jurisdiction to try any offence within the territorial waters of Goa, and that both offences, being committed on the high seas, could only be tried according to English law. As to the first objection, the Court said that, if the facts supported it, the prisoner could still be tried in British India under the Treaty Act IV of 1880.

"Then comes the question, whether the courts of India have jurisdiction, and whether the Indian Penal Code applies to offences committed on the high seas. The stat 30 & 31 Vict, c. 124, § 11, which applies to India, says that offences on the high seas must be 'tried and determined' as if committed on the high seas; (sic, but clearly a misprint). And 37 & 38 Vict, c. 27, says that the punishment must also be according to the local law. The question is argued with force and clearness by Mr Stirling in his work on Indian Criminal Law, pp 18-29 (4th ed). He points out that the rule in 7 B. H. C. R. Cr. Ca. 89 to the effect that English, not Indian, law is applicable to offences committed on the high seas, and tried in India, is altered by stat 37 & 38 Vict, c. 27. All disability is now removed since the passing of the two Acts cited. The preliminary objection as to jurisdiction therefore fails" (p. 230). The question was considered at length in a recent Full Bench ruling of the Chief Court of Lower Burma in 5 L. B. R. 221=4 Bur. L. T. 58=12 Cr. L. J. 198=10 Ind. Cas. 705. There a Native Indian subject was charged with murder on the high seas and was tried by (a) the Sessions Court had 1, 23 and 24 Vict c. 84 § 1, Act 1894, (b) under §§ 3 & 4 of the Indian Penal Code. The applicable law was this code as the any other part of the world outside British India, (c) no sanction of the Local Government under proviso (1) to § 188 of the Code of Cr. Procedure was required, as the word territory occurring therein refers only to territories of any Native Prince or Chief in India, but cannot include high seas. The contrary view as to substantive law applicable prevailed in 39 C. 487=16 C. W. N. 471=13 Cr. L. J. 246=14 Ind. Ca. 598 where 14 B. 227 is dissented from.

Now, it will be observed that in the case in 14 B. 227, the Judges did not dispute the soundness of the ruling in 1 B. L. R. (O. Cr.) 1 and 7 B. H. C. R. Cr. Ca. 89 that in trying offences in India against persons who were not native Indian subjects, under 12 and 13 Vict, c. 96, and the Merchant Shipping Code, the substance of the offence was to be dealt with under English

law. The *dictum* was that these decisions had been overruled by 37 and 38 Vict., c. 27, § 3 (*ante* ¶ 25). But that section has nothing to do with the trial of the case. It takes the matter up after conviction, that is, when the trial is over, and nothing remains but the sentence; then, if the offence committed upon the high seas, or elsewhere, was also an offence punishable under the local law, the sentence is to be the same as if it had been committed within the local limits. If the offence was not so punishable, the Court must inflict such a punishment, known to the local law, as most nearly resembles that to which the prisoner might have been sentenced in England. Nothing is said as to the converse case, already suggested, where the act charged as an offence committed at sea or elsewhere, was not an offence at all under English law, or was an offence of a different character from that which was called by the same name in the place of trial. In short, it seems to me that the statute has no other object than that of adapting the local machinery for punishment to the English definition of crime. **21 C. 782.** Under § 20 of the *Indian Extradition Act*, (see Appendix I) a demand for extradition with reference to an offence on the high seas, may be dealt with under that Act.

C.—*Extradition.*

30. Extradition.—Offences committed beyond the limits of British India may either be tried in India, or where an offender is in India as a fugitive from justice he may be given up for trial in the country where his crime was committed. Cases of the latter class will now be disposed of under Chapters II to IV of the *Indian Extradition Act*, XV of 1903. It seems to contemplate three distinct cases. *First*, where the offence has been committed in an independent Foreign State as defined in § 2 (c) of the Act (ch. II). *Secondly*, where the offence has been committed in any of those States specially connected with India, in which the Governor-General in Council has a power and jurisdiction which is exercised by a Political Agent (ch. III). *Thirdly*, where the offence is committed in some other part of His Majesty's

dominions. (Chapter IV and the *Fugitive Offenders' Act*, 44 and 45 Vict. c 81).

31. Extradition as between British India and Foreign States—Extradition, as between the British Government and non-Asiatic States, is only granted by virtue of some treaty, which again requires an Act of Parliament, or a Local Act to give effect to it—*Per Mellish, L. J., L. R., 5 P. C., 189; Forsyth, 341, 369.* As regards India, such demands are most likely to arise between the Indian Government, on the one hand, and the Governments of Portugal and France on the other

*Portugal**.—The Portuguese Treaty Act IV of 1880 provides for delivery by each of the contracting parties to the other of persons who, being accused or convicted of crimes committed in the Indian dominions or jurisdiction of the one party, shall be found in the Indian dominions or jurisdiction of the other. When the crime for which extradition is claimed has been committed beyond the dominions of the party claiming, the requisition shall be complied with, if the laws of the party applied to authorize a prosecution for such crime, when committed beyond its dominions, and if the person claimed is a subject of the party claiming his extradition. The offences for which extradition shall be granted by either party are set out in a Schedule. It is provided that no person who is a British subject by birth or naturalization shall be given up to the Portuguese authorities. And similarly that no Portuguese subject shall be delivered up to the British authorities. Also that the person surrendered shall not be kept in prison or brought to trial by the party to whom the surrender is made, for any other crime, or on account of any other matters, than those for which the surrender has been granted.

France—The Treaty with France 1909 (see *Extradition France and Tunis order in Council 1909, Fort St.*

* The extradition treaty between Portugal and Great Britain, of November 13, 1833, embodies a Protocol, of November 30, 1892, which declares that the stipulations of the treaty do not apply to extradition as between Portuguese and British India which is reserved for ulterior negotiation.

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When an extradition treaty by express terms, as in the treaties with France and Portugal, forbids the delivery over of a naturalized or natural-born subject of the State on which the demand is made, no such delivery can be made by virtue of the treaty, and a Court which has the power to test the legality of the extradition will discharge the prisoner *R v Wilson*, 3 Q. B. D., 42. Whether, even if the treaty did not apply, there might not be other steps taken by the executive with a view to extradition was a point suggested, but not dealt with, by Lord Russell, C J, in the case next mentioned. The inconvenience of being unable either to try at home, or to give up, an undesirable subject who has committed a crime abroad, has led to the substitution in later treaties of words providing that "the parties shall not be bound" to surrender their own subjects. This makes compliance with the demand legal, but optional. *In re Galwey* [1896], 1 Q. B., 230. In no case is it any objection to the demand for surrender that the criminal who has taken refuge in another State is not the subject of the demanding State. By the fact that he has committed a crime while visiting it, he becomes liable to its jurisdiction — *R v Ganz*, 9 Q. B. D., 93. The treaty of 1876 expressly preserves the treaty of March 7, 1815, relating to the East Indian possessions of Great Britain and France, which would probably be the one resorted to in the case of fugitive criminals in India. It declares that

"All Europeans and others whatsoever, against whom judicial proceedings shall be instituted within the limits of the said settlements or factories belonging to His Most Christian Majesty for offences committed or debts contracted within the said limits, and who shall take refuge out of the same, shall be delivered up to the chiefs of the said settlements and factories, and all Europeans and others whatsoever, against whom judicial proceedings as aforesaid shall be instituted without the said limits, and who shall take refuge within the same, shall be delivered up by the chiefs of the said settlements and factories, upon demand being made of them by the British Government."

The modern practice in extradition treaties is to name specifically the offences for which each party undertakes to deliver up offenders to the other. In such cases no extradition can be granted, unless the facts alleged

George Gazette, 1910), is very similar, but contains a special clause which is not found in the Portuguese convention, that no extradition shall be granted for any political offence, or any act connected with a political offence. These words are not limited to offences against the State, such, for instance, as those in Chapter VI of the Penal Code. Nor do they include crimes merely attributable to political feeling, such as the assassination of the Czar, or the dynamite outrages of the anarchists. But they mean that fugitive criminals are not to be surrendered for crimes which are specified in the extradition treaties, if those crimes were incidental to and formed a part of political disturbances, as, for instance, the shooting of a soldier who was engaged in putting down an insurrection, or the destruction of property to form a barricade. 2 Step Cr Law, 70, *In re Castioni* [1891], 1 Q. B., 149. Where extradition was demanded in England of a French anarchist, who was charged with causing explosions at a *café* in Paris, Cave, J., held that this was not a political offence. "In order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice upon the other, and if the offence is committed by one side or the other, in pursuance of that object, it is a political offence, otherwise not"—*In re Meunier* [1894], 2 Q. B., 415, at 419. Where a person, whose extradition is being demanded, resists an order being made on the ground that the offence alleged against him is a political offence, he must show that the offence said to have been already committed by him, and in respect of which his extradition is demanded, is of that character. He cannot be allowed to contend that the demanding State, while claiming his delivery for one offence, is really intending to try him for another.

"This question bears on the political aspect of extradition, and it must be determined upon a consideration of matters into which this Court is not competent, and has no authority to enter. Such considerations, if they exist at all, must be addressed to the executive of this country; they cannot enter, and ought not to enter, into the judicial consideration of this question, which in this case turns solely upon the construction of the Extradition Act and the treaty." *Per Lord Russell, C. J., in re Arton* [1895] 1 Q. B., 103.
p 115

steamer, and when it arrived in London he was tried for the murder in the Central Criminal Court. It was held that he was "found within the jurisdiction" of that court, though the putting him on board the steamer, and bringing him to London, was unlawful, in the sense that it could not be justified either by foreign or English law. *See* 6 B. 622; 35 B., 225=13 Bom. L. R., 296=12 Cr. L. J., 356=10 Ind. Ca., 956; 16 C. W. N. 421. The ruling of the Privy Council in 25 C., 31=24 I. A., 137 (see § 19 *supra*), is not in conflict with this view having regard to the very narrow question which alone was before their Lordships for consideration. The Chief Court, Lower Burma, in 7 Bur. L. R., 83 at p. 86, took a different view, holding that if the accused was illegally arrested and brought before the court, he was entitled to be replaced in the same position and place as he would have been in had no illegality been done. *See also* 15 C. W. N. 1053.

In 17 B. 369, under an agreement between the British Government and a Native State for the surrender of offenders, a man had been demanded from the Native State as being charged with dacoity, and was subsequently tried and convicted of theft, the High Court held that the conviction was good, inasmuch as there was nothing in the extradition treaty which provided that a person surrendered on one charge should not be tried on another. Even if there had been an express stipulation to that effect, it is difficult to see how that could have invalidated the conviction. The Court which tries a prisoner has nothing to do with the mode by which he has fallen into the hands of justice. Its business is to see that he has been legally committed for an offence within its jurisdiction, and that his trial is conducted according to

It is the business of the Government to see that it does not break faith with the surrendering State. If that is a matter for complaint by the State which has captured the offender. If, however, as in the case of the Extradition Treaty, the stipulation is embodied in a treaty which binds the tribunal, it would probably be held that the court had no jurisdiction to try the offender on any other charge.

In *R. v. Nelson, Cockburn, C. J.*, in charg-

constitute an offence against the laws of the harbouring as well as of the claimant party, within the terms of the treaty. It is not sufficient that the same name is given by each State to different things.—*Re Windsor*, 34 L. J. M. C., 163; *re Bellencontre* [1891], 2 Q. B., 122. Even where general words are used, such as in the French treaty of March 7, 1815, the same general principle is applied. A treaty with China bound the Government of Hong-Kong to surrender any Chinese subject "who has committed, or is charged with having committed, any crime or offence against the laws of China." It was held by the Judicial Committee that these words ought to be limited to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China, *Atty-Gen v Kouk-A-Singh*, L. R., 5 P. C., p. 193. Again, the special condition against surrender of political offenders is a general principle of international law, which has from the earliest times been acted on by all nations which are powerful enough to resist the demand. A remarkable instance in recent times was the refusal of Turkey, in which she was supported by England, to surrender to Austria and Russia their subjects who had taken part in the Hungarian insurrection of 1849. *Forsyth*, 371

Ordinarily municipal tribunals may deal with any offender found within their jurisdiction and who has committed an offence within such jurisdiction, no matter how his presence there at the time of trial was secured. A person is "found within the jurisdiction" of a court when he is actually present there, whether he came there voluntarily or not, or even when he was brought there illegally. This was so held in the case of *R v. Sattler*, 27 L. J. M. C., 48=D. & B., 525=7 Cox, 431=14 Jur. N.S. 98. Sattler was a foreigner who had committed larceny in England, and who then went with the stolen property to Hamburg. There was no extradition treaty with Hamburg, but the deceased, an English police officer, went to Hamburg, and there arrested him with the help of the Hamburg police, and put him on a steamer for England. Sattler murdered him on the

steamer, and when it arrived in London he was tried for the murder in the Central Criminal Court. It was held that he was "found within the jurisdiction" of that court, though the putting him on board the steamer, and bringing him to London, was unlawful, in the sense that it could not be justified either by foreign or English law. *See* 6 B. 622; 35 B., 225=13 Bom. L. R., 296=12 Cr. L. J., 356=10 Ind. Ca., 956; 16 C. W. N. 421. The ruling of the Privy Council in 25 C., 31=24 I. A., 137 (see § 19 *supra*), is not in conflict with this view having regard to the very narrow question which alone was before their Lordships for consideration. The Chief Court, Lower Burma, in 7 Bur. L. R., 83 at p. 86, took a different view, holding that if the accused was illegally arrested and brought before the court, he was entitled to be replaced in the same position and place as he would have been in had no illegality been done. *See also* 15 C. W. N. 1053.

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wholly unprovided for. Accordingly Act XXI of 1879 was passed, which defined the cases in which demands for extradition could be made against the British Government, and at the same time provided that no such demands should be preferred except through the Political Agent of the Queen's Government. As regards extradition to the British Government, it is apparently content to rely upon the pressure which it can bring to bear upon the Native State where the offender may be. The provisions of all existing treaties are preserved by § 18 of the present Extradition Act XV of 1903. Practically all such treaties are now obsolete, the States with which they were made finding that they have a speedier and more effective remedy under the Extradition Act. The Instrument of Transfer to Mysore in 1881 provides by Art. 16 for surrender of criminals by Mysore, but not to it. It runs thus —

"The Maharaja of Mysore shall cause to be arrested and surrendered to the proper officers of the British Government any person within the said territories accused of having committed an offence in British India, for whose arrest and surrender a demand may be made by the British Resident in Mysore or some other officer authorized by him in this behalf, and he shall afford every assistance for the trial of such persons by ensuring the attendance of witnesses required and by such other means as may be necessary."

All the States, with which extradition treaties were made under Lord Lawrence, appear in 1887 to have executed supplemental agreements by which they abandoned their right to demand extradition of their own criminals by virtue of the treaty, in consideration of the general remedy provided by later legislation. See now Chapter III of the *Extradition Act* (Appendix I).

It will be observed that the Native State is not entitled to demand the extradition of an European British subject. He must apparently be dealt with in India under § 188 of the Crim. P. C. The arrest by a police officer in India of a person charged with having committed an offence in a Native State, with a view to handing him over to be dealt with by the authorities of that State, if

made without a warrant is illegal, and punishable under § 342 of the Penal Code 19 B., 72.

33. Rendition of Fugitive offenders as between British India and some other part of the British Dominions.—A simpler remedy, as regards offenders who escape from one part of His Majesty's dominions to another, is given by the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), into which by an order in Council Chapter IV of the Indian Extradition Act, XV of 1903 is now incorporated

By §§ 2 and 9, the Act applies to any person who, being accused of having committed any offence in one part of His Majesty's dominions, has left that part and is found in another part of His Majesty's dominions, provided the offence is punishable where it was committed by imprisonment with hard labour for a term of twelve months or more, rigorous imprisonment, or any confinement in a prison combined with labour by whatever name it is called being deemed to be hard labour. It is immaterial that the act, which is an offence so punishable in the place where it is committed, should not be an offence or should be a minor offence by the law of the place where the offender is apprehended.

Where a warrant has been issued in any part of His Majesty's dominions for the apprehension of an offender from that part it may be endorsed by a Judge of a Superior Court (§ 3) or by the Governor of any other part of His Majesty's dominions, and, when so endorsed, the warrant shall be a sufficient authority for the arrest of the offender in that part (§ 3). Further, a Magistrate of any part of His Majesty's dominions may issue a provisional warrant for the arrest of a fugitive who is suspected of being on his way to that part, on such information, and under such circumstances as would, in his opinion, justify the issue of a warrant if the offence had been committed within his jurisdiction. Notice of the issue of the warrant must be forthwith sent to the Governor of the British possession in which it is issued, who may, if he thinks fit, discharge the person apprehended (§ 4).

A fugitive, when apprehended, shall be brought before a Magistrate, who shall hear the case (subject to the provisions of the Act) in the same manner, and have the same jurisdiction and powers as near as may be (including the power to remand and admit to bail) as if the fugitive were charged with an offence committed within his jurisdiction. If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) according to the law ordinarily administered by the Magistrate,

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§§ 32-2

CHAPTER III.

GENERAL EXCEPTIONS.

I. Acts done under the authority of Government

§§ 35—47

A. in ordinary course of Government §§ 35—37.

B. in Emergency §§ 38—48.

(i) riotous assemblies § 39

(ii) Martial Law §§ 39—41

(iii) Acts of State and Acts of War §§ 42—47.

II. Acts of Lawful Correction § 48.

III. Acts of a wife under the orders of her husband

§ 49

IV. Mistake §§ 50—52

V. Judicial Acts §§ 53—55

VI. Immunity for Ministerial Acts § 56

VII. Accident § 57

VIII. Choice of Evils § 58

IX. Infancy § 59

X. Insanity §§ 60—68

XI. Drunkenness § 69

XII. Consent § 70.

XIII. Compulsion § 71

XIV. Right of Private Defence §§ 72—80

34 Nature of General Exceptions—Chapter IV of the Penal Code contains a series of provisions which must be read along with every subsequent portion of the Code, and which point out how acts, which in terms come within the definition of an offence, are either justifiable, or exempt from liability to punishment. Sections 76 and 79 relate to the case of persons who are, or who justifiably believe that they are, acting in conformity with law. Where their acts are, on their face, legal, of course no further question can arise. But cases of considerable difficulty occur where persons act under superior, or even the highest, authority, when the orders given to them are not in accordance with the usual working of the law. Such orders may be (a) absolutely illegal, or (b) they may be legalized by an emergency which sets aside the ordinary procedure applicable to similar cases, or (c) they may be done by virtue of a power which stands above the law, and is

exempt from its jurisdiction. It will be advisable to preface the remarks on these three heads by some general observations on the constitutional relation between the Sovereign and the subject.

35. The exact significance of the maxim, the King can do no wrong.—The legal maxim that the King can do no wrong does not mean that he can do anything he likes. It only means that every public act of his must be done upon the advice, or by the assistance, of someone who is responsible for its legality. As Lord Hale says :

"It is regularly true that the law presumes the King will do no wrong, neither indeed can do any wrong; and therefore if the king command an unlawful act to be done, the offence of the instrument is not thereby indemnified, for though the King is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which consequently renders the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law." *1 Hale P. C. 43.*

And this is in accordance with the twenty-ninth clause of *Magna Charta*, which declares "that no free man shall be taken, or imprisoned, or disseized of his property, or outlawed, or exiled, nor in any way hurt, nor shall the King forcibly enter or pass upon him unless by the judgment of his peers or by the law of the land." Every subject therefore who is injured by an illegal act of the Executive, may sue or prosecute the person who commanded or actually did the act. See, *per curiam*, 8 M. I. A., p. 130. *Raleigh v. Goschen* [1898] 1 Ch. 73. As the Sovereign cannot directly violate any legal right of the subject, so he cannot dispense with or suspend the operation of any statute. The exercise of such a right, rested on an obscure though undoubted prerogative of the Crown, was one of the causes of the downfall of James II. While the throne remained vacant the Houses of Parliament passed the *Declaration of Rights*, which was read out to the Prince and Princess of Orange on the 13th February, 1689, when the Crown was formally offered to them, and was accepted by them as defining the limits of their sovereignty. It commenced with the following clauses :

1. "That the pretended power of suspending of laws, or execution of laws, by regal authority, without consent of Parliament, is illegal 2 That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal"—(*Rapin, History of England*, ii. 794, where the document and the assent to it are set out in full)

Nor can the Sovereign, or the Executive as representing the Sovereign, do indirectly what it cannot do directly. It cannot frustrate the operation of the law, by refusing that assistance, without which the law is helpless. This was decided in two very important cases, both arising out of occurrences in Ireland. In the earlier of these cases—*Miller v Knox*, 4 Bing, N. C., 574—the Irish Court of Exchequer had issued a writ in execution of a decree for tithes, obtained by a rector. The officer to whom it was entrusted, being unable to carry out his orders in consequence of the disturbed state of the county, applied for assistance to the District Inspector of Police, who again applied to the head of the Irish Police for direction. The latter refused assistance, in accordance with instructions issued under the Police Act by the Lord-Lieutenant, and applying to cases of tithes. Upon this, the Court attached both the police officials for contempt of Court. The case came before the House of Lords, when the Common Law Judges were asked to give their opinions on questions submitted to them. Upon three of these questions they laid down the law as to the rights of officers of justice to call upon the public generally, and specially upon the police, for assistance in executing process, either in case of actual resistance, or of a reasonable apprehension of resistance. Upon the fourth question they replied —

"That the order of the Lord Lieutenant did not affect this obligation, as nothing in the Police Act was intended to diminish or abridge the common law duties of a constable, or take away any responsibility where it has attached by the common law. There is nothing in that order which can have the effect of absolving them, nor is any authority given by the statute to absolve them from the performance of such their common law duty."

This decision was followed in Ireland, in, *Atty.-Gen. v. Kinsane*, 32 Ir. L. R., C. L. 220, under exactly

similar circumstances. The sheriff applied to the police for assistance to enable him to execute by night certain writs of *habeas corpus* for rent in a disturbed district. The police authorities refused to grant any assistance until daylight, by virtue of distinct orders to that effect issued by the chief officials in Dublin. It was proved that an attempt to execute such writs by day would be ineffectual. The court decided that the refusal of the police authorities to render the assistance required was wholly illegal, that they could derive no protection from the official orders, and that, by refusing, they had committed an offence which was punishable by indictment, by criminal information, or by process of attachment for contempt of Court.

The principle that an illegal order of the Executive is no protection to those who carry it out, against either an action or an indictment, is not always an effective remedy, especially as the higher public servants are not responsible for the acts of their subordinates, in the same way as an ordinary employer is for the acts of his servants. For instance, the head of a department who makes a contract is not personally liable for payment. It is understood that he contracts as agent for Government, and that payment will be made out of the public funds when, and if, they are supplied. If they are not supplied, he is not responsible—*Macbeath v. Haldimand*, 1 T. R., 172; *Dunn v. Macdonald*, [1897], 1 Q. B., 401 & 555. So a public servant, such as the captain of a man-of-war or the Postmaster General, is responsible for his own acts, but not for those of his subordinates, unless commanded or sanctioned by him, because he has not appointed them, and cannot displace them—*Nicholson v. Moonson*, 15 East, 384; *Whitfield v. Lord Desperer*, 2 Cowp., 754. Nor can the head of a department be sued by any of his subordinates for his pay or pension, even though he has received the necessary funds, because there is no privity between them, and the head is responsible to the State for his application of the public money—*Gidley v. Lord Palmerston*, 3 B. & E., 275. Hence where the only effective remedy is against the State, that remedy does not exist at the law,

because the Sovereign cannot be sued in his own court, or indeed in any court "Where the subject is entitled to a right which the Crown withholds, or has suffered a wrong which the Crown ought to redress, the remedy at common law or by Magna Charta is by petition of right " 6 M. & G., 253 n. The mode of obtaining this remedy is now regulated by 23 & 24 Vict., c. 34.

36. The Position of the Indian Executive as to suits is different—Now in this respect the law of England differs from that of India. It was always held that the East India Company, though it exercised sovereign powers under the authority of the Crown, was not itself a sovereign, and was liable to be sued in respect of all matters in which it was not acting as a sovereign. The earliest decision on the subject was that of *Moodaly v. E. I. Co.*, 1 Br. Ch. Ca., 469., where the lessee of a tobacco monopoly sued the Company for assigning the right to another before the termination of his lease. Sir Thomas Sewell, M. R., said

"I admit that no suit will lie in this court against a sovereign power for anything done in that capacity, but I do not think the E. I. Co. is within that rule. They have rights as a sovereign power, they have also duties as individuals. If they enter into bonds in India, the sum secured may be recovered here. When courts of justice were for the first time established in 1793, the preamble to Bang. Reg. III of 1793 declared that the Government officers "shall be amenable to the courts for acts done in their official capacity in opposition to the regulations, and that Government itself, in superintending these various branches of the resources of the State, may be precluded from injuring private property, they have determined to submit the claims and interests of the public in such matters to be decided by the courts of justice, according to the regulations, in the same manner as suits by individuals."

From this time there can be no doubt that the E. I. Co., was always held liable to be sued in the Indian courts, in every case which was not excluded from the jurisdiction of all municipal courts. When the direct Government of India was assumed by the Queen, in 1858, under stat. 21 & 22 Vict., c. 106, it was provided by § 65 that "the Secretary of State in Council shall and may sue and be sued, as well in India as in England, he

the name of the Secretary in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies, and proceedings, legal and equitable, against the Secretary of State in Council of India, as they could have done against the said Company." By this section and § 68 all judgments and executions against him are to be enforced out of the revenues of India. The liability of the East India Company before 1857, and of the Secretary of State subsequently, was elaborately discussed by *Sir B. Peacock, C. J.*, in **2 Bourke, Pt. vii. 166**, where the defendant was held to be liable for injuries caused by the negligence of workmen employed by Government in the Kidderpore dockyard. His Lordship pointed out that the liability of the Secretary of State was to be measured by that of the E. I. Co., and in that respect went beyond that which could have been urged against the Crown by a petition of right, since it was established that as the King cannot be guilty of personal negligence or misconduct, he cannot be responsible for negligence or misconduct of his servants and citing *Viscount Canterbury v. Atty-Gen*, **1 Phill., 327=12 L. J. Ch. 281=7 Jur. 224** said, "We are of opinion that for accidents like these, if caused by the negligence of servants employed by Government, the E. I. Co. would have been liable both before and after 3 and 4 Will. IV. c. 85, and that the same liability attaches to the Secretary of State in Council, who is liable to be sued for the purpose of obtaining satisfaction out of the revenues of India. In *Cileutta* the plaintiff, who had purchased at auction the right to sell liquors in a particular district, sued the Secretary of State on the ground that his right had been set aside by the Government officers, and transferred to another. It was held by the High Court that the Secretary of State could only be sued for acts done in the conduct of undertakings which might be carried on by private individuals without sovereign power, and therefore that there was no jurisdiction over the defendant. **1 C. 11**. If this decision went upon the ground that the E. I. Co. would not have been liable in such a case, it is directly opposed to the decision in *Moodaly v. E. I. Co.*, cited before. If it

went upon the ground that the liability of the Secretary of State is less than that of the E. I. Co., it is opposed to the judgment of Sir B. Peacock, C. J., just quoted. The decision itself was doubted by Stuart, C. J., in **3 A. 829 at 835**. And the High Court of Madras refused to follow it in **5 M. 273**, where the plaintiff complained of overcharges in the matter of salt duties. It seems also opposed to a series of cases in the Privy Council, where the Secretary of State was sued without objection in respect of acts directly arising from the discharge of the functions of a reigning Sovereign. Several of these will be cited hereafter in treating of Acts of State (*post*, ¶¶ 42—44). In none of them was it denied that the defendant was liable, unless he could make out that the proceeding complained of was an Act of State. In one of these cases, Sir L. Peel said, 'If it turns out that the resumption was not an Act of State, the whole question is open, and the interpretation of the Code is matter for a civil court on remand.' **2 I. A., 38, at 40**. In others no such question arose, and the case was merely argued on its merits as between two private individuals, **8 I. A., 172**; **15 I. A., 186**; **17 I. A., 40**; **26 I. A., 16**; **22 M. 270**. But the question whether the Secretary of State could be sued in Tort has been raised in several recent cases. See *per Fletcher, J.*, **38 C. 797 at 799**; *per Jenkins, C. J.*, **28 B. 314 at 318**; *Tyabji, J.*, **27 B. 187**.

37. Statutory immunity from certain suits and indictments is conferred on certain Indian officials:— An apparent exception to the general principle just discussed will be found in a series of statutes which restrained the action of the Supreme Courts as against the members of the Government, and persons acting under the written orders of the Governor-General in Council. To understand these Acts it will be necessary to keep in mind the reason for their being passed. They originated in that singular contest between the Supreme Court of Bengal and the Government, which is detailed by Mill in his *History of India*, iv pp. 308—355 and in the more glowing pages of Macaulay in his *Essay on Warren Hastings*. In 1773 the whole constitution of the East India Company was placed on a new footing by Stat. 13 Geo.

III., c. 63, commonly known as the *Regulating Act*. Among other things it authorized His Majesty to grant a Charter creating a Supreme Court. By §§ 15 and 17 it was provided that the Court should not be competent to try the Governor-General, or any of the Council for any offence, not being treason or felony, and that nothing in the Act should extend to subject the person of the Governor-General, or of any of the Council, or of any of the judges of the court, to be arrested or imprisoned upon any action, suit or proceeding in the court. Similar provisions were inserted in the Charter, § 34. Very shortly after the establishment of the Supreme Court, the judges began to claim jurisdiction over subjects and persons which were clearly beyond their control. They entertained suits against natives beyond their local limits, and broke open their houses and arrested them on mesne process. They claimed an independent control over the collection of the revenue. They refused to recognize any authority in the mofussil courts. Finally they allowed writs to issue against the Governor-General and the members of his Council for orders given to resist an armed force, which the sheriff had marched against the Rajah of Cossijurah to sequester his land and effects. The result was a complete deadlock of the machinery of Government. Petitions flowed in upon Parliament. A commission of inquiry was appointed, and upon its report, Stat. 21 Geo. III., c. 70, was passed. The §§ 1—4 are alone material to this subject.

By §§ 1 to 3, it was provided "that the Governor-General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal, for or by reason of any act or order, or any other matter or thing whatsoever, counselled, ordered or done by them in their public capacity only, and acting as Governor-General in Council." And "that if any person or persons shall be impleaded in any action or process, civil or criminal, in the said Supreme Court, for any act or acts done by the order of the said Governor-General in Council in writing, he or they may plead the general issue, and give the said order in evidence, which said order, with proof that the act or acts done, has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted, and discharged from all and every suit, action, and process whatsoever, civil and criminal, in the said court. Provided always, that with

respect to such order or orders of the said Governor-General and Council as do or shall extend to any British subject or subjects, the said court shall have and retain as full and complete jurisdiction as if this Act had never been passed."

Section 4. "Provided also that nothing herein contained shall extend to discharge or acquit the said Governor-General and Council, jointly or severally, or any other person or persons acting by or under their order, from any complaint, suit, or process, before any competent court in this kingdom, or to give any other authority whatsoever to their acts, than acts of the same nature and description had, by the laws, and statutes of the kingdom, before this Act was made." See also 10 Geo III., c 47, § 4.

The statutes which authorized the Charters of the Supreme Courts of Madras and Bombay, directed

"That the Governor and Council at Madras and Bombay, and the Governor-General of Fort William, shall enjoy the same exemption and no other from the authority of the Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid, from the jurisdiction of the Supreme Court of Judicature there already by law established." 39 and 40 Geo III., c 79, § 2. 4 Geo IV., c. 71, § 7.

The Charters of the Courts contained the same provisions exempting the Governor-General and the Governor and his Council from arrest, from actions against them for acts done in their public capacity and from indictments for offences other than treason and felony, as have been already set out. Neither the statutes nor the Charters create any exemption in favour of persons acting under order of the Governor in Council of either presidency. See **5 M., 273**, where the whole series of these statutes and Charters is reviewed by Turner, C J. It is evident that these provisions are only intended to secure the heads of Government in each Presidency from suits and indictments on account of their public conduct, which should be impeached, if at all, before the King's courts in England. With the single exception of the protection given to persons acting under a written authority from the Governor-General, no exemption can be claimed by their subordinates. Nor does anything in these statutes and Charters diminish the full right to sue the East India Company itself.

38. Power of the Executive to deal with riotous assemblies. We have next to examine acts which are not done under the ordinary course of law, but which are legalized by an emergency which justifies the setting aside of the usual procedure. Such acts, when done by private individuals, are specially provided for in the sections relating to self-defence. The most important of those which are done under the orders of the Executive come under the heads of Riotous Assemblies and Martial Law.

The summary suppression of riotous assemblies by armed force, and the use for that purpose of any amount of violence, extending even to the causing of death, are justifiable on grounds of State necessity, and can only be justified so far as that necessity exists. It may seem anomalous that an Executive officer should be authorized, at his own discretion, to inflict capital punishment upon a rioter who could only, after due trial and conviction, be liable to two years' imprisonment. But experience has shown that a riotous assembly is the first step in the contest between violence and law, and that if it is not checked at once, all law is swept away, and every species of crime is certain to follow. So imperative is the necessity of immediately checking such riotous assemblies, that the law not only imposes this duty upon every authority entrusted with the preservation of the peace, and upon every private person who is summoned by him to assist, but also invests every military man, and even every private person with the same power, to be exercised under the same restrictions. Tindal, C. J., in his charge to the Grand Jury after the Bristol Riots of 1832, laid down the law as follows —

"By the common law every private person may lawfully endeavour, by his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see

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dangerous he may arm himself against the evildoers to keep the peace."

He then pointed out, that though the co-operation of the civil authorities was desirable, it was not necessary, and should not be waited for, if the occasion demanded immediate action. He then proceeded to say :—

"The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen lying under the same obligation, and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrats, so is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too, if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same." *R. v. Pinney*, 3 B. & Ad. 916—5 C. & P., 262.

During the colliers' strike in 1833, some men were shot by the military during a riot at Featherstone. Lord Bowen, Sir Albert Rolit, and Lord (then Mr.) Haldane, were appointed a commission to inquire into the circumstances of the riot, and to report upon the law which should govern the military in such a case. The report was issued on December 7, 1893. The great legal eminence of the members forming the commission gives the report such an exceptional authority, that it may be useful to quote their statement of the law, upon a subject which may be of frequent occurrence in India.

"We pass next to the consideration of the all-important question whether the conduct of the troops in firing on the crowd was justifiable; and it becomes essential, for the sake of clearness, to state succinctly what the law is which bears upon the subject. By the law of this country everyone is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may lawfully be used in their suppression depends on the nature of each riot, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be attained. (Referred to in 21 M. 249 at p. 253.)

"The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct has become felonious through disobedience to the provisions of the Riot Act, and who resist the attempt to disperse or apprehend them. The riotous crowd at the Aekton Hall Colliery was one whose danger consisted in its manifest design, violently to

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"The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen lying under the same obligation, and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too, if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same." *R v Pinney*, 3 B. & Ad 916 - 5 C. & P., 262.

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"The taking of life can only be justified by the necessity for protecting persons or property against various forms of violent crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed, or in the case of persons whose conduct is such as to require the provisions of the law to be enforced. The provisions of the law are not to be used to suppress or apprehend persons who are engaged in the most manifest design, violently to

set fire and do serious damage to the colliery property, and in pursuit of that object to assault those upon the colliery premises. It was a crowd accordingly which threatened serious outrage, amounting to felony, to property and persons, and it became the duty of all peaceable subjects to assist in preventing this. The necessary prevention of such outrage on person and property, justifies the guardians of the peace in the employment against a riotous crowd of even deadly weapons.

"Officers and soldiers are under no special privileges, and subject to no special responsibilities, as regards this principle of the law. A soldier, for the purpose of establishing civil order, is only a citizen armed in a particular manner. He cannot because he is a soldier excuse himself, if without necessity he takes human life. The duty of magistrates and peace officers to summon, or to abstain from summoning, the assistance of the military depends, in like manner, on the necessities of the case. A soldier can only act by using his arms. The weapons he carries are deadly. They cannot be employed at all without danger to life and limb, and, in these days of improved rifles and perfected ammunition, without some risk of injuring distant and possibly innocent bystanders. To call for assistance against rioters from those who can only interpose under such grave conditions ought, of course, to be the last expedient of the civil authorities. But when the call for help is made, and a necessity for assistance from the military has arisen, to refuse such assistance is in law a misdemeanour.

"The whole action of the military when once called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done. No set of rules exists which governs every instance, or defines beforehand every contingency that may arise: One salutary practice is that a magistrate should accompany the troops. The presence of a magistrate on such occasions, although not a legal obligation, is a matter of the highest importance. The military come, it may be, from a distance. They know nothing probably of the locality, or of the special circumstances. They find themselves introduced suddenly on a field of action, and they need the counsel of the local justice, who is presumably familiar with the details of the case. But, although the magistrate's presence is of the highest value and moment, his absence does not alter the duty of the soldier, nor ought it to paralyze his conduct, but only to render him doubly careful as to the proper steps to be taken. No officer is justified by English law in standing by, and allowing felonious outrage to be committed, merely because of a magistrate's absence.

"The question whether, on any occasion, the moment has come for firing upon a mob of rioters depends, as we have said, on the

necessities of the case. Such firing, to be lawful, must, in the case of a riot like the present, be necessary to stop or prevent such serious and violent crime as we have alluded to, and it must be conducted without recklessness or negligence. When the need is clear, the soldier's duty is to fire with all reasonable caution, so as to produce no further injury than what is absolutely wanted for the purpose of protecting person and property. An order from the magistrate who is present is required by military regulations, and wisdom and discretion are entirely in favour of the observance of such a practice. But the order of the magistrate has at law no legal effect. Its presence does not justify the firing if the magistrate is wrong. Its absence does not excuse the officer for declining to fire when the necessity exists.

"With the above doctrines of English law the Riot Act does not interfere. Its effect is only to make the failure of a crowd to disperse for a whole hour after the proclamation has been read a felony, and on this ground to afford a statutory justification for dispersing a felonious assemblage, even at the risk of taking life. In the case of the Ackton Hall Colliery, an hour had not elapsed after what is popularly called the reading of the Riot Act, before the military fired. No justification of their firing can therefore be rested on the provisions of the Riot Act itself, the fact of

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remained in full force. The justification of Captain Barker and his men must stand or fall entirely by the Common law. Was what they did necessary, and no more than was necessary, to put a stop to or prevent felonious crime? In doing it, did they exercise all ordinary skill and caution, so as to do no more harm than could be reasonably avoided?

"If these two conditions are made out, the fact that innocent people have suffered does not involve the troops in legal responsibility. A guilty ringleader, who under such conditions is shot dead, dies by justifiable homicide. An innocent person killed under such conditions, where no negligence has occurred, dies by an accidental death. The legal reason is not that the innocent person has to thank himself for what has happened, for it is conceivable (though not often likely) that he may have been unconscious of any danger, and innocent of all imprudence. The reason is, that the soldier who fired has done nothing except what was his strict legal duty."

It will be observed in the above extracts that the duties, rights, and liabilities of the officer and private soldier are placed on exactly the same level. The command of the officer cannot of itself justify the soldier in firing, if the

set fire and do serious damage to the colliery property, and in pursuit of that object to assault those upon the colliery premises. It was a crowd accordingly which threatened serious outrage, amounting to felony, to property and persons, and it became the duty of all peaceable subjects to assist in preventing this. The necessary prevention of such outrage on person and property, justifies the guardians of the peace in the employment against a riotous crowd of even deadly weapons.

"Officers and soldiers are under no special privileges, and subject to no special responsibilities, as regards this principle of the law. A soldier, for the purpose of establishing civil order, is only a citizen armed in a particular manner. He cannot because he is a soldier excuse himself, if without necessity he takes human life. The duty of magistrates and peace officers to summon, or to abstain from summoning, the assistance of the military depends, in like manner, on the necessities of the case. A soldier can only act by using his arms. The weapons he carries are deadly. They cannot be employed at all without danger to life and limb, and, in these days of improved rifles and perfected ammunition, without some risk of injuring distant and possibly innocent bystanders. To call for assistance against rioters from those who can only interpose under such grave conditions ought, of course, to be the last expedient of the civil authorities. But when the call for help is made, and a necessity for assistance from the military has arisen, to refuse such assistance is in law a misdemeanour.

"The whole action of the military when once called in ought, from first to last, to be based on the principle of doing, and doing without fear, that which is absolutely necessary to prevent serious crime, and of exercising all care and skill with regard to what is done. No set of rules exists which governs every instance, or defines beforehand every contingency that may arise: One salutary practice is that a magistrate should accompany the troops. The presence of a magistrate on such occasions, although not a legal obligation, is a matter of the highest importance. The military come, it may be, from a distance. They know nothing probably of the locality, or of the special circumstances. They find themselves introduced suddenly on a field of action, and they need the counsel of the local justice, who is presumably familiar with the details of the case. But, although the magistrate's presence is of the highest value and moment, his absence does not alter the duty of the soldier, nor ought it to paralyze his conduct, but only to render him doubly careful as to the proper steps to be taken. No officer is justified by English law in standing by, and allowing felonious outrage to be committed, merely because of a magistrate's absence.

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 . . . can therefore

be rested on the provisions of the Riot Act itself, the further consideration of which may, indeed, be here dismissed from the case. But the fact that an hour had not expired since its reading did not incapacitate the troops from acting when outrage had to be prevented. All their common law duty as citizens and soldiers remained in full force. The justification of Captain Barker and his men must stand or fall entirely by the Common law. Was what they did necessary, and no more than was necessary, to put a stop to or prevent felonious crime? In doing it, did they exercise all ordinary skill and caution, so as to do no more harm than could be reasonably avoided?"

"If these two conditions are made out, the fact that innocent people have suffered does not involve the troops in legal responsibility. A guilty ringleader, who under such conditions is shot dead, dies by justifiable homicide. An innocent person killed under such conditions, where no negligence has occurred, dies by an accidental death. The legal reason is not that the innocent person has to thank himself for what has happened, for it is conceivable (though not often likely) that he may have been unconscious of any danger, and innocent of all imprudence. The reason is, that the soldier who fired has done nothing except what was his strict legal duty."

It will be observed in the above extracts that the duties, rights, and liabilities of the officer and private soldier are placed on exactly the same level. The command of the officer cannot of itself justify the soldier in firing, if the

command was illegal. *1 East. P. C. 312; Foster, C. L. 154* This might lead to a conflict between the military duty of the soldier to obey his officer, and his civil duty only to obey an order which was legal. Practically the case is not likely to occur. It is improbable that an officer would give an order to fire, which was so outrageously wrong that a soldier ought, on the spur of the moment, to refuse to obey. On the other hand, where the order was such as he might reasonably think he was bound to carry out, it is probable that any prosecution would be against the officer and not against the soldier. In *Keighley v. Bell, 4 F. & F., 763; Willes, J.*, said "I believe that the better opinion is, that an officer or soldier acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders." See also *per Kennedy, J., in Marks v. Frogley [1898], 1 Q. B., p. 404*. This rule was adopted by the Law Commissioners in the clauses relating to Suppression of Riot, §§ 51 and 53 of the Draft Code of 1879. Sir James Stephen says. *2 Steph. Crim. L., 205*.

"Probably it would be found that the order of a military superior would justify his inferiors in executing any orders, for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good reasons for ordering them to fire into a disorderly crowd, which to them might not appear to be at that moment engaged in acts of dangerous violence, but soldiers could hardly suppose that their officer could have any good grounds for ordering them to fire a volley down a crowded street, when no disturbance of any kind was either in progress or apprehended." *See 21 M., 219; 1883 P. R. 16* The same rule appears to apply generally to all cases where an inferior acts in cases of danger under the orders of his superior, which are not apparently illegal." *R. v. Trainer, 4 F. & F., 105. See also 1883 P. R. 17 & 27* and the Editor's commentaries on the Code of Criminal Procedure, Chapter IX, where the Police Orders and the case-law are considered in detail at pp. 180—183

39. Nature of Martial Law.—Before discussing the legality of placing a country or district under martial law in cases of emergency, it is necessary to point out what is not meant by the term in this application of it. In the early law books the term is used as denoting what is now called military law, that is, the special law which

governs those who, on becoming members of the military forces of the Crown, are thereby subjected to a special code of offences and procedure. The origin and growth of military law are traced by Cockburn, C. J., in his charge* to the Grand Jury in *R v Nelson* at p. 86. A similar body of law has grown up for the naval forces. The courts-martial, which try offences under this code of law, are so far subject to the superior courts of common law, that the latter courts will issue a prohibition to the former if they act without jurisdiction, as, for instance, by trying a person who is not subject to military law. But, where they have jurisdiction, no action or prosecution will lie which is founded on the assertion that they have passed an erroneous decision, or arrived at it by the admission of evidence which would be excluded in a court of common law. *Grant v Gould*, 2 H. Bl., 69, p. 101. Nor can a superior officer be sued at law for suspending his subordinate for a military offence and bringing him to trial before a court-martial, even though he is acquitted by it. If the superior officer has acted wrongly, this, again, is a military offence, which must be tried by military law. *Johnstone v. Sutton*, 1 T. R., 510, p. 548; confirmed in H. L., 1 Bro. P. C., 100; see *Warden v. Bailey*, 4 Taunt., 67, p. 74. But an officer can claim no exemption from a civil court in respect of an act wholly beyond military control. For instance, a soldier was held entitled to sue an officer for false imprisonment, where the punishment had been inflicted for disobedience to an order to attend evening school, and to make weekly payments towards its support. *Warden v. Bailey*, 4 Taunt., 67, p. 88. Nor does the term apply to acts done by an armed force, in the summary suppression of a rebellion, against the persons and property of those who are actively engaged in the rebellion, so far as such acts are properly necessary for the purpose. *Cockburn*, pp. 25, 84; 1 Steph. Crim. L., 214. Cases of this sort come under the principles already discussed in regard to riotous assemblies. Martial law, for the purpose of the present discussion, may

* Published in 1867, as revised and annotated by the Lord Chief Justice and referred to hereafter as *Cockburn*.

be defined in the language of the Duke of Wellington, who said :

" Martial Law is neither more nor less than the will of the General who commands the army, in fact, martial law means no law at all. Therefore the General who declares martial law, and commands that it shall be carried into execution, is bound to lay down the rules, regulations, and limits, according to which his will is to be carried out " *Cited by Mr Headlam, Cockburn, 101.*

The constitutional question is this. Can the Executive, at a period of emergency, suspend the ordinary law, and substitute, as regards its citizens, not being persons found in open resistance, a system called martial law, which renders them liable to be tried by new tribunals, a new procedure, and with new penalties, either for offences already recognized by law, or for conduct previously innocent, which the General declares to be criminal? That Parliament may authorize such a proceeding is beyond all doubt. In the Jamaica cases, (see below p 106) *Sir James Stephen* doubted whether such an authority could be legalized by a Colonial Legislature, but the charges of both the Chief Justice and Mr Justice Blackburn assumed that it could be. *Cockburn, 75; Forsyth, 561, Finlason, 81 R v Eyre, 2 F. & F. 579.*

40. Legal basis of Martial Law.—The legality of martial law, in the last-named sense, has never been the subject of judicial decision, and only became the subject of judicial discussion in consequence of the Jamaica disturbances of 1865. As a result of the action of the Executive on that occasion, the Jamaica Committee laid a case before Mr. Edward James and Mr. Fitzjames Stephen for their opinion. The case and opinion are printed in full in *Forsyth's Constitutional Law*, and the opinion is given less fully in *1 St. Ct. L., 207*. In the case of *R v. Nelson*, two members of a court-martial which sentenced Mr. Gordon to death were put on their trial for murder, and the Chief Justice of England delivered a charge to the Grand Jury in which the whole question was exhaustively discussed. Subsequently Governor Eyre was put on his trial on similar charges, and in that case Blackburn, J., delivered:

a charge to the Grand Jury, which has been published by Mr. Finlason. In both cases the Grand Jury threw out the bills. The joint opinion of Messrs James and Stephen, which was the work of the latter, is in remarkable conformity with the charge of Cockburn, C J, to whom, of course, it was unknown. From these sources, supplemented in some slight particulars, the following view of the question is drawn.

Between the time of Richard II and the Commonwealth, there appear to have been numerous proclamations and commissions which purported to authorize martial law in times of public disturbance and rebellion. These are examined by Cockburn, C J, and he ends his review by stating that

"So far as I have been able to discover, no such thing as martial law has ever been put in force in this country against civilians, for the purpose of putting down rebellion" *Cockburn*, 25-27. It is quite certain that no attempt to put martial law in force has ever been made in England since the Restoration.

Irish Rebellion — In Ireland, however, the facts were different. On the eve of the Irish Rebellion of 1798, lawlessness in Ulster had risen to a degree which the ordinary power of the Government was unable to control. In March, 1797, Lord Lake received instructions from the Castle, which not only directed him to disarm the disaffected and to disperse tumultuous assemblies, but also authorized him to take all measures "which a country depending upon military force alone for its protection would require." In fact he was empowered to enforce martial law in its widest sense. Under this authority steps were taken, which admittedly were far in excess of anything that could be justified by ordinary law, and under which the most terrible excesses were committed by the troops and yeomanry. *Lecky, Hist. of England*, iii 285, 291, 299-310; *Ann. Reg. of 1797*, 260-264. After the outbreak of the rebellion in 1798, further orders were issued, by one of which, in April, the Commander-in-Chief was authorized "to hold courts-martial for the trial of offences of all descriptions, civil and military, with the power of confirming and carrying into execution the sen-

tences of such courts-martial, and to issue proclamations." *Ann Reg. of 1798*, 213, 230. In October, *Wolfe Tone* was captured on board the *Hoche*, one of a French squadron of ships which was defeated in attempting a descent on Ireland. He was tried by a court-martial in Dublin, and sentenced to be hanged. *Curran* at once applied to the Court of King's Bench for a *habeas corpus*, on the ground that the prisoner "had no commission under His Majesty, and therefore no court-martial could have cognizance of any crime imputed to him, while the Court of King's Bench sat in the capacity of the great criminal court of the land." The writ was immediately issued by Lord Kilwarden, C. J., but before action could be taken upon it, *Wolfe Tone* had committed suicide 27 St. Tr., 613. In 1799 two Acts of the Irish Legislature were passed, by one of which the exercise of martial law was recognized and sanctioned, while the other indemnified those who had acted under the previous proclamations. In 1803, and again in 1833, statutes of the Imperial Parliament were passed authorizing the trial of offenders by martial law in the disturbed districts of Ireland. These Acts, and especially the Indemnity Act of 1799, showed that the Government was not content to rely on the prerogative for their justification. On the other hand, each of these statutes, either by recital or reservation, contained an express assertion of the undoubted prerogative of the Crown to exercise martial law for the suppression of treason and rebellion. The Chief Justice considers that these recitals and reservations were absolutely inoperative, so far as they went beyond the common law of the kingdom. *Cockburn*, 53—57, 70—71. Sir James Stephen thinks that the statutes "mean only that the Crown has an undoubted prerogative to attack an army of rebels by regular forces under military law, conducting themselves as armies in the field usually do." 2 St. Cr. L., 211. Both judges are agreed that no royal proclamation can authorize any act which is not reasonably necessary for the suppression of persons in open resistance to the Crown. They have no doubt that the trial of *Wolfe Tone* by a court-martial sitting within a mile of the Court of King's Bench in Dublin, was a mere nullity, and that his death, if he had

been executed under the sentence, would have been murder. This too is in accordance with the opinions of Coke, Hale, and Comyns, in their various treatises. When the Petition of Right was being discussed, Lord Coke said "A rebel may be slain in the rebellion, but, if he be taken, he cannot be put to death by martial law." And Rolle, afterwards Lord Chief Justice, and a most learned lawyer, on the same occasion said "If a subject be taken in rebellion, and be not slain at the time of his rebellion he is to be tried after by the common law." *Cockburn*, 37, 57—65. In his application for a *habeas corpus* in Wolfe Tone's case, Curran asserted as a "sacred and immutable principle of the constitution, that martial law and civil law are incompatible, and that the former must cease with the existence of the latter." This is in accordance with Lord Coke and Lord Hale, who state that when the courts are open martial law cannot be executed *Cockburn*, 69 note. See *ex parte Marais* [1902], A. C. 109, below at p 110.

Ceylon Rebellion —In 1848, Lord Torrington, Governor of Ceylon, proclaimed martial law to suppress a rebellious rising in Kandy. The matter became the subject of Parliamentary inquiry by a Committee which sat in 1849, and evidence as to the nature and legality of martial law was taken, amongst others, from Sir David Dundas, then Judge-Advocate General. He said very much to the same effect as the Duke of Wellington in the passage already quoted "The proclamation of martial law is a notice to all those to whom the proclamation is addressed, that there is another measure of law, and another mode of proceeding than there was before." "Where martial law is proclaimed, there is no rule or law by which the officers executing it are bound." "It is more extensive than ordinary military law." "It overrides all other law, and is entirely arbitrary." The Chief Justice quotes the answers merely to disagree with them. Sir James Stephen thinks that they only refer to the conduct of the army in the field, and are sound law. *Cockburn*, 102; 1 *St Cr. L.*, 214. In the course of these proceedings, Earl Grey, then Colonial Secretary, wrote a despatch, which he stated had been read out in Cabinet Council

in the presence of Lords Cottenham and Campbell, and had been approved by them. It contained the following passage, which seems not on the whole to go beyond what the Chief Justice and Sir James Stephen admit to be justifiable. There is certainly nothing in it which could be relied upon in support of the court-martial upon Wolfe Tone in Ireland, or upon Gordon in Jamaica.

"The proclamation of martial law is in fact no more than a declaration that, under circumstances of urgent public danger, the law is for a time suspended, and that for the safety of the State, the Government deems it necessary to set aside the ordinary rules of law by military force, and to proceed summarily to put down the rebellion, or to punish those who are concerned in it: courts martial are employed on such occasions, in order to guard against the danger of subjecting innocent persons to military executions by instituting an inquiry, necessarily only summary, into the guilt of the parties whose immediate punishment is necessary for the restoration of tranquillity and the suppression of rebellion. But courts-martial so assembled have nothing in common with the tribunals bearing the same name which, under the Mutiny Act, take cognizance of military offences. Courts-martial of such description have powers lawfully defined by the laws under which they are created, and the sentences passed become matters of record, which can be enforced by the military authorities, which is not the case with courts-martial assembled for the punishment of rebels, under proclamation of martial law, without the sanction of any positive enactment. Sentences of such courts add nothing to the legality of the punishments inflicted, and serve only to show that these punishments have not been inflicted without due regard to the guilt of those who were subjected to them. Accordingly it is the practice where martial law has been used, and punishments have been inflicted under it, that when the danger is over the Legislature should be applied to for laws of indemnity, for the security of those by whom these powers have been exercised, and for whom there is no legal warrant, however necessary it may have been to assume them." *Finslow, "Review of Authorities as to Suppression of Riot or Rebellion,"* p. 96, 1868.

Jamaica Riots.—In the Jamaica case the only charge against Colonel Nelson and Lieut. Brand, and the principal charge against Governor Eyre, arose out of the treatment of Mr Gordon. A negro outbreak took place at Morant Bay on October 11, 1865, in which the Volunteers were overpowered, the court house was stormed, eighteen persons were killed, and upwards of thirty wounded, and an insurrection took place which rapidly spread to the neighbouring estates, where similar acts

of murderous violence were committed. There was, no doubt, for a time a most dangerous crisis. The troops were, however, called out at once, and as soon as they appeared in the field the insurrection collapsed. Martial law was proclaimed on the 13th October. On the 17th, Mr Gordon, against whom warrants had been issued, gave himself up to the authorities in Kingston. He could have been tried there by ordinary law, but by orders of the Governor he was put on board a war steamer, conveyed to Motant Bay, and there tried for treason by a court-martial, convicted, and sentenced to be hung. The sentence was ratified by the Governor, and on the 23rd Gordon was executed. It was asserted on behalf of the accused that all they did was literally justified by various Jamaica statutes. In the case of *R. v Nelson*, the Chief Justice threw some doubt upon the application of those statutes, and suggested to the Grand Jury that they should leave this point for full discussion in the subsequent stage of the case. They, however, threw out the bill. In the subsequent charge against Governor Eyre, the judges of the Queen's Bench met to discuss the charge which Blackburn, J., was to deliver to the Grand Jury, and it seems to have been admitted that the statutes might authorize the proceedings taken. In his charge, the judge directed the jury that the Colonial Acts gave the defendant power to proclaim martial law, in the sense that it superseded the common law for the time being, and enabled all matters to be tried by summary procedure, not with an arbitrary discretion, but without applying mere technical rules; the question left to them was, whether the emergency warranted the Governor in applying, or in thinking that he was bound to apply, this law. *Finlason*, p. 81. This bill also the Grand Jury threw out. In his charge, however, Blackburn, J., through a misapprehension of what had been agreed on at the meeting of the judges, stated some propositions of law as having been approved of by them, which had not been so approved. On June 8, 1868, Cockburn, C. J., stated what had already been agreed on in the following language, which of course only applies to a case where there is an existing, to proclaim martial law.

"There was undoubtedly a proposition of law which seemed to us sufficient for the guidance of the jury, on which we were all agreed, viz., that assuming the Governor of a colony had, by virtue of authority delegated to him by the Crown, or conferred on him by local legislation, the power to put martial law in force, all that could be required of him, so far as affects his responsibility in a court of criminal law, was that in judging of the necessity which, it is admitted on all hands, forms the sole justification for resorting to martial law.

in force, or prolonging
an honest intention to

to the consideration of the course to be pursued, the careful, conscientious, and considerate judgment which may reasonably be expected from one invested with authority, and which, in our opinion, a Governor so circumstanced is bound to exercise, before he places the Queen's subjects committed to his government beyond the pale of protection of the law. Having done this, he would not be liable for error of judgment, and still less for excesses, or irregularities committed by subordinates whom he is under the necessity of employing, if committed without his sanction or knowledge.

"Furthermore, we consider that a Governor sworn to execute the laws of a colony, if advised by those competent to advise him, that those laws justify him in proclaiming martial law in the manner in which Governor Eyre understood it, cannot be held criminally responsible if the circumstances call for its exercise, and though it should afterwards turn out that the received opinion as to the law was erroneous. On the other hand, in the absence of such careful and conscientious exercise of judgment, more honesty of intention would be no excuse for a reckless, precipitate and inconsiderate exercise of so formidable a power; still less for any abuse of it in regard to the lives and persons of Her Majesty's subjects, or in the exercise of immoderate severity in excess of what the exigencies of the occasion imperatively called for. Neither could the continuance of martial law be exercised, even as regards criminal responsibility when the necessity which can alone justify it had ceased by the entire suppression of all insurrection, either for the purpose of punishing those who were suspected of having been concerned in it, or of striking terror into the minds of men for the time to come." *1 Finslison, p. 103*

In *Phillips v. Eyre*, L. R., 6 Q. B., p. 15., Willes, J., in delivering the judgment of the Exchequer Chamber, said with regard to the same facts:—

"Upon an indictment against a Governor for conduct alleged to be oppressive and criminal, circumstances, and, above all, motives, may be taken into account, which would be excluded in deciding dry questions of civil law."

The Sepoy Mutiny—The course adopted by the Government of India during the Mutiny seems to have been in full accordance with the above principles. For a considerable time, and over a large extent of territory, all civil law was necessarily suspended by the act of the rebels. The civil officers were driven away, and the courts were closed. No authority other than the military was in existence, and it had to act summarily, and on the spur of the moment, as a matter of self-preservation. While the hostile forces were face to face, everyone who appeared to belong to, or to be siding with, the rebels, was dealt with as an enemy. When the pressure of war relaxed, discrimination and mercy could be shown, and as soon as British sway was restored, civilians were attached to the army for the purpose of dealing with those whose guilt admitted of a doubt. The State Offences Act, XI of 1857, authorized the Executive to proclaim any district which was, or had been, in a state of rebellion, and to issue a commission for the trial of the rebels for any offence against the State, or for murder, arson, robbery, or any other heinous crime against person or property. The proceeding was to be summary and without appeal; but no punishment was to be passed except such as was warranted by law for the offence. As soon as peace was restored, and the courts were opened, justice resumed its ordinary course.

Boer war—In the progress of the Boer war of 1900 a similar Act of Indemnity was passed by the Cape Parliament in respect of extra-legal acts done by the military while war was being waged in the Cape Colony. No such indemnity could be required in respect of acts done within the hostile States while a state of war continued. An application to the Privy Council out of transactions which took place within the Cape Colony arose as follows: Orders, called Martial Law Regulations, provided that in certain districts of the Cape Colony where war was actually raging, persons who committed specified acts should be tried and punished by a Military Court. *D. F. Marais* was arrested in one such district, and removed to another, where he was tried and sentenced by Military Law. He applied to the Supreme

Court of the Cape Colony for release, on the grounds that there was a Civil Court actually sitting for the trial of similar offences in the district in which he was arrested, and that his arrest and removal to another district and trial in it was wholly illegal. His application was rejected, whereupon he applied to the Privy Council for special leave to appeal, this also was refused. The Lord Chancellor, in giving judgment, said:—

"Their Lordships did not think it right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear, they are of opinion that where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals, and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit. Martial law had been proclaimed over the district in which the petitioner was arrested, and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830." After referring to the language of Lord Tenterden in *1 Knapp, P. C. 316*, at p. 360 his Lordship proceeded to say, "Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. It may often be a question whether a mere riot, or disturbance neither so serious nor extensive as really to amount to a war at all has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is a universal consensus of opinion, that the Civil Courts have no jurisdiction to call in question the propriety of the action of military authorities." *Ex parte D. F. Marais* [1902], A. C. 109, p. 114.

The effect of an Indemnity Act in barring suits for illegalities committed under martial law was much considered in the case of *Phillips v. Eyre*, L. R., 4 Q. B., 225, *aff'd* L. R., 6 Q. B., 1. There, such an Act, passed by the Jamaica Legislature, was successfully pleaded to a suit brought after the Act in the English courts. Cockburn C. J., said

"We may rest assured that no such enactment would receive the royal assent, unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity. The present indemnity is confined to acts

done in order to suppress the insurrection and rebellion, and the plea contains consequently the necessary averments, that the grievances complained of were committed during the continuance of the rebellion, and were used for its suppression, and were reasonably and in good faith considered by the defendant to be necessary for the purpose, and it will be incumbent on the defendant to make good those averments in order to support his plea " L R, 4 Q. B., p. 243

In the case of *Wright v Fitzgerald*, 27 St. Tr., 765, a French master sued the Sheriff of Tipperary for acts of the greatest barbarity perpetrated during the rebellion of 1798, on the pretext—for which there does not seem to have been the least foundation—that he was a rebel. The defendant pleaded the Indemnity Act Lord Yelverton, in his charge to the jury, said —

" That as every man, whether magistrate or not, was authorized to suppress rebellion, and was to be justified by that law for his acts, it is required that he should not exceed the necessity which gave him that power, and that he should show in his justification that he had used every possible means to ascertain the guilt which he had punished; and, above all, no deviation from the common principles of humanity should appear in his conduct "

Wright recovered five hundred pounds damages. Baron Martin said, in *Phillips v Eyre*, on appeal, that this was the only case in which anyone had obtained satisfaction for any act done in suppressing the rebellion.

41. Justification for Martial Law in respect of Loyal Subjects.—Another question which, as far as I know, has never been considered judicially, is as to the rights of a State in time of invasion, not against the invaders or those who assist them, but against their own loyal subjects. There can be no doubt that any General would, for purposes of defence, set all private rights at defiance. He would requisition transport, supplies, and lodging for his troops. He would occupy all private houses which were suitable for defence, and would destroy all buildings and trees which interfered with the range of fire. In 1859 a Royal Commission was appointed to consider the defences of the United Kingdom. They addressed to Mr Headlam, then Judge-Advocate-General, the following questions with regard to this subject:—

"Have you considered the effect of the proclamation of Martial law in districts of England, and how far Generals in command can be empowered to overrule and disregard all private interests and rights of property which come in the way of their operations?"

"Is there any authority now existing, under which Martial law can be legally proclaimed?"

His answers contained the following passages:—

"The effect of a proclamation of martial law in a district of England, is a notice to the inhabitants that the Executive Government has taken upon itself the responsibility of superseding the jurisdiction of all the ordinary tribunals, for the protection of life, person, and property, and has authorized the military authorities to do whatever they think expedient for the public safety. There is no doubt, therefore, that when a proclamation of martial law is issued, the Government, to use the language of the question submitted to me, empowers Generals in command to overrule and disregard all private interests and rights of property which come in the way of their operations." "I consider it clear that during a period of great danger and necessity, the Crown is not only justified in proclaiming martial law, but that it would fail in the performance of its duty if, upon such an occasion, it were to shrink from the responsibility incident to such a step. The exercise, however, of this prerogative to proclaim martial law, seems to me to be a matter of contingent legality, rather than of absolute right, and the constitutional propriety of its exercise will have to be determined in each case by subsequent decision of Parliament, and the legality of the acts done under the authority of the proclamation will have to be established by Parliament in an Act of Indemnity to ministers, on whose responsibility the proclamation was issued." "Whenever Parliament is called on to give the sanction of law to the acts of those who have been concerned in putting in execution a proclamation of martial law, the question of granting compensation to those who have suffered in person or property, will naturally come under its consideration, and each case can then be dealt with in such manner as the Legislature may think fit." *Report of Commission on Defence of United Kingdom, February 7, 1860, Appx., p. 90.*

These remarks by Mr Headlam throw little light on the question which we are now discussing. Suppose an officer was sued or indicted for turning a mansion into a fort, in opposition to the resistance of an otherwise loyal owner, how should he defend himself? Should he plead that his proceedings were part of a great act of State, *viz.*, a war against the invading nation, and that it was outside municipal jurisdiction, or should he plead that in acting under martial law he was doing what

was justifiable by common law? Or, supposing an Act of Indemnity had been passed, should he plead that his conduct, if originally illegal, had been retrospectively legalized by Parliament? Practically, of course, his pleader would set up all these defences. It seems to me, however, that the first would be the real one. The war, suppose, with France, would be an undoubted act of State and it is impossible to see how one of a consecutive series of acts could be separated from another. If it is an act of State to shoot an enemy, it must be equally an act of State to turn a house into a fortress for the purpose of shooting him. Of course this would not protect an officer who used his position for some purpose unconnected with war, as, for instance, if he carried away valuable pictures or statues which he found in the house. The court would have jurisdiction to find that such conduct did not come under the sanction of the State (*see* ¶ 42 below). It is quite consistent with the whole tenor of English law to hold that a person, acting for the best in a difficult position, should be freed from all fear of future litigation. Mr Headlam seems rather to suggest that all such acts would be technically illegal, and would require a *post facto* justification. But if so, the act of the officer in the assumed case would be a felony, *viz.* housebreaking, and the owner would be justified in killing him; and if the owner was shot in the act of resistance, this would be murder. An Act of Indemnity would protect those who shot the owner, but it could not retrospectively render criminal any acts done by him in protecting his property. *See per Willes, J., Phillips v. Eyre, L. R., 6 Q. B., at p. 25.* This seems such an alarming conclusion that one is in-

it should be held fully cognizable by the ordinary tribunals. This seems to have been the opinion of Buller, J.

... individuals sustain an injury, for instance pulling down houses, or defence of the kingdom against the King's enemies. The civil writers indeed say that the individuals who suffer have a right to resort to the public for a satisfaction; but no one ever thought that the common law gave

an action against the individual who pulled down the houses, etc. This is one of those cases in which the maxim applies *salus populi suprema est lex*." *Governor of Cast Plate Manufacturers v. Meredith* 4 T. R. 794 at p. 797.

The spirit, though not perhaps the letter, of § 81 of the I. P. C. would certainly cover such a case.

42. Exact significance of the expression "Acts of State"—Acts of State differ from all the cases hitherto considered in this respect, that the assertion that an act is of this character does not raise a defence on the merits, but goes in bar of the jurisdiction. To make out this plea, it is necessary to show that the State, acting in its capacity as Sovereign, not only dealt, but was justified in dealing, with the matter in question, on principles paramount to the rules of municipal law, and therefore not to be controlled by municipal tribunals. It is within the jurisdiction of the Court to decide whether the proceeding complained of was an act of State or not. If it decides that it was, then its jurisdiction is at an end; if the contrary, then the case proceeds. *Musgrave v. Pulido*, L. R. 5 A. C., 102, p. 111., 6 Bom. L. R. 131 at 148. Every tribunal acts by virtue of an authority delegated to it by the State, for certain general purposes. It cannot exceed its authority, or apply it to different purposes. The Supreme Courts of the United States have a very large power to control the Sovereign action, not only of the individual States, but of the entire body acting as one. British courts are much more strictly limited.

First.—Acts done in the course of war.—The most obvious instances of acts of State are those which occur in the course of war, against an enemy, or quasi-enemy, or against persons who bring themselves within the operation of Public Law. No one, of course, would imagine that any claim could be made against the General of an invading army for injuries done to non-combatants, or for exactions levied upon them. When the forts of Alexandria in 1882 were bombarded, the European States whose subjects were injuriously affected, made claims against England for compensation, the justice of which was acknowledged; but no one would

have dreamed of indicting the Admiral for murder. And it makes no difference whether the act has been originally ordered by the State, or has been subsequently approved by it. When the captain of a ship of war burnt some barracoons on the West Coast of Africa, and released the slaves contained, he acted on his own authority, but his conduct was approved by the Secretary of State. It was held that this adoption of his act made it an act of State, which barred a suit. *Buron v Denman*, 2 Exch., 167. The same ruling was followed in the Tanjore case. 7 M. 1. A., 476, see also *Salaman v. Secretary of State for India*, L. R. [1906] 1 K. E. 613; 7 M. I. A. 555; 3 M. H. C. R. 424; 12 B. L. R. 167; *Cook v Sprigg*, L. R. [1899] A. C. 572 and for a case where there had been no ratification, see 9 E. H. C., R. 314. So by international law the ships of neutrals are liable to be seized in war time, and brought before a court for condemnation. If condemned, the property in the ship is absolutely changed, but even if the seizure is declared to be illegal, and the ship is acquitted, no action founded on the seizure can be brought against the captors. *Le Caux v. Eden*, 2 Doug., 594; *Lindo v Rodney*, *ibid*, 613. So if property in the possession of the Sovereign, or of a private individual, is seized by the belligerent State, while hostilities are raging, or while the hostile condition continues, the transaction can give rise to no proceedings in a municipal court. *Rajah of Coorg v. E. I. Co*, 29 Beav., 300=30 L. J. Ch., 226; *Elphinstone v Bedreechund*, 1 Knapp., 316, at p. 360; *ex parte Marais* [1902], A. C. 109, ante § 40.

43. **Certain Dealings of the Indian Government with Native States resemble acts of State.**—The same rule applies even where no hostilities take place, if the seizure is made by reason of the absolute power of the State, acting in its sovereign capacity. *The Tanjore Raj* was the survival of what had once been a powerful dynasty, which finally dwindled down into a petty, half independent principality, and so lingered on till the last Rajah died in 1855 without male heirs. It was then determined by the Government of India to put an end to the Raj, and to annex its territory. This was effected by the simple act of the Collector with a few British soldiers,

and was unresisted because it was irresistible, though it was carried out against the will of all concerned. The Collector took possession of all property, public and private, of the late Rajah, though as to the latter it was announced that the Government did not intend to retain it, but would apply it for the benefit of the family. A bill was filed by the personal representatives of the late Rajah, in which they admitted that they could not dispute the seizure of the public property, but they claimed an account of the personal property. The Supreme Court decreed for the plaintiff, but this decree was reversed in the Privy Council. The Committee held that the whole annexation of Tanjore was an act of State, and that every part of the proceedings which was incidental and accessory to the completion of the annexation partook of the same character **7 M. I. A., 476 at pp. 531, 536.** In recent times the British Government has occasionally taken action within the Native States in a manner which professes to rest upon its own rights, and does not claim to be an act of war, though it can neither be justified by International nor by Municipal Law. **7 B.L.R. 452; 32 C. 1; 6 Bom. L.R. 763.** *Lee Warner*, in his very interesting and suggestive work on the Protected Princes of India, has pointed out that the position taken up by the British Government since the direct assumption of authority by the Queen, in reference to the Native States, is completely different from that which had been adopted by the East India Company. In the period which commenced with Warren Hastings and ended with the Marquis of Hastings, the East India Company was one of many conflicting States, which dealt with each other as independent sovereignties, and among which the British power was at the outside *primus inter pares*. In the early treaties of this period the Native States insisted upon the recognition of their absolute right as rulers over their own subjects, and upon the exclusion of the British civil and criminal jurisdiction, with a pertinacity which perhaps concealed a conviction that they were being rapidly overshadowed. See *Treaty with Sindha, 1801, Art. 8, & Aitch., 50; with Kotah, 1817, Art. 10, 3 Aitch., 322; with Holkar, 1818, Art. 10, & Aitch., 170. Also a series of treaties of the*

same year with Oodeypore, Art. 7, 3 Aitch, 26, Jeypore, Art. 8, ib., 96, Jodhpore, Art., ib., 145, Boondees, Art. 3 ib., 214, with Kutch, 1819, 7 Aitch, 19 One of the earliest indications of the approach of a new conception of duties is contained in a letter from the Governor-General to the Gaekwar of Baroda, 3rd April, 1820

"With regard to internal affairs Your Highness is to be unrestrained, provided you fulfil your engagements to the Bankers of which the British Government is the guarantee The identity of interests of the two States will render it necessary for the British Government to offer its advice whenever any emergency occurs, but it will not interfere in ordinary details" 6 Aitch, 112

Yet so lately as in 1835, when Holkar Hatee Rao was attacked in his palace by his own subjects who wished to assassinate him and his Minister, the British Government refused to assist him, on the ground that the grant of assistance would require a continual interference in the internal affairs of the State inconsistent with the position of Holkar and the policy of the British Government 4 Aitch, 163 When therefore the mismanagement of a Native State produced an internal condition of affairs which could not be tolerated by the British Government, it saw no remedy but that of annexation, which was accordingly applied in the case of Coorg in 1834 and Oudh in 1856 Lee Warner, 135—144

After the Mutiny, however, the current of policy turned of control When Lord annuds authorising adops, he wrote on the 30th

April, 1860 —

"The proposed measure will not debar the Government of India from stepping in to set right such serious abuses in a Native Government as may threaten any part of the country with anarchy or disturbance, nor from assuming temporary charge of a Native State when there shall be sufficient reason to do so This has long been the practice" "Neither will the assurance diminish our right to visit a State with the highest penalties, even confiscation, in the event of disloyalty or flagrant breach of engagement." Lee Warner, 146

Two instances in which the exercise of this right was enforced illustrate acts of State of the intermediate character now under discussion.

Baroda —In 1874 the relations between Mulhar Rao, the Gaekwar of Baroda, and Colonel Phayre, the Resident at his Court, had become very strained, and the latter had been instructed to warn the Gaekwar that, unless he mended his ways, he would probably be dethroned. In the same year an undoubted attempt was made to poison Colonel Phayre by administering to him arsenic and diamond dust in his *sherbet*. The Gaekwar was suspected of being implicated in the attempt. Early in 1875 a Commission, consisting of three English officials and three Indian Chieftains, was appointed to enquire into and report upon the charge. The English Commissioners found that it was proved, while the Indian members were of the contrary opinion. The British Government announced, as their decision, that Mulhar Rao and his line were deposed, but that the State was to be maintained, and that the new Chief should be selected by adopting to another branch of the family a youth whom the Government should approve. This decision was rested, not on any assumption that the charge of poisoning was established, but on a long course of misgovernment and criminal misconduct, which made his continuance as a ruler detrimental to the people of Baroda, and inconsistent with the relations which ought to exist between the Indian Government and the State of Baroda. *Lec Warner, 160, Ann. Reg., 1874, 128; 1875, 87.* See also **6 Bom. L. R. 763 (P. C.)** which deals with the *Panna* case.

Manipur —The case of this little Principality was even stronger than that of Baroda, both as regards the process by which it was carried out and the principles which were laid down. In 1890 the reigning Maharajah fled from his State, and his place was usurped by his brother, known as the Jubraj (his apparent) or the Senapathi. In 1891, the Chief Commissioner of Assam was sent to carry out the decision of Government that the usurper should be deposed and deported. He was resisted in the execution of this duty, and then, under pretext of a pailey, he and his party were induced to enter the palace where they were murdered. A fresh force captured the fort and all the offenders. A commission of three English officials

was appointed to try the Senapathi, the General who commanded the assassins, and another. They were found guilty. The Senapathi and the General were hanged; the Maharajah was set aside, and a new ruler was appointed. The Government of India and the Secretary of State in announcing their decision laid down the following rules:—

"The principles of international law have no bearing upon the relations between the Government of India as representing the Queen-Empress on the one hand, and the Native States under the sovereignty of Her Majesty on the other. The paramount supremacy of the former pre-supposes and implies the subordination of the latter." "Of the right of the Government of India to interfere after the forcible dispossession of the Maharajah there can be no question. It is admittedly the right and duty of the Government of India to settle successions in the Protected States of India generally." *Ann. Reg. 1891, 368, Lee Warner, 171, Gazette of India, Aug. 21, Aug. 22, 1891.*

It is significant of the altered relation between the British Government and the Native States, that whereas the official designation of the latter was formerly "Princes and States in alliance with Her Majesty," (24 & 25 Vict., c. 67, § 22, 28 & 29 Vict., c. 17, 1), it has now been altered to "Princes and States under the suzerainty of Her Majesty." *General Clauses Act X. of 1897, § 3 (27) Interpretation Act, 52 & 53 Vict., c. 63, § 18 (5)*

44. (B) Acts in respect of newly acquired territory.—

The same principle as that stated in § 42 applies in the case of newly acquired territory, before its inhabitants have settled down into the regular legal relations of subject and sovereign. Where a country has been obtained by conquest or cession, it is usual to allow the inhabitants to retain their old laws and usages, but this is merely a matter of convenience and the sovereign may deal with the rights of the conquered absolutely at his pleasure, except so far as he is restrained by the terms of the treaty, if any, by which the country was acquired.—*Per Lord Mansfield, Campbell v. Hall, 1*

assumed that the sovereign had accepted them as constituting the basis on which the Government was to proceed,

settling the new country would be simply *Acts of State*. They might be influenced, but they would not be governed by the existing laws. Two Indian cases went upon this principle. The plaintiff claimed relief against the conduct of the E. I. Co., in one case, after they assumed the sovereignty of the Carnatic by treaty with the Nabob; in the other, after their conquest of the Punjab. In each case the E. I. Co., while professing an intention to deal with titles to land, as they would have been dealt with by the Native Rulers, had assumed to themselves the disposal of all the land, and had disregarded the alleged rights of the claimant. In each case it was held by the Privy Council that the acts were acts of State, which were not intended to be, and could not be, questioned by the municipal courts. 7 M. I. A. 555; 2 I. A., 38, at p. 44. A contrary decision was given in the case of *the Begum Sumroo*. She had held lands as a sort of subordinate feudatory under Scindia till 1803. After that year the sovereignty of Scindia passed to the E. I. Co., and they accepted the position of *Sumroo*, and she held as of her old tenure till her death in 1836. On her death the Company resumed her lands on the alleged determination of her tenure. The courts in India dismissed the suit brought by her on the ground that the resumption was an act of State. This defence was overruled by the Judicial Committee.

They said: "The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another Sovereign State; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title, that title being the undoubted right of the sovereign power to resume and retain, or assess to the public revenue, all lands within its territories, upon the determination of the tenure under which they may have been exceptionally held rent free. If, by means of the continuance of the tenure, or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising

between the Government and its subjects, would *prima facie* be cognizable by the municipal courts of India," 12 B. L. R. (P.C. 120 at p. 150 = 18 W.R. 349; see also 5 M. 273.

45. (C) Treaties.—A treaty is an act of State entered into between two sovereigns, which can only be enforced by diplomatic representations, or, in the last resort, by war. It is so completely outside municipal law, that one party may bind itself to hold property for the use of private persons, in a line of succession different from that which the ordinary law would permit. 16 I. A., 175. No suit can be brought by one party in the courts of the other for breach of its provisions 4 Bro. Ch. Ca., 179. Nor can any suit be brought by a private person, whose rights assume the continuance of the treaty, to enforce those rights against the other party, who has put an end to the treaty. In 1803 the E I Co assigned lands to the King of Delhi for the support of the Mogul sovereignty. The King mortgaged them to the plaintiffs. After the Mutiny of 1857, the possessions of the King were seized and confiscated. The plaintiffs then sued the Government to establish their right as mortgagees. The courts in India dismissed the suit for want of jurisdiction. The Privy Council affirmed their decision.

They held that the lands had been assigned to the Delhi Kings by an arrangement which "was as much an act of State as if it had been carried into effect by formal treaty assigned by the British Government."

"Municipal courts have no jurisdiction to enforce engagements between sovereigns founded on treaties. The Government, when they deposed and confiscated the property of the late King, as between them and the King, did not affect to do so under any legal right. Their acts can be judged of only by the law of nations, nor is it open to any other person to question the rightfulness of the deposition, or of the consequent confiscation of the King's property."

"The revenues and territories which in 1804 were, by an act of State, assigned for the maintenance of Shah Alum and his household, were, in 1857, also by an act of State, resumed and confiscated. The seizure and confiscation were acts of absolute power, and were not acts done under colour of any legal right, of which a municipal court could take cognizance." Sup. Vol., I. A. 189, at p. 191-193 = 12 B. L. R. (P. C.) 167, at p. 181 = 18 W. R. 389 at p. 392.

See also *L. R.* 19 *Eq.* 509, a case arising out of the annexation of Oudh.

Cook v. Sprigg [1899] *A. C.* 572 was a case from South Africa which proceeded upon the same principles. Sigean, who was described as "Paramount Chief of Pondoland," made certain concessions to the plaintiff, Cook, in the years 1889—1893. In 1894 Pondoland was annexed to the Cape Colony by Act V of 1894 passed in consequence of Sigean's deed of cession, dated 17th May, 1894. The action was brought against the Prime Minister of the Cape Colony to enforce the concessions. Various questions were raised as to the validity of the concessions, and their binding character against Sigean or the State of Pondoland, also as to an undertaking, express or implied, by the Cape Colony to take over the territory subject to the concessions. All these considerations were treated as immaterial by the Judicial Committee. The Lord Chancellor, in delivering judgment, said

"The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State, treating Sigean as an independent sovereign, which the appellants are compelled to do in deriving title from him. It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which Municipal Courts administer. It is no answer to say that by the ordinary principles of International Law private property is respected by the sovereign which accepts the cession, and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded property. All that can be properly meant by such a proposition is that, according to the well-understood rules of International Law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. And if there is either an express or a well understood bargain between the ceding potentate and the Government to which the cession is made, that private property shall be respected, that is only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure." 1899, *A. C.* 572 at p. 577.

Much more difficult questions arise where a treaty operates in derogation of the previously existing rights of the subjects. In *L.R.* 3 *L.A.* 102, by arrangement between

the Government of India and a native Prince, an exchange of territories took place, by which part of a British district was, or was supposed to have been, transferred to the Prince. In the Privy Council the question whether such a transfer could be effected without an Act of Parliament was discussed with immense learning. The appeal was decided on another point. When Heligoland was ceded to Germany in 1890, the agreement for that purpose stipulated that the cession should be made "subject to the assent of the British Parliament," and an Act authorizing it was passed in the same year. In the House of Commons, however, it was contended that the treaty-making power of the Crown was amply sufficient for a cession, and that to effect it by Act of Parliament was unnecessary and unconstitutional. The balance of opinion seems to have been in favour of this view, though it was contended, on the other side, that where the cession was made in time of peace, for the purpose of carrying out some general scheme of policy, the consent of Parliament, if not necessary, was certainly desirable. Ann Reg., 1890 170—173, 322 *Times Debates*, H C xvi 398--408. See also 2 A. 1. The same question arose, in a different form, in Newfoundland. By a series of agreements, dating from the Treaty of Utrecht, in 1713, the French have acquired rights of fishing along part of the coast of Newfoundland, which is known as the French shore. In recent years lobster-fishing has become a matter of importance, and the French contended that the inhabitants of Newfoundland had no right to erect factories on the French shore for the purpose of curing the lobsters. The dispute was temporarily settled by an international arrangement, known as a *modus vivendi*, which provided that no lobster factories, which were not in operation on the 1st July, 1889, should be permitted on the French shore, unless by the consent of commanders on each side. This agreement was not sanctioned by any Act of Parliament, or by the Legislature of the island. In pursuance of the agreement, Captain Walker, who was the English commander on the Newfoundland station, removed some lobster factories belonging to Mr. Baird. The latter sued him in the Colonial Court, and Captain Walker pleaded that the matters complained

of were acts of State, arising out of the political relations between England and France, and involved the construction of treaties and of the *modus vivendi*, and of other acts of State, and could not be inquired into by the court. This plea was held to be no answer, and the decision of the Court of Newfoundland was affirmed in the Privy Council. Lord Herschell said:—

“In their lordships’ opinion the judgment was clearly right, unless the defendant’s acts can be justified on the ground that they were done by the authority of the Crown, for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign Power. The suggestion that they can be justified as acts of State, or that the court was not competent to inquire into a matter involving the construction of treaties and other acts of State, is quite untenable.

“The Attorney General (Sir Richard Webster, now Lord Altonstone, L. C. J.) admitted that he could not maintain the proposition, that the Crown could sanction an invasion by its officers of the rights of private individuals, whenever it was necessary, in order to compel obedience to the provisions of a treaty. He claimed, that as the Crown had power to make a treaty, it must possess the power to compel its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. If this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, and that an agreement which was arrived at to avert a war which was imminent, was akin to a treaty of peace, and subject to the same constitutional law.

“Whether these powers existed in either or all of these cases, and whether in both or either of these cases interference with private rights can be justified otherwise than by the Legislature, are grave questions upon which their lordships do not find it necessary to express an opinion. Their lordships agree with the court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition, for which alone the appellant’s counsel contended.” *Balke v. Baird* [1892], A. C. 491. at p. 496.

46. In normal times there can be no Act of State between the Sovereign and his own subject.—The legality of the Sovereign’s acts towards his own subjects can be questioned in civil courts, 6 B. L. R., 392. at p. 435. A British court may also inquire into the character of the act of a Governor of a foreign State, and is not bound to accept it as an act of State. 10 B. L. R., 345.

Sir James Stephen lays down the broad proposition that "as between the sovereign and his subjects there can be no such thing as an act of State" 2 *Step. Crim. L.*, 65. The statement cannot be disputed so long as the relations between the sovereign and his subjects are in their normal condition, but I doubt whether it can be maintained when those relations have been voluntarily repudiated by rebellion, or have been suspended under the pressure of an overwhelming State necessity. An instance of the former class will be found in the well-known proceeding in Oudh. It was annexed on February 13, 1856, and thereupon all the inhabitants became British subjects. The Mutiny broke out in May, 1857. Some of the great landholders remained faithful to the E. I. Co., but the great mass of the population participated, actively or passively, in the rebellion. On March 15, 1858, Lord Canning issued his celebrated Proclamation, by which he confiscated all the land in the province of Oudh, except such as belonged to the faithful Taluqdars. (The Proclamation will be found in 6 *I. A.*, p. 74.) By various subsequent proceedings the land was re-granted, but it has been repeatedly held by the Privy Council that the Proclamation made *tabula rasa* of all the land tenures of Oudh, and that no title existed since that date which could not be traced back to some fresh grant by the Government of India. *Rani of Chhatarpur v. Government of India*, 4 *I. A.*, 210; 6 *I. A.*, 63. The same prerogative has frequently been exercised by the Government of India with the same result against individual landholders, who acted in a rebellious manner. 7. *I. A.*, 38, at p. 43; 8 *I. A.*, 99, at p. 113; 29 *I. A.*, 178, at p. 191=29 *C.* 828.

47. Acts done under the orders of a Foreign Sovereign.—The orders of a Foreign Government will only be a justification for acts done within its own jurisdiction. In *Dobree v. Napier*, 2 *Bing.*, N. C. 781, followed in *Carr v. Francis Times* [1902] *A.C.* 176, p. 179, the defendant was sued for seizing an English ship. He pleaded that he was duly commissioned as an admiral by the Queen of Portugal, and that he had been ordered by her to blockade the coast of that country, and that in

the execution of this duty he had seized the ship in question, which was duly condemned. It was admitted that this plea was sufficient, but a replication was put in that he could not justify under the orders of the Queen of Portugal, as he had entered her service in violation of the provisions of the *Foreign Enlistment Act*, and therefore his service was unlawful. This replication was held bad. A violation of the *Foreign Enlistment Act* was a matter between Captain Napier and his own sovereign, but it did not affect the Queen of Portugal, who was not bound by the statute, and was at liberty to employ any one she chose. In this case the seizure was, in fact, perfectly lawful. It was made within Portuguese waters, and was followed by a regular sentence of a prize court. But it would have made no difference to the defendant if it had been absolutely illegal. Any injury arising to an English subject from an act of war by a foreign sovereign, could only be compensated by diplomatic action between the two States (see §42 above). The same rule was applied where the master of an English ship contracted with the Chilean Government to carry to England some prisoners who were sentenced to banishment. On reaching England they indicted him for assault and false imprisonment, and, on appeal, the conviction was affirmed. The Court held that there could be no conviction for what was done within the Chilean territory, for that in Chili the acts of the Government towards its subjects must be assumed to be lawful, and that an English ship, while within the territorial waters of a foreign State, was subject to the laws of that State as to acts done to the subjects thereof. But an English ship on the high seas, out of any foreign territory, was subject to the laws of England; and, therefore, any jurisdiction under the orders of the Chilean Government ceased when the ship passed the line of Chilean jurisdiction. It might be that transportation to England was lawful by the law of Chili, and that a Chilean ship might so lawfully transport Chilean subjects. But for an English ship the laws of Chili out of the State were powerless, and the lawfulness of the acts must be tried by English law. *Per Erle, C. J., R. v. Lesley, 29 L. J.*

M. C. 97 = Bell, 220 = 8 Cox, 269 = 6 Jur. (n. s.) 202 = 1 L. T. 452 = 8 W. R. 220.

48. Justification of Acts done by way of Lawful Correction or urgent necessity.— There are a few cases in which the law vests in private persons the right of personal chastisement of those who are under their care. The right exists in the case of parents over their children, of schoolmasters over their scholars, and of masters over their apprentices. The correction must be administered for a proper purpose, and in a suitable manner. For any injury resulting from excessive violence, the person inflicting it is answerable. In a case where a schoolmaster had caused the death of a boy by excessive beating, Cockburn, C J., said —

"A parent, or a schoolmaster, who for this purpose represents the parent, and has the parental authority delegated to him, may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable. If it is administered for the gratification of passion or of rage, or if it be immoderate and excessive in its degree, or if it be protracted beyond the child's power of endurance, or with an instrument unfitted for the purpose, and calculated to produce danger to life or limb, in all such cases the violence is unlawful, and if death ensues it will be culpable homicide." *R v. Hopley*, 2 F & F 202.

Where a father beat a child of two and a half years with a strap, and death ensued, Martin, B., said "The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two and a half years old. Although a slight slap may lawfully be given to an infant by its mother, more violent treatment of an infant by its father would not be justifiable, and the only question for the jury to decide is, whether the child's death was accelerated or caused by the blows inflicted by the prisoner." *R v. Griffin*, 11 Cox, 402. Where, however, the correction has been proper and reasonable, if from any unforeseen cause death should ensue, the death will be excused as being accidental. 1 Hale, P C 174, 1 Hawk, P C 85, Foster, Cr. L. 262, 1 East, P C 261. The right of correction possessed by a schoolmaster extends not only to acts done in school,

but to acts done on the way to and from school. It is a delegation of parental rights which begins to operate as soon as the child has left his home. *Cleary v. Booth*, [1893], 1. Q. B. 465. The same law applies in the case of master and apprentice; *R. v. Keife*, 1 Ld. Raym. 144; see also the *Apprentices Act*, XIX of 1850, § 14; and in the old books it is stated to exist in the case of master over servant generally. Probably the servants there meant were youthful apprentices. Certainly no right to beat a servant is recognized by modern law. Dismissal is the only punishment allowed. Nor can a husband justify beating his wife, though in earlier times even this privilege appears to have been admitted. 6 *Com. Dig.* 543

The right of a captain of a merchant ship at sea to inflict corporal punishment upon a seaman for mutinous conduct rests upon the necessities of the case. It was recognized to the fullest extent by Lord Stowell in the case of *The Agincourt*, 1 Hagg. Adm. 272. (See to the same effect *Lamb v. Burnett*, 1 Cr. & J. 291) where he laid it down, that though the punishment inflicted might be more severe than was permissible in the case of an apprentice, yet it must be applied with due moderation, and that —

"In all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment; and therefore that the person charged should have the benefit of that rule of universal justice of being heard in his own defence. A punishment inflicted, without the allowance of such benefit, is in itself a gross violation of natural justice. There are cases undoubtedly, which neither require nor admit of such a deliberate procedure. Such are cases in which the criminal facts expose themselves to general notoriety by the public manner in which they are committed, or where the necessity occurs of immediately opposing attempted acts of violence by a prompt reversion of lawful force, as in the disorders of a commencing mutiny." Continuing, Lord Stowell says, "Nor do I find that any particular mode or instrument of punishment has received a particular recognition. That must be left to the common usage practised in such cases, and to the human discretion of the person who has the right of commanding its application."

This case was cited and relied on by Holloway, J., in the case of *R. v. Irvine*, *First Madras Sessions, 1867*,

where a master of a ship was indicted under § 340 for wrongfully confining the mate and carpenter.

He told the jury that the captain of a ship had, from the necessity of the case, considerable powers, extending, in the case of disobedient mariners, to the infliction of corporal punishment. That his powers *a fortiori* extended, in case of necessity, to what would, but for those powers, be wrongful restraint. He must, however, be restricted by the necessity of the occasion, and for determining upon that necessity, the condition of the ship, in which a whole watch had refused to work, was very material matter for their consideration, but that an act of restraint or confinement, legal in its inception, would become wrongful if the mode used was improper, or the continuance longer than the need demanded. The question of the necessity was not to be too nicely weighed, according to the calm judgment which men in cool blood would form after the event, but by a consideration of the occurrences, as they would appear to a reasonable man placed in the situation of the captain.

49. Under the Code, a wife acting under the orders of her husband, enjoys no special immunity—According to English law, the wife is supposed to be subject to such powerful influences by her husband, that in some cases, the extent of which is not very fully defined, she is excused on the assumption that she has been acting under his coercion. *Steph Dig Crim L*, art 30; *Brown v. Atty-Gen for New Zealand* [1898], A. C. 234. Further, there is assumed to be such a complete community of interest between them that neither can bring any criminal charge against the other, except in regard to personal injuries inflicted by one upon the other. *R v Lord Mayor of London*, 16 Q. B. D., 772. Neither of these principles is recognized by the Penal Code. Their application to the case of theft by one of the married couple from the other, will be discussed hereafter in reference to the law of theft (*See post, Ch XI infra*.)

50. Responsibility for acts done under mistake of fact—Each of the §§ 76 and 79 contains a reservation in favour of a person who, though neither bound nor justified by law in doing a particular act, yet (a) by reason of a mistake of fact, and not by reason of a mistake of law, and (b) in good faith believes that he is so bound or justified. 30 C. 95; 2 L. B. R. 311=1 Cr. L. J. 1118. The rule

as to mistake of fact was stated by Stephen, J., as follows in *R. v. Tolson*, 23 Q.B.D. at p. 188:—"I think it may be laid down as a general rule, that an alleged offender is deemed to have acted under that state of facts which he, in good faith, and on reasonable grounds, believed to exist when he did the act alleged to be an offence." This is in accordance with §§ 76 and 79, and with the definition of good faith in § 52. A person who finds a man in his bedroom at night, under circumstances which lead to the reasonable inference that he has come to commit a burglary, would be justified under § 103 in shooting him, even though he had come for a perfectly innocent purpose—*Levet's case*, 1 Hale, 42. He would not be justified in shooting a woman or a child. He would not be excused if he fired at a person whom he wrongly supposed to be committing a criminal trespass in his paddy field, because even if he were right in his supposition, he would be doing what is not authorized by § 105. The reasonableness of the belief is again a question of fact, and more indulgence will be shown to a person who has to act on the spur of the moment, especially if he is an officer of justice who is bound to act, than to one who, under the facts assumed, has still time for consideration. 12 B. 377; 2 W. R. Cr. 9; 24 C. 885. See also *Burns v. Nouell*, L. R., 5 Q. B. 444. A person who hears a man outside his house at night would be expected to act with more caution, than one who finds a man at his bedside. *Leete v. Hart*, L. R., 3 P. C. 322. In every case where mistake is pleaded, there must be facts whereon to ground an honest belief as required by §§ 76 and 79. 20 B. 215; [1911] 2 M. W. N. 479.

The extent to which ignorance of an essential fact may be pleaded as a defence to a criminal charge was much discussed in *R. v. Prince*, L. R., 2 C. C. 154. The prisoner was indicted under an English statute, which is in substance identical with § 361 of the I. P. C., for unlawfully taking an unmarried girl under the age of sixteen out of the possession, and against the will, of her father. All the facts were proved, but it was found by the jury that, before the prisoner took the girl away, she

had told him that she was eighteen, and that the defendant *bona fide* believed that statement, and that the belief was reasonable. Upon a case reserved it was held by fifteen judges (Brett, J., alone *dissenting*) that the conviction was right. The judgments establish the five following rules:—

(i) *That when an act is in itself plainly criminal, and is more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is no answer to a charge for the aggravated offence.* For instance, on a charge of assaulting a policeman in the execution of his duty, under § 353, or of abducting a child under ten in order to steal from its person, under § 369; or of lurking house-trespass by night, under § 444, it would be no defence to establish ignorance that the person assaulted was a policeman, that the child abducted was under ten; or that the hour at which the house was broken into was after sunset. *Ibid* p. 176.

(ii) *That where an act is prima facie innocent and proper, unless certain circumstances co-exist, then ignorance of such circumstances is an answer to the charge.* For instance, on a charge against a carrier of carrying game sent by an unqualified person, or against a person for sending vitriol not properly marked as such, or against a dealer of being in possession of stores marked with the Admiralty broad arrow, it was in each case a sufficient answer to show that the defendant was ignorant that he was in fact carrying game, or sending vitriol, or that the goods in his possession bore the Government mark. See pp. 162, 165, 168, 176 and Rule (V), *post*.

(iii) *That even in the last-named cases, the state of the defendant's mind must amount to absolute ignorance of the existence of the circumstance which alters the character of the act, or to a belief in its non-existence.* Where the defendant does the prohibited acts, without caring to consider what is the truth as to the facts, or with notice of circumstances which ought to put him on inquiry, which he avoids, the absence of positive knowledge must be no defence. See pp. 169, 177.

The difficulty in *Prince's* case was that it came under none of the above three heads. To constitute the offence charged it was necessary to make out four things: *first* that the person taken away was a girl, that is a female whose years rendered it probable that she was still under guardianship; *secondly*, that she was in fact in the lawful possession of someone, *thirdly*, that she was taken out of that person's possession without his consent; and *fourthly*, that she was under sixteen. Unless all four circumstances were combined, the act was not unlawful, in the sense of being criminally indictable. On the other hand, the absence of the circumstance of age did not make the act innocent and proper, except so far as it exempted it from punishment. It was admitted that if the taker had wrongly believed that he had the guardian's consent to the taking, he would have been excused: so also if he had, though erroneously, believed that the girl was not in the possession, or under the guardianship, of anyone. See pp. 167, 175. It was asked, on what ground an erroneous belief as to the existence of two ingredients in the definition of the offence should be a justification, while an equally erroneous belief as to another should be none? This was the ground of Mr. Justice Brett's opinion in favour of an acquittal. Different answers were given by the other judges. The judgment delivered by Blackburn, J (p. 170), rests simply on a consideration of the language and object of the statute, as rendering it unlikely that the prisoner's knowledge of the age of the girl could be an essential element in the offence. Mr. Justice Denman (p. 178) considered that the word "unlawfully" which occurs in the English statute must be taken as "equivalent to the words 'without lawful excuse, using those words as equivalent to 'without such an excuse as, being proved, would be a complete legal justification for the act,' even where all the facts constituting the offence exist." He further held that as the father had the rights of a natural guardian until the daughter was twenty-one, the act of the defendant in taking her out of his custody, even on the supposition that she was actually eighteen, was an unlawful, though not a criminal, act, and, therefore, could not be said to be done "lawfully." This view clearly could not

apply in India in the case of Hindu or Mahomedan females with whom, except for the purposes of certain statutes affecting property, minority ceases at sixteen. Probably the most satisfactory, and for Indian purposes the most instructive view, was that taken by Bramwell, B. He said (p. 175).—

“What the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a *girl*, who can be said to be in another's *possession*, and in that other's *care or charge*. No argument is necessary to prove this, it is enough to state the case. The Legislature has enacted that if anyone does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of the *mens rea*. If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*, so, if he did not know that she was in anyone's possession nor in the care, or charge, of anyone, in those cases he would not know he was doing the act forbidden by the statute—an act which, if he knew she was in possession or care of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful causes.” See also, *per* Gorell Barnes, J., in the Divorce Court, *Lord v Lord* [1903], P. D. 300.

In other words, he who does that which is wrong must take the risk of its turning out to be criminal. This would supply us with a further rule, *viz.* —

(iv) *Where an act which is in itself wrong is, under certain circumstances, criminal, a person who does the wrong act cannot set up as a defence that he was ignorant of the facts which turned the wrong into a crime.*

This view, and the reasoning of Baron Bramwell, were adopted and followed in a later case, *R v Tolson*, 23 Q. B. D. 163, where a woman was convicted of bigamy under an English statute, 24 & 25 Vict. c. 106, § 5, which is almost identical in its terms with § 494 of this Code. She had been deserted by her husband, and had married again within seven years, having been informed by his brother that he had been lost in a ship which went down with all on board, and having made inquiries which confirmed the story. As a matter of fact, the husband was still alive, but the jury found that she had,

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at the time of her second marriage, believed he was dead, in good faith, and on reasonable grounds. Her case came literally within the statute, but the majority of the judges held that the conviction was bad. She was mistaken in the cardinal fact which constitutes bigamy, and her conduct differed from that of *Prince*, since, taking the facts to be as she supposed them, the act done by her and the motives for doing it were natural and legitimate. See *Per Stephen, J.*, p. 191. The Indian courts also have held that a mistake which would be a good defence for a charge of adultery (§ 497) would not be a defence if charged with bigamy (§ 494) 2 B. H. C. Cr. Ca. 117; 5 B. H. C. R. 17; 10 B. H. C. R. 381; 1 B. 97 & 347; 6 B. 126. It may be observed that the wording of § 79 is strongly in favour of this construction. The mistake of fact must lead the person to believe in good faith that he is "justified by law in doing it." Not merely that his act is negatively not punishable, but that it is innocent and legal, neither in excess of his own rights, nor in violation of the rights of others.

(v.)—*Where a statute makes it penal to do an act under certain circumstances, it is a question upon the wording and object of the particular statute, whether the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case his knowledge is immaterial.* For instance, where a statute rendered it an offence to receive a lunatic into an unlicensed house, a conviction was upheld, though the jury found that the defendant honestly and on reasonable grounds believed that the person received was not a lunatic — *R v Bishop*, 5 Q. B. D. 259. And similarly under a statute which made it an offence to sell intoxicating liquor to any drunken person, it was held that the offence was committed though the purchaser had given no indication of intoxication, and the vendor did not know that he was drunk — *Cundy v Le Cocq*, 13 Q. B. D. 207. On the other hand, where a statute provided that every person having in his possession an animal affected with a contagious disease, should with all practicable speed give notice to a police officer, it was held

that the reasonable construction to be put upon the words imported the necessity of knowledge in the person charged with contravening the rule.—*Nichols v. Hall*, L. R., 8 C. P. 322. See also Rule (ii) *ante*, and ¶ 9. Where § 64 of Mad. Act I of 1886 made penal the act of transporting liquor without a license, and the *onus* was thrown on the accused to make out his ignorance as to the nature of the thing conveyed, accused was held to have discharged this *onus* by proving they believed in good faith they were not transporting liquor. *Weir* 1, 40; 10 Bom. L. R. 171.

51. Mistake, or Ignorance, of Law is no defence.—The rule is generally put in this way, that every person who has capacity to understand the law is presumed to have a knowledge of it. 1 *Hale*, 12. In the majority of cases this is true in fact as well as in theory. Many persons may be unacquainted with the law of theft, but everyone knows that he ought not to take what is not his. The refinements of criminal law are generally based upon feelings of right and wrong, which are common to all. But even where this is not so, the law of every country must be worked on the principle that no one can break it with impunity by alleging, even truly, an ignorance of its provisions. Those who are most interested in infusing a law would be the readiest to set up a plea of ignorance, which it would be impossible to disprove. The rule is enforced against foreigners as well as against natives of the country. Two foreigners were charged with murder, as having been seconds in a duel which terminated fatally. An application was made to release them on bail pending trial, and it was urged in an affidavit made on their behalf, that they were Frenchmen, and that by the law of France duelling was no offence. It was held that this plea would be no defence at the trial and could be no ground for indulgence before trial. Coleridge, J. said: "Foreigners who come to England must in this respect be dealt with in the same way as native subjects. Ignorance of the law cannot, in the case of a native, be received as an excuse for crime, nor can it any more be urged in favour of a foreigner. —*Barron's case* 1 E. & B. 1=D. C. C. 51.

at p. 59 = 22 L. J. (M. C.) 25 = 17 Jur. 184. This rule was applied in 14 M. 342 where the defendant was charged under § 68 of the *Christian Marriage Act*, XV of 1872, which renders punishable "whoever, not being authorised under this Act to solemnise a marriage in the absence of a Marriage Registrar, knowingly solemnises a marriage between persons one or both of whom is or are Christians." The defendant performed the marriage between two such persons under the alleged impression that he, being a lay trustee of the church, had authority to perform it. On appeal his conviction was affirmed. The High Court said "If he had looked at the Act he would have seen at once that he was not one of the persons authorised to perform the ceremony, and his real or assumed ignorance of the law could not avail him. The word *knowingly* only applies to the fact that the person is aware that he is solemnising a marriage, and that one or both of the parties are Christians." Though ignorance of law is no ground of defence it is evidence of their mental condition. *Weir* 1, 74 *John Reed* [1842], C. & M. 306, 308; *Esop* 7 C. & P. 456. Even in a case where an act was innocent before, and was for the first time made an offence by statute, a physical impossibility that the prisoner could have known of the statute was held to be no absolute bar to a conviction. The judges, however, recommended that the prisoners should be pardoned, they having shown that they were at sea when the statute was passed, and that they could not possibly have been aware of it—*R. v. Batley, Russ. & Ry.*, 1. In a similar and more recent case, *Baggallay*, L. J., said:

"Before a continuous act or proceeding, not originally unlawful, can be treated as unlawful by reason of the passing of an Act of Parliament by which it is in terms made so, a reasonable time must be allowed for its discontinuance; and though ignorance of the law may, of itself, be no excuse for the master of a vessel who may act in contravention of it, such ignorance may nevertheless be taken into account, when it becomes necessary to consider the circumstances under which the act or proceeding alleged to be unlawful was continued, and when and how it was discontinued, with a view to determine whether a reasonable time had elapsed without its being discontinued." *Burns v. Nowell*, L. R., 3 Q. B., 454.

Suppose, for instance, that an Act of Parliament was passed in England, applicable to India, which came into

operation as soon as the royal assent was given, and that an offence against it was committed in India a week after it came into operation, before the Act could have arrived, or been promulgated in India, I do not think it could be contended that the law was in force in India at the time the act was committed.

52. Error on a mixed question of law and fact will be treated as a mistake of fact.—Bishop remarks in § 378 upon this point:—

"In civil causes it would seem that if law and fact are blended as a mixed question, or if one's ignorance of fact is produced by ignorance of law, the whole may be regarded as ignorance of fact, of which the party is at liberty to take advantage. So, in criminal jurisprudence, if the guilt or innocence of the prisoner depends on the fact, to be found by the jury, of his having been or not, when he did the act, in some precise *mental condition*, which mental condition is the gist of the offence, the jury, in determining the question of mental condition, may take into consideration his ignorance or misinformation in a matter of law. Thus to constitute larceny, there must be an intent to steal, which involves the knowledge that the property taken belongs not to the taker. Yet if all the facts concerning the title are known to the accused, and so the question is merely one of law whether the property is his or not, still he may show, and the showing will be a defence to him against criminal process, that he honestly believed it his, through a misapprehension of law. A mere pretence of claim set up by one who does not himself believe it to be valid, does not prevent the act of taking from being larceny."

Thus a mixed question of law and fact is treated as one of fact, if the accused was misled into the error of fact on account of an error of law. The same view has been taken in England. In *R v Reed*, Car. & M. 308. Coleridge, J., said —

"Ignorance of the law cannot excuse anyone, but at the same time, when the question is with what intent a person takes, we cannot help looking into their state of mind, as if a person takes what he believes to be his own, it is impossible to say he is guilty of felony."

And so it was held where a poacher forcibly re-took from a gamekeeper snares which he had set, in ignorance of a statute which entitled the gamekeeper to seize them —*R. v. Hall*, 3 C. & P., 409.

53. English law regarding Judicial Immunity from Civil Suits.—The protection given to judges by § 77 appears substantially to conform to the English law. As regards civil suits, the general principle is, that Judges are protected from suits for things done within their jurisdiction, though erroneously or irregularly done, but that when they act wholly without jurisdiction, whether they may suppose they had it or not, they have no privilege. See *per Parke, B., Calder v. Hall*, 2 M. & A. at p. 397. In the well-known case of *Kemp v. Verille*, 10 C. B. (N. S.) 523=31 L. J. C P. 158, the whole law on this subject was exhaustively discussed by Erle, C. J. This was an action for assault and imprisonment brought by the plaintiff against the Vice-Chancellor of the University of Cambridge. By the charter of the University the proctors had power to arrest, and the Vice-Chancellor had power to imprison, any women who were, or were reasonably suspected of being, unpropet women. The plaintiff, who in fact was a perfectly virtuous woman, was arrested and imprisoned under these powers. The jury found that the proctors who took her before the Vice-Chancellor had reasonable cause of suspicion, that the defendant had not made due inquiry into the plaintiff's character, and that the punishment was undeserved. On these findings it was held that the judgment must be entered for the defendant. Erle, C. J., said —

"The rule that a judicial officer cannot be sued for an adjudication, according to the best of his judgment, upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue in an action against him, has been uniformly maintained."

In many of the cases a special immunity is ascribed to an officer who is acting as judge of a court of record. According to the English phraseology, every court which has power to fine and imprison is a court of record: 2 Bac. Abr. 391, *per Erle, C. J.* 10 C. B. N.S., p. 547=31 L. J. C. P., p. 164. Practically, however, this circumstance seems to be of little importance. In a case where churchwardens acted as returning officers at an

election, and an action was brought against them for rejecting a vote, Cresswell, J., said —

“Here the defendants may not be judges, but they are quasi-judges. They had to exercise an opinion upon the matter whether the plaintiff was entitled to vote or not. Having decided against the plaintiff without malice or any improper motive, it would be monstrous to subject them to an action.” *Toxer v Child*, 7 E. & B. 377 = 26 L. J. Q. B. 151; per Lord Esher, M. R., *Anderson v. Gorrie*, [1895] 1 Q. B. 688 below.

Whether a judge acting within his jurisdiction can ever be liable to an action for a judicial act, even though it were done maliciously, oppressively, or corruptly, is a question which until lately has been unsettled, no case having arisen in which the facts rendered it necessary to decide the point. In *Taaffe v. Lord Downes*, 3 Moo. P. C. 36. n., at p. 39, the Chief Justice of the King's Bench in Ireland was sued for issuing a warrant of arrest, which appears to have been illegal. He pleaded that he did the act in the discharge of his judicial functions as Chief Justice. The plaintiff demurred, and the demurrer was overruled. Mayne, J., in deciding for the defendant, admitted that if he had made the warrant the fraudulent cover for oppression, or corruption, or malice, the plaintiff could prove that upon the plea, and apparently considered that the proof of such facts would support the action. In the more recent case of *Fray v. Blackburn*, 3 B. & S. 676, at p. 678. Crompton, J., said “It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly”. The only other case of the sort to be found in the books is *Hammond v. Howell*, Mod. 84; 2 Mod. 218, where the suit was against the Recorder of London for an erroneous judgment, and the Court said that the action was worse than the injury. In none of these three cases was there any allegation of corrupt or oppressive behaviour. This element was supplied in the latest case on the subject, in which all the previous authorities were reviewed. *Anderson v. Gorrie* [1895], 1 Q. B. 688. There an action was brought against three judges of a colonial court to recover damages for acts done in the course of judicial proceedings. The jury found as to

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"It is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction.' There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the enquiry, or upon certain proceedings which have been made essential preliminaries to the enquiry, or upon facts or a fact to be adjudicated upon in the course of the enquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the Superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the enquiry, but miscarried in the course of it." *Colonial Bank of Australasia v. Willan*, L. R., 5 P. C., p. 442.

Where a judge has jurisdiction over the subject-matter, the person, and the place, he does not act without jurisdiction, merely because he does something which, or in a way which, the law does not warrant. In *Ackerley v. Parkinson*, 3 M. & S. 411, p. 427, which was a case where an ecclesiastical judge was sued for unlawfully excommunicating a defendant, Blane, J., said —

"The distinction is, that where the subject-matter is within the jurisdiction, and the conclusion is erroneous, although the party shall, by reason of the error, be entitled to set it aside, and to be restored to his former rights, yet he shall not be entitled afterwards by action to claim a compensation in damages for the injury done by such erroneous conclusion, as if, because of the error, the court had proceeded without any jurisdiction. It seems to me that this is not the case of a court having proceeded altogether without jurisdiction, but of a court having jurisdiction, and having, in the course of it, come to an erroneous conclusion, which has been the cause of the damage."

The same principle has been frequently laid down by the Privy Council, in cases under § 115 of the Civ. P. C. See e.g. 11 L. A. 237=11 Cal. 6.

Where a judge has general jurisdiction over a particular subject-matter, but is under certain limitations as to

place, person, or value: there, if he knows, or ought to know, that the special facts exist which oust his jurisdiction, he is liable for anything he does under colour of an authority which he knows that he does not possess. But if the facts are not within his knowledge, it is the duty of the party who relies upon them to bring them to his notice, and if he fails to do so, no action lies against the judge if he believes he possesses the jurisdiction which he exercises.—*Grinne v. Poole*, 2 Lutw. 387; *Houliden v. Smith*, 14 Q. B. 841. This was the ground of the judgment in *Calder v. Hall*, already cited. There an action of trespass was brought against the defendant, a judge in a criminal court in Bengal, for arresting and detaining the plaintiff, a European British subject, on a charge of riot. The defendant had no jurisdiction over such a person, except for the purpose of committing him for trial to the Supreme Court. The Judicial Committee held that the action must fail, because —

“In the case now under consideration, it does not appear from the evidence in the case that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact.” 2 M. I. A. p. 310.

Where a justice of the peace can only issue a warrant upon a definite charge being made, and an information on oath laid before him, he will be liable to an action of trespass if he issues a warrant without them. *Gasper v. Mylton, Taylor*, 291, p. 329. But if an information is in fact laid before him, he is not liable, though the information contained no legal evidence, either of any offence, or of the plaintiff's participation in it. *Care v. Mountain*, 1 M. & G. 257.

54. English Law as to Criminal Liability of judges for acts done in the discharge of their official duty.—There is very little to be found in the English Law books as regards the criminal liability of judicial officers for acts done in their judicial capacity. Lord Hale discusses at considerable length the case of persons executed under illegal sentences. 1 Hale, P. C. 496—502, folio. 1 Hawk, P. C. 8, 1 East, P. C. 331. He says:—

"If he that gives judgment of death against a person hath no commission at all, if sentence of death be commanded to be executed by such person, and it is executed accordingly, it is murder in him that commands it to be executed, for it is *coram non judice*."

"And so it is if the commission gives jurisdiction over a particular class of persons, or under particular circumstances, and it is executed against persons not included in the class, or under different circumstances. For instance, the execution by martial law in time of peace of persons who are not listed under the military power is murder. On the other hand, every intendment will be made in favour of the judicial power. If a judge has jurisdiction to pass sentence of death under one commission, it will not be murder, though he professes to act under another commission. And where the sentence is passed under a commission which has terminated without the knowledge of the judge, as by the King's death under the old law, he is not liable. Nor where there is jurisdiction, even though there has been an irregularity sufficient to cause a reversal of the sentence, such as holding the trial on a day to which the court had not been adjourned."

The law was laid down similarly by Cockburn, C J., in the case of *R v Nelson*

"When there is jurisdiction, but the jurisdiction is exercised under a misapprehension, either with reference to a person not within it, or in excess of the power of the tribunal, in such cases the persons acting with judicial authority would not be criminally responsible, but supposing that there is no jurisdiction at all, that the whole proceeding is *coram non judice*, that the judicial functions are exercised by persons who have no judicial authority or power, and a man's life is taken, that is murder, for murder is putting a man to death without a justification, or without any of those mitigating circumstances which reduce the crime of murder to one of low degree. Thus in the case put by Lord Coke of a Lieutenant having a commission of martial law, who puts a man to death by martial law in time of peace, that, says Lord Coke, is murder. Under s 300 of the Penal Code, Exception 3, such an act might be reduced to culpable homicide not amounting to murder. In another part of his charge, the Chief Justice says —

"Again on the second branch of the case, in which we take the legality of martial law for granted, if you think that although there may have been a mistake, and a most grievous mistake, in condemning and sending this man to death, yet that the proceedings were done honestly and faithfully and in what was believed to be the due course of the administration of justice, again I say you ought not to harass the accused persons by sending them for trial to another tribunal." *Cockburn*, pp 124, 156

I am not aware of any case in which one of the higher judges has been prosecuted criminally in respect of any judicial act. The case of *R. v. Loggen*, 1 Stra. 74, in which the chancellor of the *Bishop of Sarum* was convicted of extortion for compelling an executor to take out probate in the bishop's court, when he had already taken out probate in the court of the archbishop, was expressly decided on the ground that he was acting not judicially, but ministerially. Lord Bacon was impeached for taking bribes from suitors, but no charge seems to have been made against him in respect of any improper judgment delivered in consequence. *Campbell's Lives of the Lord Chancellors*, II. 399—410. The impeachment against Lord Macclesfield was in respect of corrupt exercise of patronage, and frauds upon the money of suitors in the Master's offices. *Ibid.*, IV 536—554. Numerous cases, however, are to be found of applications for an information against justices of the peace. See as to this, 4 Bac. Abr. 402. The law on this subject is stated as follows in 1 Bac. Abr., p. 631 —

"Any fraud or misconduct imputed to magistrates in proceeding, notwithstanding the issue of a *certiorari*, may be a ground for a criminal proceeding against them, and Lord Kenyon said (in *R. v. Schou*, 7 T. R. 373) he believed there were instances in which a criminal information had been granted against magistrates acting in sessions. But these must have been instances of manifest oppression and gross abuse of power. For generally the justices are not punishable for what they do in sessions."

For instance, a criminal information was granted against justices of sessions, who had ordered a woman, who had damned an alderman, to be whipped under a statute of 12 Anne, which only applied to vagrants. The Court "observed that the construction that was made upon the words of the Act was so notoriously groundless, that what the justices did they took to be manifestly an act of oppression." *R. v. Mather*, 2 Barnardiston, 249. And so, where justices of the peace had either refused to grant, or had granted, licenses to publicans, not upon the merits of the application, but corruptly for motives of personal advantage to themselves. *R. v. Davis*, 3 Burr. 1317; *R. v. Holland*, 1 T. R., 692. The same course was adopted where justices of the peace, apparently

from mere whim, had discharged a vagrant who had been committed by another justice Ashurst, J., said

"This, therefore, was gross misbehaviour in the defendants, which cannot be imputed to mistake or ignorance of law. And though they have denied generally that they acted from any interested motive in this business, yet that is not sufficient, for if they acted even from passion or opposition, that is equally corrupt as if they acted from pecuniary considerations" *R v Brooke*, 2 T. R. 190

On the other hand, the Court of King's Bench has frequently declared

"that even where a justice of the peace acts illegally, yet if he has acted honestly and laudably, without oppression, malice, revenge, or any bad view or intention whatsoever, the Court will never punish him in the extraordinary course of an information, but will leave the party complaining to the ordinary legal remedy—by action or indictment" *Per curiam, R v. Palmer*, 2 Burr. 1162, *R. v. Justices of Sleaford*, 1 W. Bl. 432; *R. v. Jackson*, 1 T. R. 633; *R v. Badger*, 4 Q. B. 468.

Practically, it will be found that where the appropriate proceeding by information has failed, no attempt has ever been made to prefer an indictment

55. Law in India as to Judicial immunity.—Judicial Officers in India are in a more favourable position as regards civil suits than they are in England Act XVIII of 1850 provides that—

"No judge, magistrate, justice of the peace, collector, or other person acting judicially, shall be liable to be sued in any civil court for any act done, or ordered to be done, by him in the exercise of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any court, or other person bound to execute the lawful warrants or orders of any such judge, magistrate, justice of the peace, or other person acting judicially, shall be liable to be sued in any civil court for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

The protection given to judges under this Act only applies where the defendants have used "due care and attention" (s 52), or, in the language of the Privy

Council, "where parties *bona fide*, and not absurdly, believe that they are acting in pursuance of statutes and according to law."—*Per* Lord Campbell, *Spooner v. Juddow*, 4 M. I. A., p. 479.

Where the officer was acting judicially and within his powers, no question of responsibility arises. 1 A. 280; 13 W. R. 340. If his act was within his competency the fact he had acted carelessly and irregularly would not take away his immunity. 7 B. L. R. 449 on review from 4 B. L. R. (A. C.) 37.

Where the error as to jurisdiction under which the judge acts is one of law, the question will be, *first*, whether as a matter of fact he believed that he was acting legally, *secondly*, whether this belief was one which, with reference to his position and attainments, the difficulty of the matter under discussion, and the opinions entertained upon it by others, he might reasonably have held; or whether the mistake is one which is so irrational that it can only be ascribed to perverseness, malice, or corruption. 5 M.H.C.R. 345; 6 *ibid.* 423; 1 M. 89; 12 B. 377; 31 B. 293; 3 B. H. C. R. App. 1; 13 K. L. R. 332=1 Cr. L.J. 146. On the other hand, it has been held that where he has jurisdiction he is protected by the statute, even though he has discharged his duties erroneously irregularly, or illegally, and without believing, in good faith, that he had jurisdiction. 12 A. 115. Jurisdiction here means power to act and not power to do an act in a particular manner. It is evident that jurisdiction is a question of law, which cannot be affected by any mistake as to its existence on the part of the officer. If, however, the facts are that a judge has acted illegally within his jurisdiction, knowing that he was acting illegally, and believing that he had not even jurisdiction to act at all, the conclusion would seem clear that he must be acting oppressively and maliciously, and probably corruptly. His liability would then depend upon the considerations which are discussed in § 53.

It will be observed that the language of s 77 is very different from that of Act XVIII of 1850. "Nothing

is an offence which is done by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law " It is not stated that he is protected if he acts without jurisdiction, under a belief entertained in good faith that he had jurisdiction. If any such protection was intended to be given to him, it is curious that the very clear words of the former Act should not have been followed, especially as the next section shows that the Legislature had in view the possibility that judgments or orders might be passed without jurisdiction. In such a case the ministerial officer is given an immunity which does not appear to be granted to the judge. Should the question ever arise in India, the question will turn upon the meaning of the word *power* in s. 77. Is it limited to a power attached to the jurisdiction which the officer actually possesses, and which he may exercise erroneously without exceeding his jurisdiction (*ante*, §§ 53, 54) ? or does it include a power which assumes a jurisdiction different from any which is vested in him ? In the former case he uses his power wrongly, or in circumstances to which it does not apply, in the latter case he uses a power which he never had, and his action is *ultra vires* and a nullity. The judgment in the case of *Calder v. Halkett*, 2 M. L. A., 293, at p. 306 appears to have an important bearing upon this point. There the Judicial Committee had to construe a statute which forbade an action in the Supreme Court "against any person whatsoever, exercising a judicial office in the county courts, for any decree, judgment, or order of the said court." They rejected the view that "it may mean to protect the judge only when he gives judgment, or makes an order in the *bona fide* exercise of his office, and under the belief of his having jurisdiction, though he had not." They held that it was intended to place such judges on the footing of English judges of a similar class, "protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, but leaving them liable for things done wholly without jurisdiction." See also 3 B. H. C. R. (A. C.), 36 and 9 I. A. 152=9 C. 341. The law, both Civil and Criminal, is practically the same. If the prosecution establish the conduct is an actionable

wrong, then it is for the accused to prove that the circumstances bring his conduct within the exception laid down in s 77. 3 B. H. C. R. (A. C.), 47.

Whatever may be the extent of the protection given by the section, the nature of the acts to which it applies is pointed out by the Privy Council in the case just cited, 2 M. I. A., p. 308; where they said:

"It is not merely in respect of acts in court, acts *sedente curia*, that a judge has an immunity, but in respect of all acts of a judicial nature, and an order under the seal of the Foujdary Court, to bring a native into that court, to be there dealt with on a criminal charge, is an act of a judicial nature, and, whether there was irregularity or error in it or not, would be punishable, by ordinary process of law."

On the other hand, the protection given to an officer under s 77 will depend upon whether he professes to be acting judicially or not. A collector acting under the Madras Regulations V and IX of 1832, or under the Bengal Act X of 1859, will be protected, since he comes under the terms of s 19. But if he were merely arranging

Act VI of 1868, is not acting judicially, and is not protected from civil suit by Act XVIII of 1850, and therefore, of course, not from criminal proceedings under s 77. 14 B.L.R., 254; 21 W.R. 391; *Cf.* 7 B.L.R. 449; 1 B. 176. On this principle it was held by the Judicial Committee, that the arrest and confinement of a supposed lunatic by the officer commanding a cantonment was not protected by Act XVIII of 1850, as he was not a judicial officer and was not acting judicially. 9 I. A. 152=9 C. 341. The taking or refusing bail is a judicial act and not a ministerial one, and a mistake in the performance of his duty is protected by this section, in the absence of malice. 2 M.H.C.R., 396. Under the Crim. P. C., s 112 no suit can be brought against a magistrate who, in an urgent case, issues an injunction to prevent imminent danger or serious public injury from a nuisance.

The Criminal Procedure Code sets out in s 529 the cases in which the proceedings of a magistrate, who has in good faith done acts which he was not empowered to do, shall not be set aside. S 530 states the cases in which proceedings similarly unauthorized shall be void.

56. Extent of Immunity granted to Ministerial Officers.—The protection given under s 78 to ministerial officers acting under the authority of a court of justice is in terms rather less than that which is given to them against civil suits by Act XVIII of 1850 (*ante* § 55), and rather more than is given to the public generally by s 79. It is less than that given by Act XVIII of 1850, inasmuch as under that Act the warrant is an absolute protection to the officer so long as he obeys it, whether it was lawful or unlawful, and whether it was issued with or without jurisdiction. Under s 78, where the court had no jurisdiction to issue the order, it is necessary further to show that the officer acting upon the order in good faith believed that the court had jurisdiction. On the other hand, s 78 goes beyond s 79, since under the former section a mistake in law may be pleaded as justification, while under the latter section the mistake must be one of fact. Practically the burden of proof thrown upon the ministerial officer will vary very much according to his position, and to the amount of care and knowledge which he is expected to exercise in that position. Every such officer will be held harmless, if he acts on a warrant which is valid on its face, and which is issued by a person who had jurisdiction to issue it. It is neither his right nor his duty to go behind the warrant. *Henderson v. Preston*, 21 Q. B. D., 362. Where, however, the order was issued without jurisdiction, the absence of jurisdiction may be apparent to one subordinate and not to another. The officer in charge of a gaol would not, I should think, be protected, if he carried out a sentence of whipping upon a prisoner, received under a warrant of conviction for a crime for which whipping could not possibly be awarded. It is his duty to examine the warrant, and to compare the punishment with the crime. On the other hand, the gaol peon who actually inflicted the lashes would

not be punishable, as he would know nothing of the offence for which the prisoner was in custody, and still less of the punishment appropriate to it. Probably the courts would adopt the rule laid down by the authorities cited in § 35 *supra*—that a subordinate will always be held harmless, if he obeys an order given by a judicial superior, which is not on its face manifestly illegal. But in 4 L. B. R. 253=8 Cr. R. L. J. 68 this view did not prevail. See also Weir I 344.

The above remarks assume that the order, whether originally lawful or not, has been carried out by the officer in a legal manner, the legality of his own acts being a matter for which he is personally liable. For instance, a bailiff is not protected if, being entrusted with civil process, he arrests a witness on his way to court who, as such witness, was privileged *eundo morando et redeundo*, and if he persists in the arrest after due notice of facts; 3 W. R. Cr. 53, or if he breaks open a house, in executing process against the movable property of a judgment debtor, 7 W. R. Cr. 12. For further discussion see §§ 71—79 *infra* under the right of private defence.

Questions under ss 76, 78, and 79 will often arise where acts professedly done on behalf of the law, are so done, either by public officers who consider that they are bound to do them, or by private persons who consider that they are justified in doing them. These cases resolve themselves into the following heads—

First — Acts done under criminal process.

(1) By police officers acting (a) with [See ss 46, 75—85, 96—98, 101 and 102 Cr P Code] or (b) without warrant [ss 54—57 and 151 of the Cr. P. Code]. As to entering houses in order to effect an arrest see ss 47—49 Cr P Code.

(2) Private persons are bound to arrest under s 42 Cr. P Code and under ss 14 and 89 they are authorised, though not bound to arrest.

Second — Acts done under civil process, always require a special warrant and can only be done by those who are specially authorised by it and in the manner which it permits. SS 55 and 62 of the Civil Pro Code, Act V of 1908 provide for arrest of person and attachment of goods

The provisions in these sections as to breaking open doors are evidently founded upon the English law. See as to it *Semayne's case*, 5 Coke 91; 1 Sm. L. C. (11th ed.) 104; 7 W.R. (Cr.) 12. The Code speaks of unfastening and opening inner doors. This, I presume, includes breaking open such doors, when locked and fastened. This is the English law, and was assumed to be so in India by Westropp, C.J. in 8 B. H. C.R. 127, at 129. The privilege of outer doors extends not only to a man's dwelling-house, but to an outhouse or other office attached to a dwelling, but not to shops, godowns, or storehouses, used not for dwelling but as receptacles for property. 5 B. & K., App. 27 = 13 W.R. 339; 3 B. 89; *Hodder v. Williams* [1895], 2 Q. B. 663. Under English law the privilege of the dwelling-house only applies to the owner and his family, and their goods. If a stranger takes refuge there, or places his goods there to secure them from seizure, the sheriff may, after demand and refusal of admission, break the outer door to effect an arrest or seizure. (*Semayne's case*, fourth resolution.) He does so, however, at his peril. He cannot justify the breaking upon mere suspicion if he does not find what he looked for. *Johnson v. Leigh*, 6 Taunt. 246; folld. 7 B. H. C. R. 83; 8 B. H. C. R. (A. C.) 177; 3 B. 74; 7 W. R. 355; 12 W. R. 329; 17 C. 436 (P. C.). Although a sheriff cannot break the outer door originally, if he has once effected a legal entrance, and is afterwards turned out by force, he may then break open the door to renew the execution, for the debtor cannot by his own illegal act put himself in a better position than he was in before; and no demand of admission is necessary.

has once got into the house, he may break out of it, if his

exit is opposed. 2 *Hawk. P. C.* 137. It is lawful to effect a distress, and, I presume, to execute any other civil process, by climbing over a wall in a garden, and then passing through an open window, but not through one which is shut though not fastened. *Long v. Clarke* [1894], 1 Q. E. 119. "The cases seem to result in this, that to make an entry the latch of a door may be lifted though the door be closed, but that in the case of a window, entry can only be made if the window is to some extent open, and that for the purpose of entry in such cases the window may be further opened." *Per Manisty J., Crabtree v. Robinson*, 15 Q.B.D., p. 314.

In the fourth resolution in *Semayne's* case, it is said that though the sheriff is a trespasser by the breaking, yet the execution he does within the house is good.

Arrests on civil process on Sunday are not illegal in India. 4 M. H. C. R. 62; 7 M. H. C. R. 285. The same rule applies as to arrest in Criminal case, 1 B.L.R. (A. Cr.) 17.

By English law the sheriff may open the outer door of a house, where the decree is for possession of it. (*Semayne's* case, second resolution, 5 *Coke* 91) 1 *Sm. L.C.* (11th ed.) 104. This seems in accordance with O. XXI. r 35 of the Civ. P. C., and is of course not affected by anything in ss 55 and 62 already referred to.

Where a civil suit is brought against a person who professes to be acting in execution of the law, he must show that he was absolutely justified in what he did. If he fails to do so, he has no defence to the action. But where a criminal charge is brought against him, the case is different. He may be civilly liable where he is not criminally responsible. For instance, a bailiff who arrests the wrong man would have no defence to an action for assault and imprisonment. But if he were indicted, he would be allowed under s 76 to show that he made a mistake. Where, however, he made no mistake, but simply did what he had no right to do, wantonly or from ignorance of law, he would be responsible criminally.

3 W. R. Cr. 53. Again, if a bailiff breaks open an outer door improperly, he would have no defence to a civil action for the trespass. But if he were charged with mischief under s 425, it would probably be a good defence to show that he was acting mistakenly in what he supposed to be his duty, and that he had not the intent or knowledge which is an essential in the definition of mischief (*ante*, § 6). So if a policeman killed a criminal whom he was trying to arrest, he would have a good defence under s 100, if he showed that his own life or limb was in danger from the resistance of the criminal. He would have no defence if he alleged that he could not otherwise have prevented the criminal's escape, the charge against him not being one punishable with death or imprisonment for life. *R. v. Dadson*, 2 Den. C. C. 35; *ante*, § 55. The cases of greatest difficulty would arise where the officer acted honestly under an order of a court which had no jurisdiction to issue the order, or which had jurisdiction, but which framed its order in such an erroneous manner that it was void. As to the first case, if the court had not, and could not have had, jurisdiction in the matter, the defence of the accused must rest upon his believing in good faith, that it had jurisdiction (s 78). The possibility of such a belief would depend upon the position of the ministerial officer who carried out the order. Such a plea would relieve him from criminal responsibility, but not from civil liability. Where, however, the court might have had jurisdiction to pass the order, though, in fact, it had not, the officer is bound to execute the order, and is protected equally from suit and prosecution. 1 Hale, P. C. 498; *Countess of Rutland's case*, 6 Coke 52a. On the other hand, where the order was one which the court had perfect authority to issue, and was one which the police officers were in the habit of executing, the mere form of the warrant, especially in India, and with the class of persons who are employed on such duties, might fairly be taken on trust by those to whom it was handed for execution. The Commissioners in § 31 of the Draft Code of 1879 lay down the following rule on this point, which seems such as might well be adopted in India. It leaves the question of civil liability untouched

"Everyone acting under a warrant or process which is bad in law, on account of some defect in substance or in form apparent on the face of it, if he in good faith, and without culpable ignorance or negligence, believed that the warrant or process was good in law, shall be protected from criminal responsibility to the same extent, and subject to the same provisions, as if the warrant or process was good in law, and ignorance of the law shall in this case be an excuse. Provided that it shall be a question of law, whether the facts of which there is evidence may, or may not, constitute culpable ignorance or negligence in his so believing the warrant or process to be good in law."

57. There is general immunity for accidental consequences of acts.—An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things.—*Per Willes J., Fenwick v. Schmalz, L. R. 3 C. P. 313 at 316.* It is not of itself a defence to a civil suit unless the injury complained of was due to some overpowering or intervening agency, such as a runaway horse, (*Holmes v. Mather, L. R. 10 Ex. 261*) or a tree in the line of fire, which causes the shot to glance off, (*Stanley v. Powell (1891), 1 Q. B. 86*) in which act at all, or is caused wholly by the plaintiff, such as suddenly placing himself in front of a horse, or of a gun which was about to be fired (*1 Hale, P. C. 476; Weaver v. Ward, Hob. 134; Wakeman v. Robinson, 1 Bing. 213,*) in which case it was his act. "If in the dark I ignorantly ride against another man on horseback, this is undoubtedly trespass, though I was not aware of his presence until we came in contact," *per* *Ld Ellenborough, C. J., Correll v. Laming, 1 Camp. 497*; but in criminal law it is different.

First, where the act is itself an unlawful one.—An injury to another, which is wholly unforeseen and unintended, is not criminally punishable, unless there is something unlawful in the act itself, or in the mode of doing it. For instance, if a man aims a blow at or leaves poison for another, and the blow or the poison takes effect upon the man's dearest friend, this, in one sense, is an accident, but in law it is treated exactly as if the real sufferer had been the one for whom the harm was intended. *Foster, C. L. 261.* So, where a

person threw large stones down a mine, by means of which he broke the scaffolding, and caused a miner, who was afterwards descending, to fall down the mine, and to be killed, Tindal, C. J., said

"If death ensues as the consequence of a wrongful act—an act which the party who commits it can neither justify nor excuse—it is not accidental death, but manslaughter". "In the present instance the act was one of mere wantonness and sport, but still the act was wrongful—it was a trespass. The only question therefore, is whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter, if it is altogether unconnected with it, it is accidental death," *Fenton's case*, 1 Lewin, 179.

Where the injury is purely accidental, but results from doing an act which is not *malum in se*, but *malum prohibitum*, as being forbidden by statute under a penalty, it is stated by some of the highest authorities that this illegality does not render the accidental act criminal, 1 Hale, P. C. 475; *Foster, Cr. L.* 259; 1 East, P. C. 260. Sir James Stephen says (*Dig. Cr. L. Art. 210*) this distinction can no longer be regarded as law. Probably the decision would depend upon the further question, whether the harm resulting from the accident was the sort of harm the statute had intended to prevent. Suppose, for instance, that a statute forbade under a penalty the sale of poisons, except in coloured and ribbed bottles, and that a chemist sold *laudanum* in a plain bottle, and that in consequence it was swallowed by accident as a harmless draught. There his act was perfectly innocent before the statute, but, from disregard of its provisions, the very death which the statute intended to prevent, naturally resulted. I think he would certainly not be protected by s 80. The case put by Lord Hale is that of a man who accidentally kills another, while he is shooting without a game licence. Here it is evident the statute was intended to protect the King's revenue, and not his subjects. On the same principle it has been frequently decided, that where a statute directs, or forbids, a particular act, in order to secure some special purpose, no action can be brought for the breach of it.

"Everyone acting under a warrant or process which is bad in law, on account of some defect in substance or in form apparent on the face of it, if he in good faith, and without culpable ignorance or negligence, believed that the warrant or process was good in law, shall be protected from criminal responsibility to the same extent, and subject to the same provisions, as if the warrant or process was good in law, and ignorance of the law shall in this case be an excuse. Provided that it shall be a question of law, whether the facts of which there is evidence may, or may not, constitute culpable ignorance or negligence in his so believing the warrant or process to be good in law."

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First, where the act is itself an unlawful one.—An injury to another, which is wholly unforeseen and unintended, is not criminally punishable, unless there is something unlawful in the act itself, or in the mode of doing it. For instance, if a man aims a blow at or leaves poison for another, and the blow or the poison takes effect upon the man's dearest friend, this, in one sense, is an accident, but in law it is treated exactly as if the real sufferer had been the one for whom the harm was intended. *Foster, C. L. 261*. So, where a

person threw large stones down a mine, by means of which he broke the scaffolding, and caused a miner, who was afterwards descending, to fall down the mine, and to be killed, Tindal, C. J., said :

"If death ensues as the consequence of a wrongful act—an act which the party who commits it can neither justify nor excuse—it is not accidental death, but manslaughter". "In the present instance the act was one of mere wantonness and sport, but still the act was wrongful—it was a trespass. The only question therefore, is whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act ; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter ; if it is altogether unconnected with it, it is accidental death," *Fenton's case*, 1 Lewin, 179.

Where the injury is purely accidental, but results from doing an act which is not *malum in se*, but *malum prohibitum*, as being forbidden by statute under a penalty, it is stated by some of the highest authorities that this illegality does not render the accidental act criminal, 1 Hale, P. C. 475 ; Foster, Cr. L. 259 ; 1 East, P. C. 260. Sir James Stephen says (*Dig. Cr. L. Art. 210*) this distinction can no longer be regarded as law. Probably the decision would depend upon the further question, whether the harm resulting from the accident was the sort of harm the statute had intended to prevent. Suppose, for instance, that a statute forbade under a penalty the sale of poisons, except in coloured and ribbed bottles, and that a chemist sold *laudanum* in a plain bottle, and that in consequence it was swallowed by accident as a harmless draught. There his act was perfectly innocent before the statute, but, from disregard of its provisions, the very death which the statute intended to prevent, naturally resulted. I think he would certainly not be protected by s 80. The case put by Lord Hale is that of a man who accidentally kills another, while he is shooting without a game licence. Here it is evident the statute was intended to protect the King's revenue, and not his subjects. On the same principle it has been frequently decided, that where a statute directs, or forbids, a particular act, in order to secure some special purpose, no action can be brought for the breach of it,

by a person who has been injured in a way which the statute never contemplated. *Gorris v. Scott*, L. R. 9, Ex. 125; *Ward v. Hobbs*, 4 A. C. 13.

Second, where the act is innocent.—The second class of cases, where an otherwise innocent act becomes criminal, from being done without proper care and caution, may be illustrated by the familiar case of accidents with horses or firearms. If a person rides or drives carelessly, or urges his horse to an improper speed, and thereby runs over one, whom he could otherwise have avoided, this is not an accident, (*1 Hale, P. C. 476*) and it makes no difference that the sufferer was deaf, and therefore did not get out of the way, as it might have been expected he would have done. *R. v. Longbottom*, 3 Cox, C. C. 439; 6 M. H. C. R., Appx. 31. Even where horses have run away with a carriage, if they have got out of control from being improperly excited, as where two rival omnibuses were racing with each other, the injury resulting will be referred to the misconduct which brought it about, and will not be excused by the fact that, at the moment when it occurred, the driver could not have prevented it. *R. v. Timmins*, 7 C. & P. 499. So with firearms. A couple of volunteers took to practising at a mark in a field near roads and houses. One of them shot a boy who was on a tree in a garden 393 yards off. The rifle was sighted for 900 yards, and was deadly at a mile. The act was held to be manslaughter, *R. v. Salmon*, 6 Q. B. D. 79. If, however, a man is shooting with due care and caution, and the bullet or shot glances off a tree and kills a bystander, this is excused, as the accident could not have been foreseen or guarded against, *1 Hale, P. C. 475*. In 3 Bom. L. R. 678 two men went into a jungle in search of game. They were lying in wait in different positions. Accused, hearing a rustle fired, thinking it was a porcupine and killed his companion, and brought himself within this exception. But, as regards that dangerous practice of pointing firearms at another, if a person points a gun at another, and it goes off, either by his pulling the trigger, or by careless handling, if he has taken no proper precautions to ascertain whether it was

loaded or not, any injury that may follow is inexcusable. On the other hand, in a well-known case, a man brought home a loaded gun and fired it off. In the evening he took it up, touched the trigger, and it went off and killed his wife. It turned out that in his absence a friend had taken out the gun, and brought it back loaded, and left it in that state. He was tried before Mr. Justice Foster, who directed an acquittal, *Foster, Cr. L. 265*. In such a case, the person who left the gun loaded would not be criminally liable, because the act of firing was not his, (*1 East, P. C. 265*) though civilly he might have been made responsible, if dangerous consequences were likely to follow, *Dixon v Bell, 5 M. & S. 198*. In one case of this sort, a man picked up a pistol in the street, tried it with a rammer and found no charge. The rammer, in fact, was too short. He then aimed it at his wife, drew the trigger and killed her. He was convicted of manslaughter, *Rampton's case, Kell. 41*. The propriety of this ruling was doubted at the time by Holt, C. J., and afterwards by Mr. Justice Foster. He says that in his opinion the judgment was not strictly legal, "for the law in these cases doth not require the utmost caution that can be used; it is sufficient that a reasonable precaution, what is usual and ordinary in the like cases, be taken." *Foster, Cr. L. 264; 1 East, P. C. 266*. It is the absence of such care and caution which is referred to in s 80 that makes up the criminality of those rash and negligent acts made punishable by various sections of the Code such as s 304 A. L. B. R. (1893-1900) 221. In 12 C. P. L. R., Cr. 11, a man had sexual intercourse with a girl just over twelve, with her consent, and caused her grievous hurt. Held s 80 or s 88 would not prevent his being liable under s 325 I. P. C.

§ 58. Immunity by reason of choice of evils.—S 81 is intended to give legislative sanction to the principle, that where, on a sudden and extreme emergency, one or other of two evils is inevitable, it is lawful so to direct events that the smaller only shall occur. The doctrine was laid down by Lord Mansfield, on the trial in England of the Member of Council who had imprisoned and

deposed Lord Pigot, Governor of Madras, on the allegation that, by his arbitrary and unconstitutional proceedings, he had brought public business to a standstill. He said:—

In England it cannot happen, but in India you may suppose a possible case; but in that case it must be imminent, extreme necessity. There must be no other remedy to apply to for redress, it must be very imminent, it must be very extreme; and in the whole they do, they must appear clearly to do it with a view to preserve the society and themselves—with a view of preserving the whole," *R v. Stratton*, 21 St. Tr. 1016, at 1224. The prisoners were all found guilty.

Lord Hale observes that, "By the Rhodian law and the common maritime custom, if the common provisions for the ship's company fail, the master may, under certain temperaments, break open the private chests of the mariners and passengers, and make a distribution of that particular and private provision for the preservation of the ship's company," *1 Hale, P. C. 55*. Nothing in the language of Lord Hale or Lord Mansfield, or in the illustrations to s 81, can lend any colour to the suggestion that a man can ever be protected by this section, where he injures another to secure some personal benefit to himself. The English jurists are all agreed that no amount of necessity will justify a man in stealing clothes or food, however much his wants may go in mitigation of his punishment, *1 Hale, 54, 2 East, P. C. 698*. The rule of Scotch law is the same, *Alison, Crim. L. 674*. And so the framers of the Penal Code say

"Nothing is more usual than for thieves to urge distress and hunger as excuse for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not deter him from committing theft. Yet it by no means follows that it is irrational to punish him for theft. For though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state. It is of no effect to

counteract the irresistible motive which immediately prompts to theft. But it is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man into a condition in which no law will keep him from committing theft."—*Note B. p. 111.*

So where a person placed in his toddy-pots juice of the milk bush, knowing that if taken by a human being it would cause injury, and with the intention of thereby detecting an unknown thief, who was in the habit of stealing his toddy, and the toddy was drunk by, and injured, some soldiers who purchased it from an unknown vendor, it was held that he was rightly convicted under s 328, and that s 81 was no defence, **5 B. H. C. R. (Cr. Ca.) 59.** See **17 B. 626** for a case covered by this exception.

In an American case, *Commonwealth v. Holms*, cited, *Wharton, Homicide, 237*, shipwrecked passengers and sailors were trying to escape in a boat which could not hold all, whereupon the sailors threw some of the passengers overboard. Upon the trial, Baldwin J., laid down, as propositions of law, that in a struggle for existence between passengers and crew, the crew were entitled to the preference so far as was necessary for purposes of navigation, but that beyond this *quota* the crew were bound to sacrifice themselves for the passengers. As to the mode of selecting victims from either class, he stated that the proper method was by lot, and that while, in a case of necessity, all were entitled to resort to this mode of arbitrament, those to whom it was unfavourable were bound to submit. It is to be feared that, in a case of emergency, the stronger would hardly pay much attention to this decision, supposing it to be sound in law, which is more than doubtful.

The only instance, in which the above considerations appear to have come before an English court in a way to require a decision, is the case of *R. v. Dudley, 14 Q. B. D. 273*. There, four shipwrecked sailors in a boat were upon the verge of starvation. Two of the four killed the third, and the three drank his blood. They

were picked up four days afterwards. The jury found a special verdict.—

That if the men had not fed upon the body of the boy, they would probably not have survived to be so picked up and rescued, but would, within the four days, have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question, there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed, or very soon fed, upon the boy or one of themselves, they would die of starvation. That there was no appreciable chance of their being rescued by someone for the others to eat. That if they had not fed, they would have killed anybody, there was no other way of escape than any of the other three men."

Upon these facts the court found the offence to be technically murder. The only English authority cited to the contrary was that of Lord Bacon, who says in his maxims, that necessity carries a privilege in itself, and that one sort of necessity is for the conservation of life, in regard to which he asserts that a man who steals to satisfy his hunger is not guilty of larceny, and that men in danger of drowning who have got upon a plank or boat may lawfully thrust away another to save their own lives. The judges denied that the former illustration was good law, and said that although there were many conceivable states of things in which the latter might possibly be true, it could not support the broad proposition, that a man could save his own life by killing an innocent and unoffending neighbour. The necessity which justifies taking the life of another is either physical, legal, or moral. The two former sorts were out of the question, and a man can never be under a moral obligation to save his own life at the expense of an unoffending person, though he may frequently be under exactly an opposite obligation. See also the remarks of Scot J. in 14 B. 115, at 146.

59. *Infancy as a plea in defence.*—SS 82 and 83 leave the law very much as it is in England and Scotland in case of felonies, but they admit of none of the distinctions which have been raised by English lawyers, where the offences charged were misdemean-

ours, or arose out of omissions to discharge obligations attaching upon property, or depended upon a command, or upon an assent to commit a misdemeanour, which an infant was supposed incapable of giving before full age. (1 Hale, P. C. 20—22; 1 Hawk, P. C. 503.) Under the Code, (see s 130 of the Indian Railways Act, IX of 1890, for a departure from this rule) there is an absolute incapacity for crime before seven, 22 W. R. Cr. 27, and a complete liability to punishment after twelve. In the intermediate period, criminal responsibility depends upon the state of the mind. Nothing is said in the Code, however, upon the presumption which is to be drawn, in the absence of all evidence, as to whether a child in the transition stage is of sufficient maturity to be called to account for its actions or not. Possibly this was passed over as being a matter of evidence. The Commissioners, however, in their first report, 1846, § 117, page 220, say in reference to this section “It would seem from this that *maturity of understanding is to be presumed* in case of such a child unless the negative be proved on the defence.” It is difficult to see why there should be any presumption that a child who, only a week ago, was absolutely exempt from punishment on the score of immaturity, should be presumed, after seven days have elapsed, to be of mature mind. It is also difficult to see how the negative could possibly be proved in the case of any child above seven.

According to English law, during this second period, an infant shall be *prima facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the evidence of it. The evidence of it may be strong and clear, or it may be weak. 58: Steph. Dig. Cr. an accused below sufficient maturity consequence of his act, 27 C. 133; Ratanlal 876; 5 M. L. T. 293—9 Cr. L. J. 392—1 Ind. Cas. 807. In this last case a girl aged ten picked up a silver button worth eight annas and gave it to her

established his non-responsibility under s. 83 I P. C., *Ratanlal* 27
Where the accused purchased from a child aged 6 a cloth worth
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Court felt itself obliged, upon the facts of the case showing premeditation, con-

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of ten years

however, to the Lieutenant-Governor with a recommendation that he would reduce the punishment to seven years' imprisonment in a reformatory. 1 W. R. Cr., 43. See also 22 W. R. Cr. 27; 6 M. 373. See the *Reformatory Schools Act* (Appendix III) and s. 399, Cr. P. Code, as to detention of youthful offenders in a Reformatory School.

60. Misconception as to the real nature of insanity as a plea in defence.—Probably there is no branch of criminal law in respect to which public opinion has undergone a greater change, than that which professes to define the criminal responsibility of lunatics. It has been long since established that madness is merely a disease, like paralysis or epilepsy. Like them it may be brought on by the vicious habits of the sufferer, or may arise from causes for which he is in no way to blame. Whatever may be its origin, when it is once established, the victim may struggle against it, but he can no more escape from the malady itself or its consequences than he can from cholera or smallpox. A feeling has grown up, that every act committed by a mad man partakes of the character of inevitable helplessness which attaches to his disease, and that it is as unjust to punish him for a result of his disease as for the disease itself. Many go even further, and assume, from the inexplicable character of a crime, the existence of a madness of which the crime itself is the only evidence; the stereotyped verdict of a coroner's jury, "that the deceased committed suicide while in a state of temporary insanity," is merely an expression of the popular opinion that a person who has committed a crime, for which a sensible man cannot account, must have been mad to do it. Hence, in a very appreciable number of cases of murder, insanity is set up as a defence. Witnesses are called to prove facts evidencing every mental phase from oddity to madness, and every ailment from sunstroke to

epilepsy, which might lead to insanity. Doctors are called to assert that these facts lead to the conclusion that the prisoner was mad when he committed the act. A suppressed premise is assumed, that if he was mad he was not responsible for his acts. The judge supplies this premise, and tells the jury that madness is no defence, 17 C. P. L. R. 113=1 Cr. L. J. 854, if the prisoner in fact knew that he was committing a punishable act. The jury look at the puzzled and stupid, or irritable and excited, object in the dock, and wonder what he really had been thinking of when he killed the deceased. If they convict, the doctors say it is a sin to hang a man for what he did when he was mad. If they acquit, the lawyers say it is a sin not to hang a man who knew perfectly what he was about. Insanity by itself may be a ground for mitigation of punishment, 1906 A. W. N. 193=4 Cr. L. J. 88; but, unless coupled with an incapacity of knowledge is no ground for exemption from liability, 22 C. 817; 28 C. 613=5 C.W.N. 665.

In England, as Sir James Stephen points out, (2 *Steph. Cr. L.*, 186) where every prisoner is tried by a jury, these differences of view do no substantial harm. The juries do not trouble themselves about refined reasonings. If they think the crime was one which no one but a mad man would have committed, they acquit on the ground of insanity. If they think it was the crime of a very wicked but sane man, they convict. They give no reasons for their verdict, and, until recently, no appeal lay against it. If the conviction is open to doubt, the Home Secretary sets aside the capital sentence. If they take too merciful a view, the man is in any case shut up for life, and no great harm is done. In India, however, it is different. If the trial takes place in the mofussil, the judge has to give his reasons, and his sentence is subject to appeal or confirmation. The High Court again gives its reasons, and its decision forms a precedent to which future judges try to conform. It is, therefore, most important that the theory of criminal responsibility should be thoroughly understood by those who practise in, and preside over, criminal courts.

substantial conformity with the doctrine of the Penal Code in several cases, particularly in *Bowler's case*, by Le Blanc, J., and in *Bellingham's case*, by Mansfield, C J, (1 *Russ.*, *Crim* 65) had not yet received the thorough examination of more recent times. The treatises on criminal law used terms either misleading or vague. *Hale* says he can think of no better test, than that a person labouring under melancholy distempers, who has ordinarily as great understanding as a child of fourteen years of age, may be guilty. 1 *Hale*, *P C* 30. This is obviously too favourable to the offender. *Hawkins* extends exemption to "those who are under a natural disability of distinguishing between good and evil." (1 *Hawk*, *P C* 1.) This again is an inaccurate test, as many a lunatic is quite aware that he is committing an act for which he will be punished, if found out, though it seems to him a perfectly good and proper thing to do. This test of a capacity to distinguish between moral good and evil appears to have been adopted by Tiacy, J., in charging the jury in the case of *R. v. Arnold*, 16 *St. Tr.* 764, (1724) and, to a certain extent, by the Solicitor-General in 1760, in his speech for the prosecution in *R. v. Fenners*, 19 *St. Tr.*, 947. In the case of *R. v. Hadfield*, 27 *St. Tr.*, 1338 (1800), Erskine, in his celebrated speech for the defence, said to the jury "I must convince you, not only that the prisoner was a lunatic, but that the act in question was the immediate and unqualified offspring of the disease." This might probably be affirmed of every criminal act committed by a lunatic. It means nothing more than that his lunacy supplied the motive upon which he acted, just as jealousy or revenge supplies a motive to a man who is sane. It would almost seem, however, as if Erskine's proposition had been accepted by the Law Commissioners, and embodied in the draft Code of 1837.

62. McNaghten's Case and the Law as laid down by the English Judges.—The legal doctrine in regard to criminal insanity was for the first time settled in England after the trial of McNaghten, for the murder of Mr. Drummond, 10 *Cl. & F.* 200=1843 *Ann. Reg.* 344=4 *St. Tr. (N. S.)* 847. It appeared from the evidence for

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61. Exact scope of the plea as embodied in the Penal Code.—It is hardly necessary to say that in India the limits of criminal responsibility must be sought for in the sections of the Penal Code alone, and in such inferences as may be legitimately drawn from them. A prisoner who claims exemption on the ground of insanity, must show that "*at the time of doing the act he was by reason of unsoundness of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law,*" 22 C. 817: See 3 W. R. Cr. 9, where the expert testimony is criticised. The Legislature might have given him much greater indulgence, and would have done so if they had passed in 1837 the Code which was then drafted by Macaulay and his colleagues. The sections relating to insanity in that Code were the following :—

s. 66. Nothing is an offence which is done by a person in a state of idiocy

s. 67. Nothing is an offence which is done by a person in consequence of being mad or delirious at the time of doing it.

It is clear that s. 67 would grant to a lunatic an immunity extending as far as anything claimed by medical theorists. It is also clear that the framers of the Code of 1837 imagined they were laying down a self-evident proposition, which they apparently assumed to be a plain statement of the English law. They did not notice s. 67 in their very elaborate notes on the Code, though they entered into a lengthened defence of ss. 69 and 70 (87 and 88 of the present Code), and no one of the numerous authorities to whom the draft was referred for criticism commented upon the principle so laid down. In 1837 the law on the criminal responsibility of lunatics, though it had been laid down in

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the defence that McNaghten had for many years suffered from what is known to doctors as "persecution mania." He thought that he was dogged by a gang of persons who followed him about, and slandered him, and prevented him getting situations. After the murder he told the doctor who was in charge of him, that "he imagined the person whom he shot at Charing Cross to be one of the crew, a part of the system that was destroying his health, when he saw the person at Charing Cross at whom he fired, every feeling of suffering which he had endured for months and years, rose up at once in his mind, and he conceived that he should obtain peace by killing him." There seems to be no doubt that he really did suffer from these delusions. The suggestion that he had some fancied grievance against Sir Robert Peel, and that he shot Mr. Drummond, mistaking him for the Prime Minister, appears to be without foundation. The case was stopped by the judge upon the medical evidence, especially upon the testimony of the last two witnesses, one of whom stated that in his opinion the prisoner was at the time of the act impelled by an uncontrollable impulse, while the other merely stated that he was undoubtedly insane at that time. Some of the witnesses admitted that many lunatics were aware of the difference between right and wrong. Very little cross-examination was directed to that point, and none as to the possibility that a lunatic, while thinking that he was doing a right act, might be aware that he would be punished for it. The Solicitor-General, Sir W. Follet, when yielding to the opinion of the Bench, said, in his final address to the jury, that the object of the Crown had been "to ascertain whether at the time the prisoner committed the crime, he was at that time to be regarded as a responsible agent, or whether all control of himself was taken away." Tindal, C. J., in charging the jury, 4 St. Tr. (N. S.) p. 926, said nothing about uncontrollable impulse. He asked them, "Whether you are satisfied that at the time the act was committed, the prisoner had that competent use of his understanding, as that he knew that he was doing by the very act itself, a wicked and a wrong thing. If he was not sensible at the time he committed that act, that it was a violation of the law.

of God or of man,* undoubtedly he was not responsible for that act, or liable to any punishment whatever flowing from that act." The jury acquitted the prisoner on the ground of insanity.

This trial and its result appear to have caused considerable sensation, and the House of Lords called on the fifteen judges to lay down the law on the subject of criminal responsibility in cases of alleged lunacy, in answer to questions propounded to them. This course appears to have been taken with a view to some legislation which was then contemplated. Fourteen of the judges united in their answers. Maule, J., returned separate answers, which did not materially differ from those of his colleagues. The questions and answers are as follows:—

"1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?

"2nd. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

"3rd. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

"4th. If a person, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is he thereby excused?

"5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all

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the defence that McNaghten had for many years suffered from what is known to doctors as "persecution mania." He thought that he was dogged by a gang of person who followed him about, and slandered him, and prevented him getting situations. After the murder he told the doctor who was in charge of him, that "he imagined the person whom he shot at Charing Cross to be one of the crew, a part of the system that was destroying his health; when he saw the person at Charing Cross at whom he fired, every feeling of suffering which he had endured for months and years, rose up at once in his mind, and he conceived that he should obtain peace by killing him." There seems to be no doubt that he really did suffer from these delusions. The suggestion that he had some fancied grievance against Sir Robert Peel, and that he shot Mr. Drummond, mistaking him for the Prime Minister, appears to be without foundation. The case was stopped by the judge upon the medical evidence, especially upon the testimony of the last two witnesses, one of whom stated that in his opinion the prisoner was at the time of the act impelled by an uncontrollable impulse, while the other merely stated that he was undoubtedly insane at that time. Some of the witnesses admitted that many lunatics were aware of the difference between right and wrong. Very little cross-examination was directed to that point, and none as to the possibility that a lunatic, while thinking that he was doing a right act, might be aware that he would be punished for it. The Solicitor-General, Sir W. Follet, when yielding to the opinion of the Bench, said, in his final address to the jury, that the object of the Crown had been "to ascertain whether at the time the prisoner committed the crime, he was at that time to be regarded as a responsible agent, or whether all control of himself was taken away." Tindal, C. J., in charging the jury, 4 St. Tr. (N. S.) p. 926, said nothing about uncontrollable impulse. He asked them, "Whether you are satisfied that at the time the act was committed, the prisoner had that competent use of his understanding, as that he knew that he was doing by the very act itself, a wicked and a wrong thing. If he was not sensible at the time he committed that act, that it was a violation of the law

of God or of man,* undoubtedly he was not responsible for that act, or liable to any punishment whatever flowing from that act." The jury acquitted the prisoner on the ground of insanity.

This trial and its result appear to have caused considerable sensation, and the House of Lords called on the fifteen judges to lay down the law on the subject of criminal responsibility in cases of alleged lunacy, in answer to questions propounded to them. This course appears to have been taken with a view to some legislation which was then contemplated. Fourteen of the judges united in their answers. Maule, J., returned separate answers, which did not materially differ from those of his colleagues. The questions and answers are as follows:—

"1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?"

"2nd. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?"

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To the fourth question:—"The answer to this question must of course, depend on the nature of the delusion, but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased has inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

And to the last question:—"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right." 10 Cl. & Fin. 200=4 St. Tr. N. S. 925.

The mode by which these opinions were elicited was certainly anomalous, as no judicial proceeding was pending in reference to the questions asked. The result, as Sir James Stephen points out, was that the answers themselves were unsatisfactory. They were not given after formal argument. They contained no examination of the previous current of authorities and decisions. What was most important, they were not given with regard to any state of facts, real or assumed, which
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the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to the law, or whether he was labouring under and what delusion at the time?"

To the first question.—“Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land.”

To the second and third questions:—“That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract as, when put to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstance of each particular case may require.”

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that they were apparently adopted by the Legislature of India. Act IV. of 1849, S. 1, provides that—

“No person can be acquitted for unsoundness of mind, unless it can be proved that, by reason of unsoundness of mind, not wilfully caused by himself, he was unconscious and incapable of knowing, in doing the act, that he was doing an act forbidden by the law of the land ”

The Code substantially follows the same rule. It lays down two tests of criminal responsibility: First, did the offender know the nature of the act? Second, did he know that it was either wrong or contrary to law? 27 C. 368, 10 C. W. N. 725=3 Cr. L. J. 469; 4 Eur. L. T. 267=13 Cr. L. J. 49=13 Ind. Cas. 385.

63. Uncontrollable impulse, whether a justification for Crime.—Sir James Stephen is of opinion, (2 *Crim L.*, 177,) that these tests are not exhaustive, and that there is a third ground of exemption, *viz.*, “that a person should not be liable to be punished for any act done when he is deprived by disease of the power of controlling his conduct, unless the absence of the power of control has been caused by his own default.” He thinks that it is not certain that this view is opposed to English law, but that, if it is, the law ought to be altered.

On the first point, with the most unqualified respect for his opinion, one cannot agree with him; the judges in their opinions certainly did not negative this ground of exemptions in terms, but in their answers to the second and third questions, which applied to all cases of alleged insanity, and not merely to cases of insane delusions, they practically excluded any such defence. In *McNaghten's* case the medical witnesses had expressly asserted that he was not capable of exercising any control over acts which had connection with his delusion, and the judges must have had this evidence present to their minds when they were consulted on the law. On the trial of *Orford* for shooting at the Queen, 9 C. & P., 525. Lord Denman, C. J., did, no doubt, say, “If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be

responsible," but the doctrine of uncontrollable impulse has been rejected in the most unqualified manner by Rolfe, B., in *R v. Stokes*, 3 C. & K. 185, by Parke, B., in *R v. Barton*, 3 Cox, C. C 275, and by Wightman, J., in *R v. Burton*, 3 F & F 772. In 1878, when an attempt was being made to codify the criminal law of England, Sir James Stephen drafted a Code, in which he introduced this ground of exemption for which he contended. That draft was referred to a Commission consisting of Lord Blackburn, Lush, J., Barre J. (of the Irish Bench), and Sir James Stephen. They framed a new Code in 1879, s. 22 of which provided.—

"That to establish a defence on the ground of insanity, it must be proved that the offender was, at the time when he committed the act, labouring under natural imbecility or disease, affecting the mind to such an extent as to be incapable of appreciating the nature and quality of the act, or that the act was wrong." In their report they refer to the draft of 1878 as recognizing "as an excuse the existence of an impulse to commit a crime, so violent that the offender would not be prevented from
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hatred, or ungovernable passion, appears to us on the whole not to be practicable or safe, and we are unable to suggest one which would satisfy those requisites, and obviate the risk of jury being misled by considerations of so metaphysical a character."

It is certainly conceivable that there might be a state of mental disease, which would deprive the sufferer of all capacity to resist a particular impulse, while it left him the perception of the nature and consequences of the act to which he was impelled. The insuperable difficulty in the way of giving legal effect to such a defence would be, that it would be impossible to establish it. We can tell that a man has not resisted an impulse, but how can we tell that he could not have resisted it, or why he could not? It is a matter of everyday experience that persons who are subject to no mental disease yield to apparently uncontrollable fits of passion, and commit crimes for which they are hung. It may be that they could not control their passion, but we hang them all the more on that account, 23 C. 634 at p 609; 28 C. 613, at 618; 17

C.P.L.R. 113=1 Cr. L. J. 854. If a man who is mentally diseased acts in a similar way, how are we to know that his want of control is due to his mental disease, or that his mental disease did more than supply him with a motive for his act, while not depriving him of the power to refrain from it, if he had chosen? Even in a lunatic asylum some sort of discipline is maintained by pains and discomforts inflicted upon the patients, and they learn to exercise some self-restraint in order to avoid the infliction, 2 *Steph. Crim. L.*, 181. If a case arose in which it appeared to be made out that mental disease had absolutely destroyed the capacity to govern the will, the case would probably fall under one or other of the two grounds of exemption stated in the Penal Code. If it did not, the conflict between law and mercy would have to be solved by the dispensing power of the Executive, not by the exempting power of the judge. See the remarks of Sir James Stephen on the medical evidence in *Dove's case*, 3 *Steph. Crim. L.*, pp 429—437. It might only affect the question of the quantum of punishment. *Ratanlal* 229 & 279; 10 B. 512, 12 M. 459= *Weir* 1, 42; 23 C., 604; 28 C. 613; 1909 P. L. R. 94= 6 M. L. T. 101=11 Cr. L. J. 105=4 Ind. Cas. 985.

64. Analysis of the mental state which alone would exempt from liability on the ground of insanity.—The Penal Code contemplates, as grounds of exemption from criminal responsibility, two completely different mental conditions arising from unsoundness of mind, *viz.*, an incapacity (1) to know the nature of the act; (2) to know that he is doing what is either wrong or contrary to law. Of these, the first seems to refer to the offender's consciousness of the bearing of his act on those who are affected by it; the second, on his consciousness of its relation to himself. Each species of consciousness is ordinarily present to the mind of a normally sane person. Either, or both, or neither, may be absent from the mind of one who is mentally diseased. The absence of both, or either, relieves the offender from liability to punishment.

The question of criminal insanity practically only arises in cases of homicide. In other cases, a successful plea

of insanity would entail upon the prisoner a penalty worse than that resulting from conviction. Even in England, where *kleptomania* is sometimes set up on behalf of respectable thieves, it is rather addressed to the elemency of the judge than to the verdict of the jury. The ensuing remarks will refer exclusively to cases of homicide.

First —The words "incapable of knowing the nature of the act" may refer to two different states of mind, which are distinguished in the answers of the judges, and in the English Draft Code of 1879, by the words *nature* and *quality*. A man is properly said to be ignorant of the nature of his act, when he is ignorant of the properties and operation of the external agencies which he brings into play. As if, for instance, an idiot should fire a gun at a person, looking upon it as a harmless firework. He is ignorant of the quality of his act if he knows the result which will follow, but is incapable of appreciating the elementary principles which make up the heinous and shocking nature of that result; as if, for instance, an idiot was unable to perceive the difference between shooting a man and shooting an ape. Both of these states of mind are no doubt intended by the authors of the Penal Code to be included under the words they have used.

This ground of exemption will hardly ever be found to exist, except in the case of idiots, or of lunatics whose insanity is so complete as to sweep away substantially all the reasoning power which distinguishes a man from a beast. But it seems to me most important to point out, that a person in this condition might have that consciousness, which is equally possessed by the lower animals, that the act which he intended to do was wrong in the sense of being forbidden, and one for which he might be punished. This, however, would not render him liable under the words of the second clause, if he was incapable of knowing the nature of the act which he really did, and for which alone he could be indicted. A good illustration is to be found in the case, mentioned by Sir James Stephen, of the idiot who cut off the head

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was the head of a gang of rebels. If this was an insane delusion, he would have been entitled to acquittal on the ground of insanity. So a person who kills another under the belief arising from an insane delusion, that the person had committed adultery with the prisoner's wife, would be entitled to have his offence reduced under s 300, exception 1, as having been committed under grave provocation **28 C., 613; Ratan Lal 229.** If there was nothing in *McNaghten's* case except his delusion, it certainly did not justify his acquittal. Shooting Mr Drummond, even if it had been true that he was one of a set of people who had been persecuting him, was rank murder. The mere existence of an insane delusion only entitles a man to be treated as if the facts really were such as he supposed them to be.

It is common to speak of persons subject to insane delusions as being in other respects sane, and the term *monomania* is founded on the assumption that the mania is confined to a single point. Medical science, however, has established that such a conception is incorrect. Insane delusions, as distinguished from delusions arising from a disordered state of the senses, spring from a diseased state of the brain. The delusion is the outward and visible sign of the disease, but the disease itself must have preceded the delusion, and continues silently to vitiate the mind, sapping the reason, warping the intelligence, and perverting the emotions. The disease may break out at any moment in a fresh direction, and with new symptoms. *2 Steph. Crim. L., citing Griesinger, 307, 328, 1 Taylor, Med. Jur., Vol. I (6th Ed.) pp 816-817.* As to the effect upon the mind of partial paralysis, see **L. R. 22 I. A., 171=23 C. 1.** A man who imagines himself a teapot, may, apparently, be the victim of a perfectly harmless fancy. But it is obvious that such a notion cannot continue, unless his powers of observation, comparison, and inference are completely undermined. Where the existence of insane delusions is established, and especially where it is shown that they led to the offence, the facts are very valuable, as evidencing the prisoner's state of mind at the time of the offence. It must not, however, be assumed that he did,

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Second.—The next ground of exemption is the most important, as it is generally the test in the very numerous cases, where mental disease has only partially extinguished reason. One familiar instance of such partial extinction is the case of delusions, which, apparently, leave the mind unaltered outside the special ideas which they affect. The questions put by the House of Lords to the judges seem to have been specially addressed to this form of insanity. Their answers are perfectly clear, and are embodied in the following clause of the Draft Code of 1879, which puts the law in the most satisfactory manner

“A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act. Provided that insanity before or after the time he committed the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he committed the act, in such a condition of mind as to entitle him to be acquitted on the ground of insanity.”

In *R v. Tounley*, 3 F. & F., 839, Martin, B., put, as an instance of a delusion, the case of a man who fancied himself to be a king dispensing justice to his subjects. “If such a man were to kill another under the supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal, he would not be responsible.” In a case which occurred in the Madras Presidency, an official travelling by night in a district which had been disturbed, shot a *moonsiff* who came to greet him when he was changing his bearers, under the belief that the *moonsiff*

was the head of a gang of rebels. If this was an insane delusion, he would have been entitled to acquittal on the ground of insanity. So a person who kills another under the belief arising from an insane delusion, that the person had committed adultery with the prisoner's wife, would be entitled to have his offence reduced under s 300, exception 1, as having been committed under grave provocation **28 C, 613; Ratan Lal 229.** If there was nothing in *McNaghten's* case except his delusion, it certainly did not justify his acquittal. Shooting Mr Drummond, even if it had been true that he was one of a set of people who had been persecuting him, was rank murder. The mere existence of an insane delusion only entitles a man to be treated as if the facts really were such as he supposed them to be.

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of a man whom he found sleeping, because, as he explained, it would be such fun to watch him looking about for his head when he awoke. It is probable that the idiot was quite aware that the man was entitled to the possession of his head, and expected that, if he was detected, he would be well cuffed by the man, and very probably taken up by the police. It is quite certain he had no idea that his fun would be lost, because the man would never awake.

Second —The next ground of exemption is the most important, as it is generally the test in the very numerous cases, where mental disease has only partially extinguished reason. One familiar instance of such partial extinction is the case of delusions, which, apparently, leave the mind unaltered outside the special ideas which they affect. The questions put by the House of Lords to the judges seem to have been specially addressed to this form of insanity. Their answers are perfectly clear, and are embodied in the following clause of the Draft Code of 1879, which puts the law in the most satisfactory manner

"A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act. Provided that insanity before or after the time he committed the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he committed the act, in such a condition of mind as to entitle him to be acquitted on the ground of insanity."

In *It v Townley*, 3 F. & F., 839, Martin, B., put, as an instance of a delusion, the case of a man who fancied himself to be a king dispensing justice to his subjects. "If such a man were to kill another under the supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal, he would not be responsible." In a case which occurred in the Madras Presidency, an official travelling by night in a district which had been disturbed, shot a *moonsiff* who came to greet him when he was changing his bearers, under the belief that the *moonsiff*

commissioned by the Almighty to save mankind by the sacrifice of himself. As he did not wish to commit suicide, he hit upon the plan of doing some act for which he would be hung. On the morning of the offence he tried to kill his infant child, but was prevented. He then went to the Drury Lane Theatre, which was to be attended by the Royal Family, having concealed upon his person a horse pistol, loaded with slugs. As soon as the King entered his box, Hadfield stood up and fired at him. It is stated that a slug only missed him by about a yard. He was seized, and when the Duke of York came in, he at once recognized him, showed his wounds, told how he had received them, and for a time talked in a perfectly sensible manner. He then relapsed into incoherence, talked of his Divine commission and approaching martyrdom, and otherwise sank back into lunacy. Hadfield was acquitted on the ground of insanity. What makes the case so strong is, that he was not acquitted by the jury under the influence of Erskine's eloquence, but that Lord Kenyon, C.J., who presided at the trial, assisted by three very able judges, Grose, Lawrence, and Le Blanc, stopped the case when Erskine had still twenty witnesses to call. He said: "Mr. Attorney-General, can you call any witnesses to contradict these facts? With regard to the law as it has been laid down, there can be no doubt upon earth. To be sure if a man is in a deranged state of mind at the time he commits the act charged as criminal, he is not answerable. The material question is, whether at the very time when the act was committed the man's mind was sane?" I confess that the facts proved convince my mind that at the time he committed the supposed offence (and had he then known what he was doing, a most horrid offence it was), he was in a very deranged state." The Attorney-General (Mitford, afterwards Lord Redesdale) admitted that he could not support the prosecution, and Lord Kenyon then said: "Gentlemen of the jury, the Attorney-General's opinion coinciding with mine, I believe it is necessary for me to submit to you, whether you will not find that the prisoner at the bar committed the act was not under the influence of reason?" The jury accordingly returned a verdict of "Not guilty." 27 St. Tr., 1353.

or could have contemplated the surrounding facts with the same unclouded mind as an ordinarily sane person.

This consideration is most important when we are arriving at an opinion whether the prisoner did the act, knowing or not knowing the matters on which his responsibility depends. In *R. v. Layton*, 4 Cox, C. C. 149; Rolfe, B., said "Perhaps it would be going too far to say that a party was responsible in every case, where he had a glimmering knowledge of what was right and wrong." When we talk of a man knowing that murder is wrong and contrary to law, we mean that the knowledge forms an essential part of the stock of principles which govern every moment of his life. That whenever he is tempted to commit a murder, his mind must necessarily at the same time contemplate the fact, that if he does commit it, he will probably be hung, and in any case his life will become a burthen to him, from the constant chance of his being found out. There is no ordinary murderer of whom this, at least, may not be stated with certainty. But can it be said of all lunatics? Of many, no doubt, it can, but certainly not of all. When we say of a lunatic that "his mind is unhinged," we use a phrase which seems to me to embody a very important truth. His mind is still there, but it is dislocated. The facts which make up his knowledge are still there, but they have ceased to be in connection with, or to bear upon, each other. They have passed from being principles of conduct to being barren pieces of information—such as the statement that we may each drop down dead at any moment—which everyone believes, and by which no one is influenced.

The case *R. v. Hadfield*, (27 St. Tr., 1281; 2 Steph. Crim. L. 159) seems to me to be only explicable in this view. Hadfield was a sergeant of dragoons, who had received the most frightful wounds in his brain while defending in battle the life of his Commander-in-Chief, the Duke of York. His body was cured, but he became an outrageous lunatic. His latest delusion was that the world was coming to an end, and that he was

commissioned by the Almighty to save mankind by the sacrifice of himself. As he did not wish to commit suicide, he hit upon the plan of doing some act for which he would be hung. On the morning of the offence he tried to kill his infant child, but was prevented. He then went to the Drury Lane Theatre, which was to be attended by the Royal Family, having concealed upon his person a horse pistol, loaded with slugs. As soon as the King entered his box, Hadfield stood up and fired at him. It is stated that a slug only missed him by about a yard. He was seized, and when the Duke of York came in, he at once recognized him, showed his wounds, told how he had received them, and for a time talked in a perfectly sensible manner. He then relapsed into incoherence, talked of his Divine commission and approaching martyrdom, and otherwise sank back into lunacy. Hadfield was acquitted on the ground of insanity. What makes the case so strong is, that he was not acquitted by the jury under the influence of Eiskine's eloquence, but that Lord Kenyon, C J, who presided at the trial, assisted by three very able judges, Giose, Lawrence, and Le Blanc, stopped the case when Eiskine had still twenty witnesses to call. He said: "Mr Attorney-General, can you call any witnesses to contradict these facts? With regard to the law as it has been laid down, there can be no doubt upon earth. To be sure if a man is in a deranged state of mind at the time he commits the act charged as criminal, he is not answerable. The material question is, whether at the very time when the act was committed the man's mind was sane?" I confess that the facts proved convince my mind that at the time he committed the supposed offence (and had he then known what he was doing, a most horrid offence it was), he was in a very deranged state." The Attorney-General (Mitford, afterwards Lord Redesdale) admitted that he could not support the prosecution, and Lord Kenyon then said: "Gentlemen of the jury, the Attorney-General's opinion coinciding with mine, I believe it is necessary for me to submit to you, whether you will not find that the prisoner at the time he committed the act was not under the guidance of reason?" The jury accordingly returned a verdict of "Not guilty." 27 St. Tr., 1353.

Sir James Stephen remarks upon this trial: "In this case Hadfield clearly knew the nature of his act, *viz.*, that he was firing a loaded horse pistol at George III. He also knew the quality of the act, *viz.*, that it was what the law calls high treason. He also knew that it was wrong (in the sense of being forbidden by law), for the very object for which he did it was that he might be put to death, that so the world might be saved; and his reluctance to commit suicide showed that he had some moral sentiments. It would seem, therefore, that, if the answer given by the judges is not only true as far as it goes, but is all complete, so that no question can properly be left to the jury as to the effects of madness upon responsibility, other than those which it states, Hadfield ought to have been convicted" — *2 Crim. L.*, 179.

I think that Hadfield had no real idea of the quality of his act. He thought that he was taking the first and indispensable step towards effecting the salvation of the world, and that, even if he hit the King, which he probably did not intend, he would still be conferring on him a benefit infinitely transcending the possible harm he might inflict. His frame of mind was rather that of a fireman, who tears down a building to check the progress of a conflagration. If this is so, then his case came within the express words of the answer to the second and third questions, because the fact that he knew he was doing wrong only becomes material according to that answer, if he did know the nature and quality of his act. Nor do I think that his case came at all within the answer to the first question. That answer was expressly limited in its application "to those persons who labour under such partial delusions only, and are not in other respects insane." The analysis of madness with which Sir James Stephen follows up the remarks just quoted, *2 Steph Crim. L.*, pp. 160—166, seems to prove conclusively that Hadfield's delusions, so persistent and violent as they were, delusions which were capable of converting an affectionate father and a loyal soldier into a murderer of his child and his King; established that his mind was in other respects completely and utterly insane, and that any "glimmering knowledge" he may have had of the nature and consequences of his act, was absolutely incapable of influencing, guiding, or controlling his conduct.

It may be material to remark that so high an authority as Lord Campbell, writing in 1857, long after *McNaghten's* case, says of *Hadfield's* trial (*Lives of the Chief Justices iii*, 60): "On this occasion Lord Kenyon conducted himself with great propriety, laying down the sound rule which ought to prevail where the defence to a criminal charge is insanity, and applying that rule with promptness and precision to the facts before him."

It seems that the authors of the Penal Code have tried to embody in s. 84 the substance of the answer of the judges in *McNaghten's* case, that those answers attempted to define the minimum of sanity which is necessary for criminal responsibility where the offender is mentally diseased, but that they assume the existence of some margin of sanity, and have no application to the case of a person who is so completely insane at the time of the act as to be no longer a rational being. Such a complete absence of sanity was found to exist in *Hadfield's* case by Lord Kenyon, and in *McNaghten's* case by the jury, and fully explained the result arrived at in each instance 10 B., 512; 12 M., 459; 22 C., 817; 23 C., 604. A man who by reason of mental disease is prevented from controlling his own conduct or a man who is deprived, by mental disease, of the power of passing a rational judgment on the moral character of the act he meant to do, is entitled to the benefit of this section 1887 P.R., Cr. 42; 7 W.R., Cr. 42; 24 W.R., Cr. 5; 1909 P. W. R., Cr. 16; 10 C. W. N. 725=3 Cr. L.J., 469; 34 C. 636=6 Cr. L. J. 233. But see 7 W.R., Cr., 64 where the religious hallucination do not incapacitate the accused from knowing the nature of his act.

65. Proof of Insanity.—Where insanity is alleged on behalf of a prisoner, the burthen of proving such a degree of insanity as exempts him from punishment lies on the prisoner. *Indian Evidence Act 1 of 1872* S. 105, 22 C.; 817; 20 W. R., (Cr.) 70=13 B. L. R., App. 20; Ratanlal 818 & 172; 1901 A. W. N., 132; 1905 A. W. N., 2; 17 C. P. L. R., 113=1 Cr. L.J., 854. But mental derangements a year previous to the act

combined with peculiar circumstances were held sufficient to shift the burden in 2 W. R., Cr. 33. "A mere doubt as to his sanity is not sufficient. The jury must be satisfied by the prisoner, on whom the *onus* lies, that he was insane." *Per Rolfe B., R. v. Stokes*, 3 C. & K., 185. Where the offender has lucid intervals, Lord Hale says that the law will assume that the offence was committed in a lucid interval, unless the contrary is shown. *I. Hale P. C.* 34. If, however, a fit of madness had existed only shortly before the act, the presumption of sanity would be greatly weakened, or might absolutely disappear. *Alison, Crim. L.*, i 652, 659. It may be well to remark that a contrary rule prevails in testamentary cases, because the person who propounds a will undertakes to prove that the testator was of "sound and disposing mind." *Banks v Goodfellow*, L. R., 5 Q. B., 549; *Smith v Tebbutt*, L. R., 1 P. D., 398, 434. The facts that the conduct of the accused at the time of the trial was unusual and that his father was insane, are insufficient to bring his case within s. 81. *Ratanlal* 10. See 1 W. R. Cr. 19; 2 W. R. 33.

The most valuable evidence in cases of alleged insanity is that of medical men who have had the offender under treatment or observation before or immediately after the commission of the act. It is a useful caution which *Cheiers* gives "with regard to the necessity for reserve in attempting, previous to trial or examination by the magistrate, to cure or remove the causes of excitement, whether it be the result of drugging, cerebral disorder evidently depending upon organic causes, or acute mania." *Medical Jurisprudence* p. 808. It is clearly essential that those who have to decide whether the prisoner at the time of the act was suffering from any, and what degree of, mental disease, should see him in the same state, as far as possible, as he was in when he committed the act, and not in a state brought about by medical care. The medical evidence will be particularly valuable as showing whether the excitement, evidenced at the time of the crime, was cerebral, or caused by stimulants, and whether the appearances of insanity exhibited after arrest are genuine or feigned. Much

interesting information on the latter point will be found in *Taylor*, *i* 494, and *Cherers*, 824. In dealing with the evidence of medical witnesses, it must always be remembered that their function is to assist, not to supersede the judge. The medical witness states the existence, character, and extent of the mental disease. The judge has to decide, or to guide the jury in deciding, whether the disease made out comes within the legal conditions which justify an acquittal on the ground of insanity.

The nature and operation of insanity as bearing on criminal questions is fully discussed by Sir James Stephen, *2 Crim L.*, 133—146, by *Taylor* (VI Ed.) Chap. XIII, *i* pp. 806—915, and by *Cherers*, pp. 627, 774, 824. Little practical assistance will be obtained from the numerous judicial cases which they cite. *Taylor* justly remarks, "that there are no certain legal or medical tests whereby homicidal mania can be demonstrated to exist. Each case must be determined by the circumstances attending it." In most cases the particular outbreak complained of is a symptom in a long and advancing course of disease, which can be traced back, and of which some history remains. In the case of criminals of a low class, however, such knowledge of their previous condition may be unattainable or untrustworthy. It seems also to be undoubted that homicidal impulses appear unexpectedly in persons who have never exhibited any previous indications of mental disease, *2 Steph. Crim L.*, 138, citing *Griesinger*, 263—267. Cases of complete *dementia* are also known to have arisen from a sudden shock, *Taylor i* 811. Such instances would be most likely to occur where madness was inherited, *Taylor i* 817. In general, however, the assertion that a crime was committed under the impulse of insanity, which had never exhibited itself before, would be looked on with extreme suspicion. The probability would be that it had been prompted by an ordinary criminal impulse, or by some artificial stimulant, such as alcohol, opium, ganja, or bhung. *Cherers* 779, 786, 795, 813, 14 B, 564. In India it has often been set up as a justification, that the prisoner was suffering

combined with peculiar circumstances were held sufficient to shift the burden in 2 W. R., Cr. 33. "A mere doubt as to his sanity is not sufficient. The jury must be satisfied by the prisoner, on whom the *onus* lies, that he was insane." *Per Rolfe B., R. v. Stokes*, 3 C. & K., 185. Where the offender has lucid intervals, Lord Hale says that the law will assume that the offence was committed in a lucid interval, unless the contrary is shown. *1 Hale P.C. 34*. If, however, a fit of madness had existed only shortly before the act, the presumption of sanity would be greatly weakened, or might absolutely disappear. *Alison, Crim. L., i. 652, 659*. It may be well to remark that a contrary rule prevails in testamentary cases, because the person who propounds a will undertakes to prove that the testator was of "sound and disposing mind." *Banks v Goodfellow, L. R., 5 Q. B., 549; Smith v Tebbitt, L. R., 1 P. D., 398, 434*. The facts that the conduct of the accused at the time of the trial was unusual and that his father was insane, are insufficient to bring his case within s. 84, *Ratanlal* 10. See 1 W. R. Cr. 19; 2 W. R. 33.

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brain It is needless to remark how utterly unsafe it would be to admit a defence of insanity upon arguments merely derived from the character of the crime In such a case, *Rolfe, B*, said "It would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death and the certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity" *R v. Stokes*, 3 C. & K., 185. In that case a soldier had levelled his gun at the wife of a comrade, and shot her dead, in the barrack room, in the presence of her husband and two other soldiers, without any quarrel or reason that could be suggested In another case, where a man, equally without assignable motive, shot a woman with whom he had been living, *Bramwell, B*, said to the jury

"It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency But the circumstances of an act being apparently motiveless, is not a ground from which you can safely infer the existence of such an influence Motives exist, unknown and innumerable, which might prompt the act A morbid and restless, but resistible thirst for blood, would itself be a motive urging to such a deed for its own relief But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it There are three powerful restraints, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law But if the influence itself be held a legal excuse, rendering the crime dispensable, you at once withdraw a most powerful restraint—that forbidding and punishing the murder We must return, therefore, to the simple question you have to determine—did the prisoner know the nature of the act he was doing and did he know that he was doing what was wrong?" *R. v. Hughes*, 1 F. & F, 665.

The circumstance of an act being apparently motiveless is not a ground from which the existence of an irresistible influence can be inferred 1905 P. R. Cr. 40.

It is probable that those who are disposed to find what I have termed "inferential insanity" are influenced

by an erroneous tendency to attribute to the criminal the state of mind of which they have always been conscious in themselves. Human nature is manifold. Man at his best is only a very highly developed animal, with all the instincts and passions of the inferior animals. In him they are softened, modified, and controlled by generations of civilization and education, and restrained by example, social opinion, and the fear of punishment. Man at his worst, as we so often see him in the dock, is very little above the lower animals, and is only made more dangerous by that reason which distinguishes him from them. With him criminal longings are natural and familiar, and he is only kept from yielding to them by the dread of punishment. Cruelty—that is, a desire to inflict suffering for the pleasure of witnessing it—is a natural instinct. We find it in nearly all animals, in nearly all savages, in the lower more than in the upper orders, in the boys of the upper orders more than in the men, among the men of the upper orders, in those who are freed from restraint by the possession of absolute power. Cruelty is the characteristic vice of the despot. When a criminal of the lowest class commits some act of—to us—unaccountable atrocity, he is only giving way to a savage instinct, which presents nothing revolting to his nature. Possibly he may be quite certain of punishment, even of death. But it is an everyday experience that men will encounter certain death from motives, such as jealousy, honour, patriotism, duty, which are not more powerful to their minds than are the animal longings to which the criminal yields.

67 Cases of running amuck—A class of murder which is peculiar to the East is that which is known as “*running amuck*” (*amok*, kill). Crimes of this sort are very fully discussed and illustrated from recorded cases by *Cherers* (pp. 781—795). They are all of the same character. A man suddenly attacks another with a deadly weapon, without any apparent motive or provocation. He then rushes about killing everyone he meets at random. He makes no attempt at concealment, and seems to have no object except to take as many lives as possible before he is seized.

such cases, though not accepted as a good defence, often reduce the offence to one under s. 304, I. P. C.

68 Procedure at the trial of insane persons.—It is a curious thing, as showing how seldom a plea of insanity had been successful in any serious crime, that when *Hadfield* was acquitted on that ground in 1800, the judges did not know what to do with him. They remanded him to custody under some common law power, which they supposed they possessed, the existence of which Lord Campbell seems to doubt. Statutes 39 and 40 Geo. III., cc. 93 and 94, were immediately passed, which supplied the necessary authority in this and similar cases; as, for instance, where a person put upon his trial for a criminal offence was unable, either through insanity, or from being deaf and dumb, to take an intelligent part in the proceedings. *R v Berry*, 1 Q. B. D., 447. All these cases are now provided for in India by legislation.

Section 341, Crim. P. C., provides that "if an accused person, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than the High Court, if such inquiry results in a conviction, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit."

This section applies to persons whose inability to understand the proceedings arises from their being deaf or dumb, or ignorant of the language, or from any other similar cause except unsoundness of mind. 5 B., 262; 27 C., 368.

The Crim. P. C., Chap. XXXIV., contains rules for the treatment of lunatics. Where a prisoner, against whom a charge is preferred, is shown to be of unsound mind and incapable of making his defence, the case is to be postponed, but to continue pending, and the prisoner is to be released on bail, or kept in custody, according to the character of the offence charged (ss. 464—469). 1866 P. R. Cr. 56.

" Whenever any person is acquitted, upon the ground that at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state especially whether he committed the act or not " (s. 470)

The case is then to be reported to the Local Government, who may commit the person to custody in a lunatic asylum or other safe place (s. 471), or hand him over to his friends for safe keeping (s. 475). If committed to a lunatic asylum under s. 471, he can only be released upon the report of a Commission, to the effect that "they consider that he can be set at liberty without danger to himself, or any other person " (s. 474)

In addition to the powers conferred by this Act, provision has been made by 14 & 15 Vict., c. 81, for the removal from India of persons charged with offences, and acquitted, or not tried on the ground of insanity. Section 1 makes it lawful for the person, or persons, administering the government of the presidency in which such persons shall be in custody, to order such person to be removed from India to any part of the United Kingdom, there to abide the order of Her Majesty concerning his or her safe custody, and to give such directions for enabling such order to be carried into effect as may be deemed proper. *In re Maltby*, 7 Q. B. D., 18.

Section 4 provides for the recovery from the lunatic of the expenses so incurred.

See also Act XXXVI. of 1858, and Act II. of 1867, as to removal of lunatic prisoners from jail to a lunatic asylum.

69. Drunkenness, how far it would be a good plea in defence—Involuntary drunkenness, by the operation of s. 85, places a man exactly in the same position as if his aberration of intellect arose from any of the usual forms of unsoundness of mind. 7 N. L. R. 180=13 Cr.

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The Crim. P. C., Chap. XXXIV, contains rules for the treatment of lunatics. Where a prisoner, against whom a charge is preferred, is shown to be of unsound mind and incapable of making his defence, the case is to be postponed, but to continue pending, and the prisoner is to be released on bail, or kept in custody, according to the character of the offence charged (ss. 464—469). 1866 P. R. Cr 56.

incumbent on the prosecution to make out specific knowledge of a particular fact, and where the circumstances raise no necessary inference of it, the rule might be different. For instance, if a man is charged with passing off a counterfeit rupee, knowing it to be such, the knowledge must be made out by the prosecution, and is not necessarily to be assumed, though it might be inferred, from the mere fact of passing the coin. Suppose the fact to be established that the man had several good rupees in his pocket, but knew also that he had one bad rupee, still it would have to be made out that he knew he was paying the bad rupee, not merely that he had the means of knowing, if he had taken better precautions. It would be clearly admissible to show that he was in a hurry to catch a train, and therefore did not examine the coin, and I can see no reason why evidence of his intoxication should not be admissible for the same purpose. Hurry is a state of mind voluntarily brought about just as much as drunkenness.

Section 86 lays down no rule as to the inference of intent in cases of intoxication, but there seems no reason to suppose that the framers of the Code proposed to introduce a different rule from that of the English law. Intention is sometimes a presumption of law; sometimes it is a mere fact, to be proved like any other fact. A man is assumed to intend the natural or necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club, I am assumed to know that the act will probably cause death, and, if that result follows, I am assumed to have intended that it should follow. *R. v. Meakin*, 7 C. & P., 297. As the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention, since, assuming the knowledge, the law will allow no other explanation of the act to be given. But sometimes, in determining the quality of an offence, evidence is necessary of a specific existing state of mind, which must be found as a fact, and cannot be assumed. *Steph. Dig. Crim. L. art. 29; R. v. Meade*, L. R. [1909], 1 K. B. 895 at 898; 8 B. L. R. Appx.

21; 1864 W. R. Cr. 24; and where knowledge is the result of a legal fiction, constructive intention will not always be raised. For instance, supposing a fatal blow to be struck under circumstances of grievous provocation it might be shown that, notwithstanding the provocation, the defendant had acted, not under its influence, but from a preconceived malicious resolve to kill. If so, the offence would be murder. But the mere fact of the deadly blow would not be sufficient evidence for that purpose. Given the provocation, the legal inference derivable from the character of the blow would be exhausted in making the act be culpable homicide not amounting to murder. Evidence of a different state of mind would be required to constitute the graver charge. In the state of things intoxication would be admissible in evidence, for the purpose of showing that the prisoner had acted under the excitement of drunken passion, rather than under fixed and settled malice. *R v Thomas*, 7 C. & P., 817; *Pearson's case*, 2 Lewin., 144. So if a man is found in the house of another by night, the fact that he was drunk would be very material in considering whether he came with the intention of committing a robbery.

70. **Consent of the injured, how far is a valid plea in defence.**—No suit can be brought in consequence of anything done, or arising out of what is done, with the consent of the person complaining of it. *Volenti non fit injuria*. *Thomas v. Quartermaine*, 18 Q. B. D., 685; *Membery v. Gt Western Railway*, 14 A. C., 179. Consent is a complete answer in such suits, because the court is only concerned with the wrong asserted to have been done to the complainant. In criminal law it is different. Acts are punished as crimes, because it is for the interest of society that they should be prevented. The consent of the immediate sufferer is immaterial, if the injury to society remains.

Sections 87–92 lay down the rules for determining when the claims of society are satisfied by the consent of the individual. These rules provide—

First, for the cases in which consent is permissible — By s 87 no consent will authorize any act which is intended to cause death, and therefore if death ensues from the doing of an act which had no other object, the consent of the sufferer will not save the agent from being guilty of culpable homicide. Where a duel ends fatally, the surviving party is guilty of murder by English law. *R v Barronet*, 1 E. & B., 1=Dears. & Pearce, 51; 1 Hawk, P. C. 96, and of culpable homicide not amounting to murder under the Penal Code (s 300, Exception 5.) 6 C 154; *Contra*. See 5, C 31, & 18 C. 484 (F.B.) The person who helps another to commit suicide, as, for instance, anyone who assists a Hindu widow to commit *sati*, is similarly guilty. 1 Hawk, P. C. 78, s 306 I P C. And so it would be if one were to administer poison to another, to save him from public execution, or even from incurable disease, such as cancer or hydrophobia.

The mere consent of a person above eighteen years of age will justify any harm resulting from an act which is not intended to cause, and which is not known by the doer to be likely to cause death or grievous hurt. The most familiar instances of this sort are the ordinary games, such as fencing, single-stick, boxing, foot-ball, and the like. And it is obvious that the protection extends to injuries which actually cause death or grievous hurt, provided it was not intended. As, for instance, if an eye is put out in fencing, or one is killed by a cricket-ball. It is essential, however, that the act consented to, though not intended to cause death or grievous hurt, should be one which from its nature is not likely to have such a result. No amount of consent would protect a person who entered into a fencing match, however friendly, which was conducted with naked swords. 1 Hale, P. C. 173, 1 Hawk., P. C. 86. In a case where a foot-ball player killed another by what is known in the game as "charging" him, and thereby rupturing his intestines, it was contended that "charging" was fair according to the rules of the game. *Bramwell, B.*, laid it down that this was immaterial, as the rules of the game could not sanction anything that was likely to cause death. If the

prisoner intended to cause serious hurt, or knew that he was likely to cause it, and was indifferent and reckless as to whether he would produce serious injury or not, his act was unlawful. The fact that what he did was in accordance with the rules of the game was only important as tending to negative any malicious intention. *R. v. Bradshaw*, 14 Cox, 83; *R. v. Coney*, 5 Q. B. D. 549; *R. v. Billingham*, 2 C. & P. 234; *Murphy* 6 C. & P. 103; *Perkins*, 4 C. & P. 537.

The harm done must not be different in kind, or degree, from what the person has agreed to run the risk of. Therefore, if two men were to begin boxing with gloves, one would not be justified in throwing aside the gloves, and striking with his fist. Similarly, either of the players in a fencing match would be bound to discontinue the moment the button fell off his foil. On the same principle, all the recognized rules of the contest must be observed, for they enter into the estimate of the risk. Where two men are sparring, every blow must be fair. And so it is laid down in *East*

"That in cases of friendly contests with weapons, which, though not of a deadly nature, may yet breed danger, there should be due warning given that each party may start upon equal terms. For, if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, and death ensued, the want of due and friendly warning would make such act amount to manslaughter, but not to murder, because the intent was not malicious." *1 East, P. C. 269.*

It may be questioned whether a prize-fight between two adults, fairly conducted according to English rules, would be protected under this section. Notwithstanding the apparent ferocity of the contest, it may well be argued, that it is not on the whole likely to cause death or grievous hurt, certainly the annals of boxing are in favour of such a position, where the combatants are at all matched. On the other hand, there is no doubt that the law of England, which countenances such sports as fencing, wrestling, and cudgel-playing, always treated prize-fighting as absolutely illegal, and even extended the criminality to every one present and countenancing the transaction. *Foster, Crim. L. 260; 1 East, P. C.*

270. The English writers seem to rest this view on various grounds. partly that mere manly sports are intended as friendly trials of skill, in which the hurt is only an incident, whereas in a prize-fight, or other deliberate fight with fists, the object is to inflict hurt, and that this object in itself makes the contest unlawful. *1 Hale, P. C. 472; Foster, Cr. L. 279; R. v. Canniff, 9 C. & P., 359.* No doubt, in a prize-fight, just as in a fight between two schoolboys (who however, would not be protected by s. 87, if under eighteen), the object is to do each other as much harm as fists are capable of, till one or the other gives in. But if that harm is, in all practical experience, something less than grievous hurt, it would seem to be protected by s. 87, unless the contest is in itself unlawful on other grounds, in which case it would still be criminal under s. 91. In recent times, a practice has sprung up of glove-fights, which are undistinguishable from the old prize-fights, except in the fact that the combatants wear gloves. In one case of the sort, the judge directed the jury that the contest would be lawful if it were a mere exhibition of skill in sparring, but that if the parties met, intending to fight till one or other gave in from exhaustion or injury received, it was a breach of the law and a prize-fight, whether it was a prize-fight or not. *R. v. Bramwell, 11 C. & P., 255.* In this case, it was a prize-fight, and the direction of the judge was upheld by the Court of Crown Cases Reserved. *R. v. Orton, 14 Cox, 226.* Another reason alleged is, that the publicity of such contest leads to riot and breach of the peace, and that not only the combatants, but all who encourage them by their presence are guilty of the same offence. *1 East, P. C. 270; Foster, 260; R. v. Perkins, 4 C. & P., 537.* This, of course, would not apply, if the contest was carried on in private. Accordingly where, in a sparring match with gloves, held in a private room, one of the combatants fell from exhaustion and struck his head against a post, from which he died, Bramwell, B., said. "The difficulty was to see what there was unlawful in this matter. It took place in a private room. There was no breach of the peace. No

prisoner intended to cause serious hurt, or knew that he was likely to cause it, and was indifferent and reckless as to whether he would produce serious injury or not, his act was unlawful. The fact that what he did was in accordance with the rules of the game was only important as tending to negative any malicious intention. *R. v. Bradshaw*, 14 Cox, 83; *R. v. Coney*, 5 Q. B. D. 549; *R. v. Billingham*, 2 C. & P. 234; *Murphy* 6 C. & P. 103; *Perkins*, 4 C. & P. 537.

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Finally, consent will never give validity to acts which are in themselves offences (ss 91, 89, cl. 4, 92, cl. 4) The consent of a girl under sixteen to be taken away from lawful guardianship, or of a married woman to be enticed from her husband, does not prevent criminality under ss 361 and 498 of the Penal Code.

Second — The nature of the consent required.—Under s 90 consent can only be given by a person who is twelve years of age, unless the contrary appears from the context. The consent must be voluntary, and the person who gives it must be capable of knowing, and must in fact know, the nature and consequences of the act consented to. Difficult questions in respect to consent often arise in offences of a sexual character. "There is a difference between consent and submission. Every consent involves a submission, but it by no means follows that a mere submission involves consent. The mere submission of a child when in the hands of a strong man, and most probably acted on by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law." *Per Coleridge, J., R. v. Day, 9 C. & P., 722.* So in the case of an indecent assault upon young boys, the judge left to the jury the question "whether the boys merely submitted to the filthy act, ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it, and consented to what the defendant did. In the former case they would find the defendant guilty; in the latter case they would acquit him." The jury found him guilty upon the first alternative, and the direction was held to be correct *R. v. Lock, L. R., 2 C. C., 10=42 L. J. (M. C.) 5=27 L. T. 661.* So where a girl allowed a quack doctor to have connection with her, he having informed her that it was necessary to perform a surgical operation upon her, and she submitting to what she believed was a surgical operation, he was held to have committed a rape. *R. v. Flattery, 2 Q. B. D., 414=46 L. J. (M. C.) 130=36 L. T. 32.* In one respect the English law was more indulgent than the Penal Code. Both systems admit that a man commits a rape who has connection

doubt if death ensued from a fight, independently of its taking place for money, it would be manslaughter, because a fight is a dangerous thing likely to kill; but the medical witness here had stated that the sparring with gloves was not dangerous, and not a thing likely to kill. *R. v. Young*, 10 Cox, 371. Probably the element of money in a fight is only material, as tending to make it probable that the fight would be allowed to go on, after it became apparent that serious consequences were likely to result. Acts which are not intended to cause death are not punishable, even though they do cause death, and may be known by the doer to be likely to cause death, provided they are done in good faith for the benefit of a person, who consents and is able to consent, that is, a person above twelve years of age, and in other respects competent to enter into a contract (ss. 88 & 90). Section 88 and ss. 89 and 92 will cover all cases of surgical operations, which will be discussed hereafter. The benefit to be procured must be one accruing to the person endangered. It will therefore not cover the case of persons such as soldiers, policemen, and sailors, who may be ordered to perform acts which will lead to probable, or even to certain death. Their case will come under ss. 76 and 79, if the order given to them is one which their superior officer is bound to give, or is justified in giving. Nor does it include cases of mere pecuniary benefit (Explanation, s. 92). Hence dangerous exhibitions are not protected by it. A person who wheels another over a height on a tight-rope, or who shoots at an apple on his head, however well paid that other may be, is not doing an act for his benefit within s. 88. If an accident happened, the guilt of the doer would depend upon the question of fact: whether the fatality was one which, in the probable course of events, would be likely, sooner or later, to arrive. If so, it would be an event which was absolutely probable, though, in each particular instance, the chances were against it. 12 C. P. L. R. Cr. 11. Nor are mutilations permissible, which are consented to for some indirect motive, such as making the sufferer an object of charity, or to prevent enlistment as a soldier, or for the purpose of procuring a discharge. *1 Hale, P. C. 411; 1 Hawk., P. C. 108; 5 W. R., Cr., 7.*

her. *R. v. Bennett*, 4 F & F., 1105; *R. v. Sinclair*, 13 Cox, C. C. 28.

Third—Substituted Consent. By s 89, where a person is under twelve, or is of unsound mind, the consent of the guardian or other person having charge of him, is sufficient, and may be substituted for that of the person who is, by infancy or otherwise, incapable of forming an opinion on the point. Here also the act done must be for the benefit, as above explained, of the person for whom it is done. The section proceeds to lay down limitations as to the nature of the act which may be permitted, which are not found in s 88. Substantially they embody the considerations upon which a person of mature mind would probably act in consenting to incur any risk. As an illustration of the principle, where the principal offence is not exempted from liability, all abetment thereof is not exempt, see *R. v. Whitchurch*, L. R. 24 Q. B. D. 420, where a woman to whom drugs to cause abortion were administered, was herself held liable for abetment.

Fourth.—Circumstances under which consent may be assumed or dispensed with. Under s. 92 consent may be absolutely dispensed with, where the circumstances are such as to render consent impossible, or where in the case of a person incapable of assenting, there is no one at hand whose consent can be substituted. The same limitations apply as in s. 89. The protection of persons who perform surgical operations which end fatally, or which produce injurious consequences that were not anticipated, is made by the Penal Code to rest upon the principle of a consent, express or implied, having been given to the operation. The same principle is adopted by Sir James Stephen in arts. 204 and 205 of his Digest of Criminal Law. He says: "I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth." The English Draft Code of 1879 makes no reference to consent. By s. 67, "Everyone is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person if it is for his benefit;

with a woman who, from idiocy, is unconscious of the nature of the act, and is incapable of signifying consent or dissent. But the English judges hold that a consent arising from mere animal instinct is sufficient, and that where the female is of an age to have such instincts, and in the absence of some evidence to the contrary, it could not be inferred that the act was without her consent *R. v. Fletcher*, L. R., 1 C. C., 39=35 L. J. (M.C.) 172=14 L. T. 573 *R. v. Barrett*, L. R., 2 C. C., 81. The Penal Code, however, requires the intelligent consent of a woman who is able to understand, not only the nature, but the consequences of the act. An idiot may be as capable of assenting to sexual intercourse as any other female animal. But it is evident that the nature and consequences of illicit intercourse with a woman, are very different from what they would be in the case of a cow. It is precisely this difference which the Indian law requires that she should be able to understand, and, understanding it, still to consent.

In all the above cases the court held that the prisoner must be acquitted, if he was deceived by the actual submission into a belief that a real consent was being given to the act complained of. The same rule is laid down in the first clause of s 90, but not in the second. It would seem, therefore, that a defendant who relies on the consent of a person of unsound mind, or in a state of intoxication, must take the risk of its being found that the mental state of the person affected was not such as to excuse his act (see *ante*, § 50).

It is obvious that there can be no consent at all, when it is given under the influence of fear, or under misconception of facts. An instance of the latter sort occurred where the accused, a snake charmer, induced the deceased to allow himself to be bitten, in the belief that the charmer had power to cure snake-bites by charms. 12 W R, Cr., 7= 3B. L. R. (A. Cr.,) 25. So it has been held in England that a man who induced a girl to sleep with him, she being ignorant that he had a venereal disease, might be convicted of an indecent assault; that is to say, that her consent was nullified by the fraud practised on

71. Immunity for acts done under Compulsion.—*Compulsion* is of two sorts it either arises from the act of an authority which, rightly or wrongly, has for the time being superseded the Government of the country, or from the acts of private persons, who, without any show of legality, proceed in open defiance of law. S. 94 appears to refer exclusively to the latter class of cases. There are obvious reasons why a Code, which assumes the continuance of law and tribunals, should take no notice of a state of things in which both have ceased to exist. It may be advisable, however, to offer a few remarks upon that branch of the subject.

The effect of foreign conquest is to annul, or suspend, the ordinary sovereignty of the conquered country, and, while the occupation lasts, the laws of the subject State can no longer be rightfully enforced, or be obligatory upon the inhabitants who remain and submit to the conquerors. No laws other than those of the conquerors can, in the nature of things, be obligatory upon them, for where there is no protection or sovereignty there can be no claim to obedience. *Per Mr. Justice Story*, cited 3 *Phill, Int. L.*, 737—739. In cases of civil war, there is greater difficulty, for the first stage of a civil war is always, and necessarily, termed rebellion, and those who take part in, or aid it, rebels and traitors. But it is quite clear that, with respect to civil war also, obedience involves sovereignty, and sovereignty is tested by protection. Sir Robert Phillimore says:—

The case supposed is always one of the greatest nicety and difficulty. It would rather seem, as a matter of speculation, that when an old Government is so far overthrown that another Government entirely claims, and at least partially exercises, the jurisdiction which formerly belonged to it, the individual is left to attach himself to, and to become, by adoption at least, the subject of either Government. The analogy under which it is most just to range such cases has been thought to be that which has just been discussed, *i.e.*, the rule which applies to cases of foreign conquest, where those only are bound to obedience and allegiance who remain under the protection of the conqueror." 3 *Phill, Int. L.*, 742, 1 *Hale P. C.* 49.

So the stat. 11 Hen. VII., c. 1, which was passed after the Wars of the Roses, recited "that the subjects of

provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case." Of course actual dissent would be one of the circumstances of the case. There are some extreme operations, such as those resorted to in certain cases of cancer, which entail such terrible suffering, with such a small chance of success, that many men of ordinary strength of character would prefer to die quietly rather than submit to them. No surgeon would, or ought to, venture to perform tracheotomy or excision of the tongue upon an adult who, upon full consideration of the facts, refused to encounter the risk. On the other hand, no medical man would, or ought to, hesitate to extract a tooth, or to lance a boil of a child of thirteen, however much it might struggle and howl, and I cannot imagine that he could be prosecuted for inflicting hurt without due consent. Possibly in such a case, if it were conceivable, a very scrupulous judge might require the support of s 95. In most instances the consent of a patient is never asked to an operation. He is told that it is considered necessary, and he submits to it. In such a case consent would be implied from submission. The mere fact of an adult placing himself under treatment in a surgical case would, I have no doubt, carry with it an implied readiness to submit to everything that was necessary for a cure. If his state of health rendered it advisable that the prospect of an operation should be kept from him, and if he were placed under chloroform, and operated on, without knowing what was about to take place, and if such a proceeding was a proper one for his own benefit, a judge or jury might reasonably infer his consent. In a case where an ignorant practitioner performed an operation, so imminently dangerous that skilful surgeons hardly ever attempt it, *viz.*, cutting out internal piles, and the patient bled to death, it was held that he could not claim the benefit of s 88, as a patient cannot be held to accept a risk of which he is not aware, and which even the operator does not appear to have suspected. 14 C., 566. *St John Long*, 4 C. & P. 398 & 423. Contrast this case with 1908 A. W. N. 91=5 A. L. J. 155, where an unsuccessful operator for cataract escaped liability.

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So the stat. 11 Hen. VII., c. 1, which was passed after the Wars of the Roses, recited "that the subjects of

England are bound by the duty of their allegiance to serve their prince and sovereign lord for the time being in defence of him and his realm against every rebellion, power, and might raised against him"; and enacted that no person attending upon the King for the time being in his wars, should be punishable for such service. The general principle was laid down in s. 70 of the Draft Code of 1879: "Everyone is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced by those in possession *de facto* of the sovereign power, in and over the place where the act is done."

There is very little upon this point to be found in the English decisions. The rebellion of 1688 was successful and permanent, while those of 1715, 1745, and 1798 were so immediately unsuccessful that they gave birth to no apparently legal state of things. The rebellion against Charles I. is the only instance in English history, apart from disputed succession to the Crown, in which a Government, which had been completely overthrown and replaced by a different constitution, has itself been afterwards restored. Several cases are accordingly to be found in that series of trials which took place after the Restoration of Charles II. In *Arlett's* case, *Kelyng*, 13, an officer who commanded the guards at the trial and execution of Charles I., pleaded that all he did was, as a soldier, by command of his superior officer, whom he must obey or die. This was held to be no excuse, as his superior officer was a traitor, and where the command is traitorous, obedience to it is also treason. This decision, it will be observed, is in accordance with s. 94 of the Code. In *Sir Henry Vane's* case, *Kelyng*, 15, the charge was treason against Charles II., and the overt acts were that he was one of the State Council, and that he took command of the forces by sea and land, and appointed officers. He pleaded that the King was then out of the kingdom, and out of possession; that Parliament was the only power *regnant*, and that what he did was by its authority. In fact, he appears to have relied on the principle of 11 Hen. VII., c. 1. The court overruled his defence, holding that Parliament was dissolved

by the death of the King, which was immaterial if it continued to be the sole depository of power, and that from the death of Charles I. his son was *de facto*, as well as *de jure*, King of England, which was certainly untrue. Sir Michael Foster obviously considered this ruling to be unsound. *Foster, Cr. L., 204*. Various cases arising out of the rebellion of 1745 will be found in Foster. The most important as bearing upon this subject is *McGrowther's case, Foster, Cr. L., 13*, where a lieutenant in the rebel army pleaded that he was a tenant of the Duke of Perth, and that on being summoned by the Duke to take up arms he refused, and was then told that he should be forced and bound with cords; and that the Duke threatened to burn the houses and drive off the cattle of all who refused to follow him. It was laid down by Lee, C. J., that the only force that could excuse was a force upon the person and present fear of death, and this force and fear must continue all the time the party remains with the rebels. See *1 Hale, 50, 1 East P. C. 70*.

Where an authority founded on rebellion has settled down into an apparently legal form of Government, I should suppose that everyone would be justified in obeying and acting under its orders, in the ordinary course of civil administration, even though such orders were illegal in their origin and procedure. So it was held in the United States, that a person who had received, and was accountable for, public money, was discharged by showing that it had been seized and appropriated by the rebel authorities, without any fault or negligence on his part. *1 Bishop, Crim. L., s. 251*. But such obedience would be no defence if the acts committed were in direct and voluntary furtherance of the rebellion itself, or were crimes which could not be justified under the orders of any authority (*ante*, §§ 35 & 38).

As regards compulsion exercised in time of peace by mere private persons, the law is more severe, as in most cases there is a remedy at hand. The mere menace of future death will not be sufficient, however likely it may be to be executed. *1 Hale, P. C. 51*. The threat

must be of instant death, made under circumstances which render it reasonably likely that it may be executed on the spot. Even such a threat will not excuse a person for committing murder; 1912 M. W. N. 1108; or an act of treason punishable with death. If the alternative is offered to him of dying as an innocent man or a criminal, he is bound to accept the former; and this was also the law of England *1 Hale, P. C. 51*. Nor will even a threat of immediate death be an excuse if he has voluntarily, or under any weaker form of compulsion, exposed himself to the threat; as, for instance, if he has joined a secret society for criminal purposes, which enforces obedience to its orders by death (§ 94 Explanation 1) 13 K. L. R. 290=1 Cr. L. J. 282. *A fortiori*, it is no defence to a charge of giving false evidence that the witness had been coerced into doing it by the police inspector; 10 W. R. Cr., 48; 22 W. R. Cr., 2; 20 B., 394 or to a charge of offering bribes to public servants, that the servants were so corrupt that it was necessary to bribe them in order to avoid molestation and pecuniary injury 14 B., 115

72 The legal bases of the Right of Private Defence.—The whole law of self-defence (I. P. C., ss. 96—106) rests on these propositions: (1) that society undertakes, and, in the great majority of cases, is able, to protect private persons against unlawful attacks upon their person or property, (2) that, where its aid can be obtained, it must be resorted to; (3) that, where its aid cannot be obtained, the individual may do everything that is necessary to protect himself, but (4) that the violence used must be in proportion to the injury to be averted, and must not be employed for the gratification of vindictive or malicious feeling. It is evident that proposition (1) is the basis of the entire law. No one would dream of applying the refinements of the Penal Code to an unsettled country, where everyone carries his life in his hand and proposition (2) rests upon and assumes proposition (1)

73 Limitations to the exercise of the right—Section 99 lays down two classes of cases, in which self-

defence is absolutely forbidden. First, where there is time to have recourse to the protection of public authorities, and, secondly, with certain limitations, where the act is being done by, or under the direction of, a public servant.

(A) *No right of private defence where recourse may be had to public authorities*—The first case rests upon the assumption that self-defence is unnecessary. "If A fears, upon just grounds, that B intends to kill him, and is assured that he provides weapons and lies in wait so to do, yet without an actual assault by B upon A or upon his house, to commit that act, A may not kill B by way of prevention. For the law hath provided a security for them by flight, and recourse to the civil magistrate for protection." *1 Hale, P. C. 52*; *7 W. R. (Cr.) 34*; *35 C. 384=12 C. W. N. 579=7 C. L. J. 374*; *35 C. 443*; but property however need not be abandoned to marauders in view of applying to the Police; *Weir L. 44, 1896, A. W. N. 170*; *36 C. 827=10 Cr. L. J. 245*; *10 Ou. Ca. 196=6 Cr. L. J., 271*; nor need a person flee from a violent assault to seek their protection, *1 Cr. L. J. 16*; *5 Cr. L. J. 218=2 P. W. R. (Cr.), 22*; *28 M. 454*. It never was intended that a man should submit to deprivation of property in his possession while exercising any right of defence, and trust to recover it by the tedious operations of a case in the Civil Court, with all the weight of possession, *onus* of proof, etc., against him *2 W. R. (Cr.), 59*; *7 C. L. J. 359*. Also the fact that, even after warning of an impending attack, he has not procured the necessary protection, does not deprive him of the right of self-defence when the danger actually arises. *14 B., 441; Jolld., 24 C. 686*. The circumstance might, however, be very material if a question arose, whether the injury ultimately inflicted upon the assailant was *bona fide* an act of self-defence, or was done from motives of malice and revenge.

(B) *No right of private defence against acts of Public servants*—Secondly, the clauses in favour of public servants rest partly on the probability that their acts will be lawful, in which case resistance must necessarily be

unlawful; partly on the theory that resistance is unnecessary, since the law will set right what has been wrongly done in its name, and, lastly, on the ground that it is for the good of society that public servants should be protected in the execution of their duty, even where they are in error.

Where the act intended by a public servant is itself lawful, the only possible defence for one who resists, is that he did not know that the person resisted was a public servant, or was authorized by a public servant. It will be observed that Explanations 1 and 2 of s. 99, which correspond to clauses 1 and 2 of the same section, contemplate different states of things. The first refer to acts which a public servant can do by his own authority, as, for instance, the arrest by a policeman of any person who comes within the provision of s. 54 of the Criminal Procedure Code. The second, to acts for which he must receive a special authority from a superior; as, for instance, the seizure of the property of a judgment-debtor in execution of a decree against him. In the former case, all that is required for the protection of the officer is that his official position should be known. In the latter case this alone is not sufficient, unless it also appears that he has a special warrant for the action which he is taking. Lord Hale says upon this point, that a bailiff sworn in and known in the vicinity as, with us, a policeman in his uniform—need not notify himself to be such by express words, but it shall be presumed that the offender knew him. But it is not so in the night-time, unless there is some notification that he is a constable. But whether it be in the day or the night, it is sufficient notice if he declares himself to be the constable, or commands the peace in the King's name. If, however, he be a private bailiff, either the party must know that he is such, or there must be some such notification thereof, whereby the party may know it, as by saying "I arrest you," which is of itself sufficient notice; and it is at the peril of the party if he kills him after these words. *1 Hale, P. C. 460* But as to the writ or process against the party, there is no difference between a public and a private bailiff; for, in either case, if the party

submit to the arrest, and do demand it, he is bound to show at whose suit, for what cause, out of what court the process issues, and when and where returnable *1 Hale, P. C. 458, note (g), Crim P. C., s. 80.* Where the arrest is lawful, and made by one who states the charge on which it is made, resistance is unlawful, whether the offender did or did not know that under the circumstances he could lawfully be arrested *R v Bartley, 4 Cox, 406*

Where the act of a public servant is unlawful, and is likely to cause death or grievous hurt, resistance to it is necessarily justifiable, as any redress that might be afforded by an appeal to superior authority would come too late. The improbable but conceivable case of an attempt to execute or flog the wrong man, or a man against whom no such sentence had been passed, would come under s. 99, cl. 1 and 2. In cases of other wrongful acts not attended by such consequences, the right to resist will depend upon whether the public servant can be said to have been "acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

Acts purporting to be done under the authority of the law (*as to what acts one may claim privilege as being of an official character, see 21 B., 754*) may be illegal in one or other of four ways

First — Where the warrant under which the officer acts is on its face legal, even though defective in form, and is issued by an authority competent to issue such a warrant, but was improperly or irregularly issued.

Second — Where the warrant is issued by a competent authority, but is on its face illegal

Third.—Where there is a good authority to do a particular act, but it is done in an illegal way by the officer entrusted with the execution of it

Fourth — Where the act is ordered by one who had no jurisdiction to order it, or executed by one who had no authority to execute it.

In applying the English cases upon this subject, most of which arose out of the killing of a constable or other officer, it is necessary to bear in mind the peculiar doctrines of the English law as to homicide. "When a minister of justice, as a bailiff, constable, or watchman, is killed in the execution of his office, in such a case it is murder," and it makes no difference that the killing was wholly unintentional, provided it occurred in the act of resistance. *1 Hale, P. C. 39, 457, 472, Foster, Cr. L. 258, 308.* But where the officer is doing an act in which he is not protected by his warrant, he is in the same position as if he had none. He may be resisted to such an extent as any other man might be resisted who was doing the same act. If he is killed by violence, in excess of what the case requires, this is manslaughter, the excess rendering the killing unlawful, but the provocation arising from the illegality of the officer's conduct reducing it below murder. *1 East, P. C. 309; Foster, Cr. L. 312; R. v. Lockley, 4 F. & F., 155, at p. 159; R. v. Chapman, 12 Cox, 4.* In all such cases, therefore, where the killing is held to be murder, it must be taken that mere resistance was unlawful. Where the killing is only manslaughter, the mere resistance was lawful, the excess only constituting the crime.

First, where the issue of the warrant is legal but is issued irregularly.—In the first of the four cases, resistance is always unlawful.

"It is sufficient if the process itself be legal in the frame of it, and issue in the ordinary course of justice from a court or person having jurisdiction in the case. No error or irregularity in the previous proceeding will affect it, or excuse the party killing the officer in the execution of it from the guilt of murder; and therefore if a *capias ad satisfaciendum*, or a *fiari facias* (warrant to seize the creditor's person or goods), or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it; upon an indictment for this murder it is only necessary to produce the writ or warrant, without showing the judgment or decree; for however erroneously the process issued, the sheriff must obey, and is justified by it. If however, the proceeding is against the party who sues out the writ, he must show the judgment as well as the writ. *Cole v. Michell, 3 Lev., 20* So, although the cause be not expressed with sufficient particularity, the officer is justified if enough appear to

show that the magistrate had jurisdiction over the subject-matter. This must, however, be understood of a warrant containing all the essential requisites of one. In all kinds of process, both civil and criminal, the falsity of the charge contained in such process—that is, the real injustice of the demand in one case or the party's innocence in the other—will afford no matter of alleviation for killing the officer, for everyone is bound to submit himself to a court of justice." 1 East. P C 309, 1 Hale P C 457. 1 Hawk., P C 103, Foster, Cr L 311, Curtis's case, Foster Cr. L 133

Accordingly it was held in England that the police were protected by a warrant issued by a competent magistrate, though irregular in form *R v Allen*. And so it was held in India that it was unlawful to resist arrest upon a warrant issued under s 351 of the Civil Procedure Code, which was sealed by the Court, but initialed instead of being signed, 8 A., 293, 18 A. 246; 6 C. L J 753=6 Cr L. J. 439; 3 C. W N. 605; [see, however, 23 C., 896 & 28 C 411, at p. 414,] or to resist the police in carrying out a distraint under s 19 of the Madras Rent Recovery Act, though the attachment was in fact unlawful 13 M., 148

In considering, for this purpose, whether a warrant or order was issued by a competent authority, it must be remembered that the question is, whether the authority was competent to issue the sort of warrant or order which is placed in the hands of the officer for execution, not whether he was competent to issue the particular warrant or order, which must depend upon the facts and circumstances of the actual case. Also, that the general rule for determining jurisdiction is "that nothing shall be intended to be out of the jurisdiction of the superior courts, but that which specially appears to be so; but that nothing is intended to be within the jurisdiction of an inferior court, but that which is expressly alleged." Per Parke, B., *Howard v. Gossett*, 10 Q B at p 453=16 L J Q B, at p 349. Both of these points were illustrated in the following case. In England a peer cannot be arrested or imprisoned for debt. In violation of this rule the Court of Common Pleas issued a writ for the arrest of the Countess of Rutland, which showed her rank upon

its face. It was held, however, that the sheriff and his officers were justified in executing the writ, notwithstanding the principle that ignorance of law is no excuse, since in some cases, as in cases of contempt of court, such a writ can issue against a peer. *Countess of Rutland's case*, 6 Rep., 52a. Recently (1893) the Dowager Duchess of Sutherland was arrested and imprisoned for six weeks for contempt of an order of the Court of Chancery.

Second, where warrant emanating from a competent authority is prima facie illegal.—The second case may be illustrated by the well known instance of *General Warrants*, which were for the first time discussed in the prosecutions arising out of the publication of the *North Briton* by Wilkes, in 1763. The Secretary of State issued warrants directing the arrest of the printers and publishers of the *North Briton*, without specifying their names, and ordering the search for and seizure of seditious books, papers, and documents, without specifying what. It appeared that warrants of this sort had been constantly issued by the Secretary of State, and their authority had never been disputed. They were decided by Pratt, C. J., (afterwards Lord Camden) to be wholly illegal, and heavy damages were awarded against all who had acted upon the warrants. *Leach v. Money* and *Entick v. Carrington*, 19 St. Tr., 1002; 3 Burr., 1692; It is obvious that no one could be expected to submit to an authority so vague in its terms. This was the principle on which the judgment of the Queen's Bench was given in the case of *Howard v. Gossett* 10 Q. B., p. 377; 16 L. J. Q. B., 375. There the plaintiff had been arrested by the Serjeant-at-arms of the House of Commons on a warrant which set out no reason for the arrest. The Court of Queen's Bench held that it gave no protection to the officer executing it. Coleridge, J., said: "The warrant does not disclose that the party was charged with any offence, or had been convicted of any; still less does it show the nature of the offence. If for the House of Commons in the warrant you substitute any other authority known to the constitution, it is quite clear

that the warrant would be bad. The party sought to be arrested under it might lawfully resist, or, if arrested, would be discharged upon the return to a writ of *habeas corpus*." This decision was reversed on appeal. Parke, B., who delivered the judgment, agreed with the lower court that the warrant would have been void, if it had been issued by a magistrate acting under some special authority to take a man into custody under some special circumstances. He considered, however, that the warrant of the House of Commons must be treated in the same way as if it had been issued from one of the superior courts, and that such a warrant would be valid even if it expressed no cause at all, as every presumption must be made in favour of the legality of every act of the superior courts. *Howard v Gossett*, 10 Q. B. 452—455=16 L. J., Q. B. 349. The former judgment would evidently govern the case of all warrants issued by Mofussil courts, and by magistrates in the Presidency towns. Its principle was applied in a case where the defendant was charged under s 147 with rioting by resisting the execution of a warrant to seize property in a house. The warrant was general in its terms. It did not on its face purport to authorize the peon to seize the property of the petitioners, or to enter their house, and did not even mention the names of the persons whose house was entered. It was held that the warrant was illegal, and that an assembly formed merely to resist its execution could not be called an unlawful assembly. 29 C. 244. See also 16 C. W. N. 1078, where resistance, offered to the police to prevent an illegal entry and search, was justified. The same principle has been applied, both in England and in India, where the warrant was upon its face ambiguous or uncertain, as, for instance, where a person was arrested upon a warrant which omitted her Christian name. *R v Hood*, 1 Moody, C. C. 281. This is intelligible enough. A warrant to arrest Smith or Ramasawmy may apply to a hundred different persons. No one is bound to appropriate the warrant to himself, nor has the officer any authority to supply, by his own knowledge or otherwise, that which is left uncertain in the warrant. The same can hardly be said of an old

case, which is still cited as an authority in the law books, where the arrest of Sir Henry Ferrers under a warrant, in which he was so named, was held illegal, because the warrant went on to describe him as a knight, whereas he was really a baronet. *R. v Ferrers*, Cro. Car. 371. In two cases in India, the Bombay High Court has held warrants invalid where the full name of the individual was given, but without any description by way of residence to distinguish him from any other person of the same name. In each of these cases, however, the form of warrant given by the statute directed that the residence should be stated. 9 B. H. C. R. 154; 18 B. 636. In Calcutta it was held that no offence was committed by disobedience to a warrant which described the person to be arrested as the son of a man who was not his father. 28 C. 399.

Third, where the warrant is good, but its mode of execution is illegal.—In the third class of cases resistance appears to be lawful in England. Accordingly it was held that killing was only manslaughter "where a good warrant is executed in an unlawful manner; as if a bailiff is killed in breaking open a door or window to arrest a man; or, perhaps, if he arrest one on a Sunday, since 29 Car II, c 7, by which all such arrests are rendered unlawful" *Hawk., P. C. 104; 1 Hale, P. C. 458*. In India the question would be, whether the bailiff was acting in good faith under colour of his office so as to come within the terms of s. 99. 12 B. 377. Nothing is said to be done in good faith which is done without due care and attention (I. P. C., s. 52). Where a police officer attempted, without a search-warrant, to enter a house to search for stolen property, it was held that resistance to him was unlawful, and could not be justified on the ground of self-defence. 7 B. H. C. R. (Cr. Ca.) 50; 19 M. 349; 1869 P. R. 69; 1900 P. R. 21; 1901 P. R. 5. In the Bombay case, it appears that the police were as much in search of persons as of property, and for the former purpose their entry was lawful. The judgment, however, was rested on the fact that it did not appear that the police were acting otherwise than

in good faith. Similar decisions were given on the same ground, where the officers were acting wrongly in doing acts which they in good faith believed they were bound to do 29 C. 417; 30 C. 97. On the other hand, where a bailiff broke open the doors of a third person, in order to seize the goods of a judgment debtor which were supposed to be therein, and it turned out that there were no such goods, the same Judge, Melvill, J., who had decided 7 B. H. C. R. (Cr. Ca.) 50, held that the act was unlawful, and that resistance to it was not punishable under s 183 or s 186 of the Code 7 B. H. C. (Cr. Ca.) 83. It is likely that the same decision would have been given if the defendant had been charged under s 353 with using criminal force to the bailiff, and he had pleaded that he was acting lawfully in defence of his property. When resistance was offered to a police officer who attempted to search a house without a written authority, under a section of the 1872 Code which corresponds to s 165 of the 1898 Code of Cr Pro it was held that a conviction under s 353 could not be maintained 7 N-W P. H. C. R. 209. See also 27 B 590; 6 Cr. L. J. 439=6 C. L. J. 753. It has also been held that no offence was committed under s 183, where a bailiff had been resisted in attempting to attach property under a warrant which had ceased to be in force by lapse of time 10 C 18

Similar questions would arise where a good warrant was wrongly executed. A warrant for stealing a horse was issued against John Hoyes, whereas it should have been issued against Richard Hoyes, who was the son of John. If the constable had arrested John Hoyes, the man would have been discharged, but the constable would have been safe (*ante*, p 206). Instead of doing so, he arrested Richard Hoyes, who was the person really intended. It was held that his act was wholly illegal, and that he was not protected by his warrant. An officer who is directed to arrest John cannot be allowed to form an opinion that Richard was really meant, even though the opinion is a sound one. "Where, indeed, it can be shown that a felony has actually been committed,

the constable may throw the warrant aside. It is sufficient to show that he has taken the person who is really charged with the offence, however he may have been misdescribed. He cannot do this where only a misdemeanour is charged," for in such a case he cannot arrest without a warrant. Per Tindal, C.J.—*Hoyes v. Bush*, 1 M & G. 775. Where a warrant is issued against A. B., and is executed against a person of the same name, who was not the person intended, the liability of the officer for a wrongful arrest, and the right to resist him, would depend upon the question whether he made the arrest in good faith, and believing upon reasonable grounds that he was arresting the right man. (See 21 C 392, where it was unnecessary to decide the point.) On the same principle, where an officer is authorized to do any act without warrant, upon a reasonable suspicion that a particular state of things exists; as, for instance, that a person has committed, or is about to commit a particular crime, resistance to him is unlawful, though the suspicion is unfounded, if the officer *boni fide* and reasonably entertained it. 12 B. 377. See *R v Phelps*, Car & M. 180; *R v Carey*, 14 Cox, 214, where it was held that the policeman acted without any grounds of suspicion. Similarly where a warrant authorizes the seizure of the goods of a debtor or defaulter, and the officer seizes goods which he reasonably supposes to be the property of such person, but which in fact are not, or which are protected against seizure, resistance to the seizure cannot be justified. 21 M. 78 & 296; 9 C W. N 125=2 Cr. L. J. 13; 29 C. 417. Where a warrant authorizes the doing of any act under limitations which are, or but for his ignorance of his duty would be, known to the officer, he is not protected by his warrant if he violates them; as, for instance, if he arrests a witness on his way to court, 3 W. R. (Cr.) 53, or breaks open a house in attempting to seize goods under civil process. 7 W. R. (Cr.) 12; 2 C. P. L. R. 73. In neither of these cases did any question of resistance arise. Such resistance would possibly have been held unlawful under s 99, cl. 1 or 3. Thus, where a Sub-Inspector of Police illegally attempted to obtain a thumb impression which he was not

authorized to take and was assaulted, the assault was held not justified. 30 C. 97=6 C. W. N. 342.

Fourth, where there is absolute want of jurisdiction from the commencement—In the fourth class of cases, where there is an absolute want of jurisdiction in the official who issues the order, or an absolute want of authority in the person who does the act, resistance is lawful in England, and does not seem to be unlawful by s. 99. The words "not strictly justifiable by law," seem to point to cases where there is an excess of jurisdiction, as distinct from a complete absence of jurisdiction, to cases where an official has done wrongly what he might have done rightly, not to cases where the act could not possibly have been rightly done. 11 C. W. N. 836=6 C. L. J. 127=6 Cr. L. J. 38. For instance, a plaintiff sued in the Mamlutdar's Court in Bombay for possession of a piece of land. The Court gave him a decree for possession, which it could give. It had no power to decree and was not asked for a partition. When the decree came to be executed, it turned out that the land in question was, with other land, in the joint possession of the defendant and others. The Collector was consulted on the difficulty, and he ordered the surveyor to divide the land, and to put the decree holder in possession. The defendant resisted, and was convicted of obstruction. The conviction was reversed, on the ground that neither under cl. (1) nor (2) of s. 99 was any protection given to an officer, who was doing an act absolutely illegal as regards himself, and wholly *ultra vires* as regards the official who authorized it. 13 B. 168; see also 24 C. 320; 22 C. 286; 1891 A. W. N. 195. So a conviction under ss. 143 and 186 was reversed, where resistance had been offered to the execution of a warrant which had been illegally issued in order to procure the production of a witness before an investigating police officer. 24 C. 320; 11 C. W. N. 836=6 C. L. J. 127=6 Cr. L. J. 38; 19 M. 310.

In England it has been repeatedly held that an arrest, either on civil or criminal process, may be lawfully resisted, where it can only be made by warrant, and

where the warrant, though actually issued, is not in the possession of the officer who makes the arrest. *A fortiori*, of course, where there never had been a warrant. *Galliard v. Laxton*, 2 B. & S. 363 = 31 L. J. (M. C.) 123 = 9 Cox C. C. 127; *Codd v. Cube*, L. R. 1 Ex. D. 352; *R. v. Withers*, 1 East, P. C. 295, 308. The reason is that, where an act can only be lawfully done by warrant, the person against whom such an act is attempted is entitled to see that there is a warrant, which has been issued against himself, by a competent officer, and for a justifying cause. This principle has been adopted into the Indian Law by s. 80 of the Cr. P. Code, which provides that "the police officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant"; where, therefore, the person attempting to arrest has no legal warrant in his possession, or has only some copy which is not equivalent to a warrant, or where he makes no attempt to notify the substance of it, the person who resists him cannot be charged under ss. 186 or 225 B. or 332. 18 A. 246; 23 C. 896; 26 C. 743. The person sought to be arrested under such circumstances is entitled to the right of private defence, 5 A. 318; 3 C. W. N. 741; 25 C. 274; 26 C. 748; though it would be otherwise when arrest is made by a police officer on suspicion, 7 B. H. C. R. (Cr. Ca.) 50.

Where, however, in cases where an arrest may be made without warrant, a written order to arrest is given under s. 56, Cr. P. C., by an officer in charge of a police station to a subordinate, it is not necessary to show the order, and the non-production of it does not justify resistance. 27 C. 320.

Cases in which arrests have been held unlawful in England, because the warrant was issued in one county and executed in another county, (*1 Hale*, P. C. 458, 459; *R. v. Crompton*, 5 Q. B. D. 341 = 42 L. T. 543 = 49 L. J. M. C. 41 = 28 W. R. 539) are provided for by s. 84, Cr. P. C. So the execution of a warrant by a person not duly authorized is illegal, *Broadfoot's case*, *Foster*, Cr. L. 154;

Dixon's case, 1 East, P. C. 313, but the Cr. P. C., while it requires a warrant to be addressed to one or more persons by name, authorizes the endorsement of it by the officer to whom it is addressed to any other police officer (ss. 77, 79). Where, however, the warrant is endorsed over by a person to whom it is not addressed, or to persons who are not police officers, the arrest under it is illegal. 27 C. 457. In England, a practice grew up of issuing warrants in blank, which were afterwards filled up by some subordinate who could not have issued a warrant, with the name of the person to be arrested, or of the person who was to execute the warrant. Such a practice was decided to be wholly illegal, and to give no protection to the officer. 1 Hale, P. C. 457; *Foster*, Cr. L. 312; *Stockly's case*, 1 East, P. C. 310; *R. v Stevenson*, 19 St. Tr. 846; *Housin v Barlow*, 6 T. R. 122; *R. v Winnick*, 8 T. R. 454. In India, however, the officer would be protected by the seal and signature of the Court, as he could not possibly know the circumstances under which it had been affixed.

In dealing with the Indian decisions in the previous paragraphs, it is material to remember that they involve two classes of cases, one of which has really nothing to do with the law of private defence. In one class of cases the charge is framed upon sections of the Penal Code which make it a distinct offence to resist or obstruct a public officer in the lawful exercise of his public duties. [See as to s. 183, 25 C. 274, 10 C. 18; as to s. 186, 22 C. 286, 23 C. 896; as to s. 225 B, 26 C. 748; as to s. 332, 18 A. 246; 28 C. 399; as to s. 353, 26 C. 630; 28 C. 411; as to s. 147, 29 C. 244; 28 C. 411; 14 Cr. L. J. 142=18 Ind. Cas. 894.] Here it is necessary for the prosecution to establish that the officer was acting in such a manner as to bring himself within the terms of the particular section. If it fails to do so the offence is not made out, though the very same fact might have been so charged as to bring the officer within the protection of s. 99 (1 and 2). In 18 A. 246=1896 A. W. N. 48, the charge was under s. 332 and failed, because the officer who was making the arrest had only a copy of the warrant, but it was held that

the accused might have been charged with causing hurt under s. 323, and would have had no defence. The Court said.

"In our opinion the words '*in discharge of his duty*' can have only one meaning, and that is that the officer has a duty to discharge and is discharging it at the particular time. They cannot mean that the officer is acting under colour of his office. He must be acting at the time as a police officer, and in the particular matter discharging a duty incumbent upon him as a police officer."

"... which occasionally exceed what his duty is or may, in the act, unlawful in itself, and not required to be done by the police officer, for the purpose of performing the duty which he is then engaged upon. It is to cover acts which the police officer may have to do when in the discharge of his duty that, in our opinion, the words '*lawful discharge*' are introduced in the concluding portion of s. 332. If it was unnecessary to do such an act, and yet it was done, the act would not be done by the police officer in the lawful discharge of his duty, and therefore would not be covered by the concluding portion of s. 332." 15 A 216 at 250.

So in 23 C. 896, where a charge under s. 353 had been altered into one under s. 186, the Court set aside the conviction.

"To sustain a conviction under that section, it must be shown that the accused voluntarily obstructed the constable in the discharge of his public functions. There cannot be any voluntary obstruction of a public servant in the discharge of his public functions, unless it is shown that the public servant was acting in the discharge of his public functions in the manner authorized by law. Of course if the constable was actually assaulted, the accused would be guilty of an offence under s. 352 of the Penal Code."

In 31 C. 424 resistance offered to a Commissioner appointed by a Court to the entry upon land under a time-expired warrant was justified. See 6 C. W. N. 164; 28 A. 481=3 A. L. J. 327=3 Cr. L. J. 368=1906 A. W. N. 98, 9 B. 558. In 27 M. 52=13 M. L. J. 285, assault on a constable who knocked at night at the house of an old offender, to see if he was in, was justified. See also Ratanlal 380 & 605.

Now if, in these instances, the accused had been originally charged under ss. 323 or 352, the cases would

have fallen under the second class, in which the right of private defence really arises. A man is charged with assaulting or hurting another. He pleads that that other was attempting to imprison him or to take away his goods. The complainant replies that he was a public officer who was doing his duty. The defendant rejoins that, if so, he was doing something unlawful, or in an unlawful manner. The complainant meets this by saying that, at all events, he was acting in good faith under colour of his office, and this is the issue which has ultimately to be tried. It would be an immaterial issue if the form of the charge required him to begin by establishing the legality of his own proceedings.

74. Extent of the right of private defence.—Subject to the exceptions already discussed, every person has a right to defend his own person against criminal injury or restraint, and his own property against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit such an offence. The enumeration of the offences specified in s. 97 is by no means exhaustive. The right extends to all offences *ejusdem generis*. And what he may do for himself he may do for anyone else under similar circumstances (s. 97). This right is not dependent on the actual criminality of the person resisted, it depends solely on the wrongful, or apparently wrongful, character of the act attempted. If the apprehension is real and reasonable, it makes no difference that it is mistaken. 4 B. L. R., Appx. 101=13 W. R. Cr. 55, 1879 P. R. No. 56; 3 A. 253. See also 21 M. 249. In 28 A. 481=1906 A. W. N. 98=3 A. L. J. 327=3 Cr. L. J. 368, a vaccinator, who attempted to vaccinate a man's child without his consent, was assaulted by the father and his friends and they were held to have acted in private defence. See also 24 C. 324; 3 C. W. N. 627. It is lawful to kill a lunatic who attacks a man, though the lunatic is not punishable for his act (s. 98). It is lawful to assault a man who is found carrying away one's goods, though the man is a bailiff who is bound to do the act, if his character is not known (s. 99, Explanation 2). It is lawful to shoot a man who is found

have fallen under the second class, in which the right of private defence really arises. A man is charged with assaulting or hurting another. He pleads that that other was attempting to imprison him or to take away his goods. The complainant replies that he was a public officer who was doing his duty. The defendant rejoins that, if so, he was doing something unlawful, or in an unlawful manner. The complainant meets this by saying that, at all events, he was acting in good faith under colour of his office, and this is the issue which has ultimately to be tried. It would be an immaterial issue if the form of the charge required him to begin by establishing the legality of his own proceedings.

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opening your plate-chest at night, though he happens to be your butler, whom you mistake for a burglar (s. 79). It is even lawful to run the risk of injuring an innocent person, where that risk is inseparable from the proper exercise of the right of resisting a criminal act (s. 106). The extent of the harm which it is lawful to inflict in self-defence is limited: first, by the rule that it is unlawful to kill an assailant, unless the crime he is attempting is one of special gravity (ss. 100, 103); and, secondly, by the general principle that the injury inflicted upon the assailant must never be greater than is necessary for the protection of the person assailed (s. 99, cl. 4). The right is not taken away merely because the accused is himself prepared to fight or to offer effective resistance; 1906 P. W. R. Cr. 22=5 Cr. L. J. 218.

75. When right of private defence of person may or may not extend to killing.—The cases in which injury to the person may be resisted to the extent of killing the offender are laid down in s. 100, cl. 1—5. It will be observed that all of these are cases in which the person attacked would willingly risk his own life to prevent the commission of the offence. See, as to cases in which killing was held justifiable in consequence of personal violence threatening life or grievous hurt 11 W. R. Cr. 41; 22 W. R. Cr. 51; Cf. 17 W. R. Cr. 46; 13 C. W. N. 1180=10 Cr. L. J. 391. Clauses 3 and 4 refer to violations of liberty. Of these, assaults with the intention of kidnapping or abducting are attempts to deprive a person of liberty with a view to the commission of ulterior crimes, which themselves are generally, or probably, such as may be resisted to the last extreme. Clause 5 suggests a case of confinement which is not likely frequently to occur. All arrests made under colour of law assume that the case will immediately be brought before a public authority, who will decide upon their legality. Where the arrest is made by a public servant acting without authority, whether the arrest is by civil or criminal process, it is held in England that resistance, even if accompanied with considerable violence, cannot be punished criminally as an assault. *R. v.*

Osmer, 5 East, 304, *Galliard v. Laxton*, 2 B. & S. 363 = 31 L. J. (M. C.) 123; *Codd v. Cabe*, L. R. 1 Ex. D. 352 = 16 L. T. 331 = 36 L. J. (M. C.) 87 = 15 W. R. 752 = 16 Cox, C. C. 445; *R v. Sanders*, L.R., 1 C. C. 75. It is, however, assumed by the Code that the public authority, before whom the person unlawfully confined may expect to appear, is one whose duty it would be to let him go free if the arrest was unlawful. Where an English criminal who had escaped to Hamburg was there unlawfully arrested by a police officer, and put on board an English steamer, and he, while on his way back to England, murdered the constable who had arrested him, it seems to have been admitted by the Court that, if the killing had been solely to secure his liberty, it would have been lawful. In that case the illegality of his arrest would not have secured his release when he came again within English jurisdiction. *R v. Sattler*, D. & B. 529 = 27 L.J. (M.C.) 50 = 7 Cox C. C. 431 = 4 Jur. (N. S.) 98. In *Broadfoot's* case *Foster*, Ct. L. 154, a press-gang, who were acting absolutely without warrant, went on board a merchant ship to press sailors for the naval service, one of the crew fired a blunderbuss at and killed one of the press-gang. It is quite certain that if he had once been taken on board a King's ship he would never have been released on account of any error in the mode of his arrest. The killing was held not to be murder, as the arrest was illegal. It was, however, held to be manslaughter. The report does not say why, but apparently, upon the facts of the case, the shooting was a degree of violence beyond what was necessary for the protection of the merchant seaman from being pressed.

Where the violation of person or liberty is not of the aggravated nature of the offences mentioned in s. 100, it may still be resisted by any necessary degree of violence short of killing (s. 101). For instance, it is illegal to confine a man who is found ploughing up his neighbour's land by day, in order to keep him till he can be handed over to the police; 13 W. R. Cr. 64; 9 C. W. N. 125 = 2 Cr. L. J. 13; because trespass is not one of the offences that would raise a right of private defence. But he would not be justified in killing

his captor to effect his escape. And even where the violence used in self-defence falls short of death, it will not be justified if a lesser degree of violence would secure the end aimed at, or, according to English law, if the injury inflicted is out of proportion to that which would otherwise be suffered. "A man cannot justify a maiming for every assault; as, if A strike B, B cannot justify the drawing his sword and cutting off his hand; but it must be such an assault whereby in all probability his life may be in danger." *Cook v. Beale*, 1 *Ld. Raym.* 176; *per Holt, C. J., Cockcroft v. Smith*, 11 *Mod.* 43. The right of private defence is subject in all cases to the restrictions contained in cl 3 and 4 of s. 99—1879 P. R. 36. Where the prisoner got into an altercation at night with a man and a couple of women, and the man struck him a blow, and he struck the other with a knife, *Crowder, J.*, said "Unless the prisoner apprehended robbery or danger to life, or serious bodily injury (not simply being knocked down), he would not be justified in using a knife in self-defence." *R. v. Hewlett*, 1 *F. & F.* 91; 9 *C. W. N.* 125=2 *Cr. L. J.* 13.

So the English Commissioners, in their Report of 1879, say at p. 11, "We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet this is all subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used, is not disproportioned to the injury or mischief which it is intended to prevent."

Again, at p. 45, they quote a passage from the first report of the Commissioners who drafted the Penal Code (Appendix M. p. 147), in which, while admitting that it would be illegal for a man to kill another to prevent that other from pulling his nose, they assume that it would be lawful to inflict upon him any harm short of death, "to give the assailant a cut with a knife across the fingers, which may render his right hand useless to him for life, or to hurl him downstairs with such force as to break his leg"; and speak of a man so

threatened as "merely exercising a right by fracturing the skull and knocking out the eye of an assailant" Upon this the Commissioners say, "If we thought that the common law was such as is here supposed, we should without hesitation suggest that it should be altered. But we think that such is not, and never was, the law of England. The law discourages people from taking the law into their own hands. Still, the law does permit men to defend themselves (3 W. R. Cr. 47; 1901 P. R. 5). And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified." This latter limitation is not expressly stated in s. 99, cl. 4, but it is probable that the language of that clause would be held to forbid any flagrant excess in resisting minor wrongs; 26 M. 249.

76 When right of private defence of property may or may not extend to killing.—Offences against property are again divided into two classes, of which one may be resisted to the extent of causing death, 5 B. H. C. R. 59; while in the second, killing can never be justified. The first class is described in s. 103. Violence is the characteristic of all the offences enumerated in this section. It is the essence of robbery (s. 390), and is the aggravating circumstance which, under cl. 4, enlarges the right of defence, when added to offences which could not otherwise be resisted to the extent of death. House-breaking by night is always considered an offence of special enormity, as being an invasion of a man's home at a time when he is specially defenceless. Mischief by fire is not only peculiarly dangerous, but requires to be stopped at once by the most summary and effective means. All this is in affirmance of the old common law of England, 1 Hale, P. C. 435, 493. On the other hand, the rights given by this section must be taken with the limitation in s. 99, cl. 4. Every one of the offences stated in s. 103 may in reality be a very trivial affair which may be warded off with violence falling far short of extreme results. 1 Hale, P. C. 488, 1 East, P. C. 273. The greatest indulgence is always shown to the acts of a person who suddenly discovers a housebreaker in

his house at night. The heinous character of the offence, the uncertainty whether the man is armed, and likely to attempt violence, the want of time for reflection, would in the great majority of cases be an ample justification to any inmate of the house who at once made fatal use of a deadly weapon. But if the size or youth of the offender, his efforts to escape observation when approached, or his entreaties for mercy, showed that no real danger was to be apprehended from him, I imagine that no measures of extreme violence could be justified. In one case in India, a man being disturbed by sounds of breaking in at night, rushed out of his house, and finding a man who had partially effected an entrance, cut off his head with a pole-axe; **2 Wym. Cr. 40**. This was held to be an excessive exercise of the right of self-defence. And so in a case where a person, caught in the act of housebreaking by night, was strangled by the inmates, after he was fully in their power and helpless, **14 W. R. Cr. 68**. On the other hand, where persons, who were on guard in a *cutchery*, were attacked in the day time by a gang of persons armed with deadly weapons, who were trying to force their way in, it was held that those inside were justified in firing upon them, as there was a reasonable apprehension that they would suffer death or grievous hurt if an entrance was effected, **22 W. R. Cr. 51**.

The cases of injury to property which only admit of violence short of death, are stated in s. 101. It is obvious that a resort to the extreme limits of violence sanctioned by this section, will only be allowable in very rare cases. No one would be justified in inflicting any very serious injury on a person whom he detected in picking his pocket, or stealing plantains out of his garden, or insulting (s. 501) **11 C. L. J. 11=11 Cr. L. J. 213=5 Ind. Ca. 721**; unless the offender entered into a personal contest which brought the case within the rules of defence to the person, or unless he persisted in his offence so as to render greater violence necessary. **6 B. L. R., App. 9=14 W. R. Cr. 69; 3 W. R. Cr. 41; 7 W. R. Cr. 112; 12 W. R. Cr. 43; 14 W. R. Cr. 74**. In **1 Cr. L. J. 997**, the accused hearing a

thief cutting his sugarcane with a *da*, aimed with a cross-bow in the direction of the same and killed one of the thieves, and it was held that the accused was not bound to abstain from any defence at all of his property and if he approached nearer to drive away the thief, the *da* might have been used by the thief, and so the killing was justifiable. In an old English case a boy came into a park to steal wood, and hid himself in a tree when he saw the wood-ranger coming. The latter struck him, and then bound him to his horse's tail. The horse took fright and ran away, and the boy suffered injuries from which he died. This was held to be murder—*Holloway's case*, 1 East, P. C. 237. And so a man who is set to watch his master's yard, is not justified in shooting one who enters it at night, and who goes to the place where fowls are kept, even though he has good reason to suppose the man is about to steal the fowls. *R. v. Scully*, 1 C. & P. 319; see also 5 W. R. (Cr.) 33 & 73; 6 W. R. (Cr.) 50 & 89; 17 W. R. (Cr.) 46; 18 W. R. (Cr.) 29; 3 A. 253; 1902 P. R. (Cr.) 29; 1885 P. R. No. 25.

It will be observed that the act which is forbidden in ss. 101 and 104 is "the voluntary causing of death." By s. 39, a person is said to cause death voluntarily, when he meant to cause it, or when he used means which to his knowledge are likely to cause it. A person who uses a deadly weapon, as a gun or a spear, will be held to have voluntarily caused death, if it follows from his act; 18 W. R. (Cr.) 29. Even if the act be done under moral coercion, it does not cease to be voluntary; 1912 M. W. N. 1108. On the other hand, if a man, in defence of his person or property, knocks another down with his fist, or strikes him with an ordinary stick, and death ensues from some cause which could not have been anticipated, he has committed no offence. *R. v. Knock*, 14 Cox, 1; see also 12 W. R. (Cr.) 15; 3 W. R. (Cr.) 12. The voluntary causing of death in self-defence, where the circumstances only justify the infliction of hurt falling short of death, is not murder, but culpable homicide, if the act is done in good faith—that is, for the purpose of self-protection, and in the belief that

no other means will effect the purpose. For instance if a man shoots another to prevent being horsewhipped; s. 300, Excep. 2; 1868 P. R. 13; 1872 P. R. 12; 1880 P. R. 1. There would be no justification for a trespasser being confined, 13 W. R. Cr. 64; or where a riot is premeditated; 7 W. R. Cr. 34. The harm inflicted must be proportionate to the harm threatened and with a view to prevent the latter; 1882 A. W. N. 172; 1884 P. R. Cr. 41. But the killing of a person who is found committing a crime that would justify killing him in self-defence, will be murder if it is done vindictively and for revenge: as, for instance, where a person, finding a man in the act of committing housebreaking by night, called for a weapon for the express purpose of killing him and did kill him; and it appeared that the housebreaker was at the time trying to escape, but probably would have been unable to escape, the High Court of Bengal ruled that the act was murder. 1 Wym. Cr. 68. Where a person who is charged with injuring another pleads that he did it in self-defence, he must prove that a crime was actually attempted which would justify him in causing the particular hurt complained of, or that the facts were such as would justify a rational man in supposing that such an attempt was being made. If a man suspects his wife and meets her paramour in his house, he may lay in wait for him and chastise him if caught in the house; 20 W. R. (Cr.) 36, but not before he has entered the house or while he is returning. 10 W. R. (Cr.) 9. It is a right of *defence* and not of *punishment*. Where a builiff rushed into a gentleman's bedroom early in the morning, without announcing his character or purpose, the gentleman was held justified in inflicting the same, but no greater hurt, than would have been lawful if the man had been a mere wrongdoer. 1 Hale, P. C. 470; 1 East, P. C. 271, 17 W. R. Cr. 46. In an old case, a gentleman was in possession of a room in a tavern, and several persons insisted on having it and turning him out, which he refused to submit to. Thereupon they drew their swords upon him and his companions, and he then drew his sword and killed one of them; this was held to be justifiable homicide; not that he would have

been authorized to act in that way in maintaining his possession of the room, which might fairly be questioned, but because he might reasonably have thought that his life was in danger.—*Ford's case*, Kelyng, 51; 1 East, P. C. 243. It is obvious, too, that a person who is living in a lonely house, or among a lawless population, or who is travelling by night on an unprotected road, is justified in acting upon appearances of danger which would be insufficient if he was dwelling in all the security of a civilized town.

77. Acts that are offences, can alone evoke the right of private defence.—It will be observed that all the cases in which self-defence is authorized under ss. 103 and 104, are cases where the injury to property involves a crime, and it must be understood that there is no right of private defence against any act, which is not in itself an offence under the Code. 16 C. 206 at 218. The provisions of these sections do not apply to offences under any special or local law. See s 40 & 4 B. L. R. 101 = 13 W. R. Cr. 55. Nothing is said as to injuries which are merely trespasses punishable by civil action, still less where the trespasser is asserting a right, honestly though erroneously believed. In the majority of such cases the injured party would obtain sufficient redress by an appeal to law. If so, of course the right of private defence is excluded by s 99, cl. 3. It must not, however, be supposed that in cases not covered by this provision, the owner of the property is forbidden to protect himself. If a man, pretending a title to the goods or the house of another, attempts to take away his goods or to enter into possession of his house, the owner may ultimately beat him sufficiently to make him desist, but he may not do so at once. He must go through the various steps of requesting him to go away, and of gently laying his hands upon him to enforce his request. If, then, the trespasser turns upon him and assaults him, the owner may protect himself against the assault, in a manner proportioned to its severity, and if the trespasser has actually entered into his house, and the owner cannot otherwise retain possession, he may justify even a killing in self-defence. For

no other means will effect the purpose. For instance if a man shoots another to prevent being horsewhipped; s. 300, Excep. 2; 1868 P. R. 13; 1872 P. R. 12; 1880 P. R. 1. There would be no justification for a trespasser being confined, 13 W. R. Cr. 64; or where a riot is premeditated; 7 W. R. Cr. 34. The harm inflicted must be proportionate to the harm threatened and with a view to prevent the latter; 1882 A. W. N. 172; 1884 P. R. Cr. 41. But the killing of a person who is found committing a crime that would justify killing him in self-defence, will be murder if it is done vindictively and for revenge; as, for instance, where a person, finding a man in the act of committing housebreaking by night, called for a weapon for the express purpose of killing him and did kill him; and it appeared that the housebreaker was at the time trying to escape, but probably would have been unable to escape, the High Court of Bengal ruled that the act was murder. 1 Wym. Cr. 68. Where a person who is charged with injuring another pleads that he did it in self-defence, he must prove that a crime was actually attempted which would justify him in causing the particular hurt complained of, or that the facts were such as would justify a rational man in supposing that such an attempt was being made. If a man suspects his wife and meets her paramour in his house, he may lay in wait for him and chastise him if caught in the house; 20 W. R. (Cr.) 36, but not before he has entered the house or while he is returning, 10 W. R. (Cr.) 9. It is a right of *defence* and not of *punishment*. Where a bailiff rushed into a gentleman's bedroom early in the morning, without announcing his character or purpose, the gentleman was held justified in inflicting the same, but no greater hurt, than would have been lawful if the man had been a mere wrongdoer. 1 Hale, P. C. 470; 1 East, P. C. 271. 17 W. R. Cr. 46. In an old case, a gentleman was in possession of a room in a tavern, and several persons insisted on having it and turning him out, which he refused to submit to. Thereupon they drew their swords upon him and his companions, and he then drew his sword and killed one of them; this was held to be justifiable homicide; not that he would have

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the owner need not fly from his own house to avoid killing one from whose violence he cannot otherwise escape, for that would be to give up the possession of his house to his adversary by flight. *1 Hale, P. C. 485, 486; 1 East, P. C. 272, 287.* The English Commissioners say upon this point: Report, 1878, p. 45. "But the defence of possession either of goods or lands against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace. The party in lawful possession may justify by gently laying his hands on the trespasser, and requesting him to depart. If the trespasser resists, and in so doing assaults the party in possession, that party may repel the assault, and for that purpose may use any force which he would be justified in using in defence of his person. As is accurately said in *1 Rolle's Abridgment Trespass, G. 8*, a justification of a battery in defence of possession, though it arose in defence of the possession, yet in the end it is the defence of the person." So Lawrence, J., said, "The defendant ought not in the first instance to begin with striking the plaintiff. But the law allows him, either in defence of his person or his possession, to lay his hand on the plaintiff, and then he may say, if any further mischief ensued, it was in consequence of the plaintiff's own act, so that the battery follows from the resistance." *Weaver v. Bush, 8. T. R. 78; 3 Steph Crim. L. 16.* Accordingly, mere resistance by a party lawfully in possession of land to an attempt made by others to expel him by force is lawful. *3 W. R. (Cr.) 41; 7 W. R. (Cr.) 76; 2 B. L. R., (A. Cr.) 16=10 W. R. (Cr.) 64; 14 W. R. (Cr.) 69; 19 W. R. (Cr.) 66; 20 W. R. (Cr.) 36; 2 W. R. (Cr.) 59; 21 C. 392; 16 C. 206; 26 C. 574; 11 C. W. N. 176; 24 M. 124; 19 W. R. (Cr.) 66; 23 W. R. (Cr.) 25; 3 C. 573 p. 584; 24 C. 324=1 C. W. N. 233; 6 C. W. N. 164; 35 C. 103 at 107; 20 A. 459; 10 Ou. Ca. 196=6 Cr. L. J. 271 at 273; 1864 W. R. (Cr.) 11; 7 W. R. (Cr.) 34 & 103; 1 C. L. R. 521; 7 C. L. J. 359; 24 A. 143.* In this last case the Court took a stronger view against the right of a party in possession to resist aggression than that taken by the Calcutta Court. But it must be remembered that the very idea of private

defence implies the accused was in possession. A man can only defend his possession by force; 16 C.W.N. 1053; but cannot try to obtain possession by force or in other words the accused must have acted on the defensive, not on the offensive, 9 C. 639; 33 C. 295 at 299; 24 A. 298; 35 C. 103 & 368 at 375, 443. Also it must be remembered that the right cannot be claimed by people who believing they will be attacked, court the attack; 1864 W. R. (Cr.) 11. There is no right of private defence where two parties arm themselves for a fight to enforce their right. In such a case, if it is not shown that the accused were acting within the limits of the right of private defence, it does not matter which party was the first to attack; 35 C. 368=12 C. W. N. 384=7 C. L. J. 359=3 M. L. T. 385=7 Cr. L. J. 256; 35 C. 443=8 Cr. L. J. 54; 35 C. 384 =12 C. W. N. 579=7 Cr. L. J. 374; 35 C. 103=7 Cr. L. J. 123; 3 C. W. N. CCXCIX; 14 B. 441, is an extreme case, very nearly on the border line. Here persons who were in peaceful possession of land were attacked by a party armed with sticks, who came to cut up the crops, and, there being no time to get the aid of the police, the persons in possession armed themselves with sticks, and a riot ensued, and one of the aggressors received a blow, from the effects of which he died; the prisoners were acquitted, it being held that the violence they had used did not exceed their right of private defence of property; see 6 B. L. R., (App.) 9; 13 C. W. N. 827=10 Cr. L. J. 245=3 Ind. Cas. 96; 25 M. 624; 14 Cr. L. J. 380=20 Ind. Cas. 140 (see 26 M. 249 where unlawful obstructions had been offered to persons walking in religious procession). Obstruction offered by tenants to a distraint by a land-holder, when no rent is in arrear, is not an offence, Weir I. 44 & 56. If a Zemindar's men, without notice, enter upon crops to distrain, the ryot owners are justified in treating such entry as trespass and in repelling the illegal entry, 23 W. R. Cr. 40; but mere persistence in demanding rent is not trespass which would justify an assault, 19 P. R. Cr. 75; 16 W. R. (Cr.) 65; a severe assault, when complainant entered to have intercourse with accused's wife would be justified; 20 W. R. (Cr.) 36; 6 W. R. 203; 27 M. 52=13 M. L. J. 285. On the

other hand, where there was a *bona fide* dispute about land between A and B, and B, with some of his people, began ploughing A's land by day; A, with a party armed with spears, came into the field, and after a few words of remonstrance on either side, killed two of B's party, and wounded a third. These acts were held not justifiable under either s. 100 or s. 101, as the act of ploughing under the particular circumstances did no harm, and could have been redressed by an appeal to the authorities; no effort had been made in a lawful way to induce the trespassers to retire, and no violence had been offered or threatened by them, to justify any such violence as was used. 18 W. R. (Cr.) 29. (See 16 C. 206, p. 213; 24 A. 298.) If an assembly is not unlawful by reason of the right of private defence, but some members exceed the right by acts of unnecessary violence, those that still continue in the assembly, knowing of such excess, would make themselves liable as aiders and abettors of the former; 36 C. 296=9 Cr. L. J. 443.

In all the previous observations, it has been assumed that the act which was resisted was in itself an offence. Section 97 has no application to any other case. There can, of course, be no resistance by way of self-defence to an act done by lawful authority, as the flogging of a convict under judicial sentence. Nor can there be any right of defence against an act which is itself an act of lawful self-defence. A gentleman, after vainly challenging another to fight, threw a decanter at him, which hit him on the head, and at once drew his sword. The other retaliated with another decanter, which broke the assailant's head. The latter at once killed him with his sword. This was held to be murder, and neither to be justified nor extenuated by the blow which he had provoked and received—*Mawgridge's case*, Kelyng, 119=17 St. Tr. 57. So, if a robber or house-breaker by night is attacked in self-defence, and kills the person who attacks him, he cannot plead that he would otherwise have lost his own life, for this is one of the perils which the law attaches to his criminal act. 1 Hawk, P. C. 82; 1 East, P. C. 271. Where, however,

the right of self-defence was being carried to an inexcusable excess, or was being enforced after the criminal attempt had been abandoned, there would, in theory at all events, be a right to resistance. I know of no such case having arisen, and in practice it would be difficult to make out. Where a fight takes place between two persons, whether by pre-arrangement or on sudden anger, each is acting unlawfully. In such a case the old books enter into the most minute discussion as to the circumstances under which either of the contending parties may rely on the right of self-defence; *1 Hale, P. C. 479, 482*, *1 Hawk. P. C. 97*, *Foster, Cr. L. 277*; *1 East, P. C. 279*. The Draft Code of 1879 summarizes the views of the Commissioners in s. 56 as follows:—

“Everyone who has without justification assaulted another, or has provoked an assault from that other, may, nevertheless, justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the party first assaulted or provoked, and in the belief on reasonable grounds that it is necessary for his own preservation from death or grievous bodily harm. Provided that he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided, also, that before such necessity arose, he declined further conflict, and quitted or retreated from it as far as practicable.

“Provocation within the meaning of this section may be given by blows, words, or gestures.”

The principles contained in this section appear to be capable of application to cases such as I have suggested above.

Where an act of self-defence is being done under a misconception of facts, it may be lawfully resisted by the person whose action is misconceived, although the person who does the act is himself committing no offence (s. 98).

The burthen of proving the plea of private defence is on the accused, and when raised a full account of the occurrence must be given in evidence; *1 C. L. R. 62*; *11 C.L.R. 232*; *1879 P.R. (Cr.) No. 36*; and in the absence of

evidence the court is bound to assume the absence of such special circumstance as would make out the plea. 21 A. 122; 20 A. 459; 16 K. L. R. 177=4 Cr. L. J. 271; 19 K. L. R. 68=10 Cr. L. J. 102. If therefore the accused has not set up the plea at his trial, and especially if he has raised other pleas inconsistent with it, he cannot on appeal rely upon evidence recorded in the case as making out such a defence, nor can the Court raise such a defence on his behalf. 21 A. 122; 7 A. L. J. 438; 1904 A. W. N. 113=1 Cr. L. J. 427; 1884 P. R. No. 41. In 2 W. R. (Cr.) 59 the Court raised of its own motion such a plea on behalf of the accused, but this was before the Evidence Act came into force; 1912 M. W. N. 404=11 M. L. T. 251.

78. Commencement and continuatoin of the right of defence of person—The right of defence begins when a reasonable apprehension of danger commences (ss. 102 & 105) 4 B. L. R. (App.) 101=13 W. R. (Cr.) 55; 17 W. R. (Cr.) 46; that is, when there is a reasonable apprehension of such danger as would justify the particular species of defence employed. A man who is attacked by another who wears a sword is not justified in killing him on the chance that he may use the weapon, but if he sees him about to draw it, it is not necessary to wait till he does draw it; see 11 W. R. (Cr.) 41; 10 Ou. Ca. 196=6 Cr. L. J. 271. So, a man who hears a burglar busy opening the lock of the house door, may fire at him before he gets in. But he would not be justified in firing at a man he saw prowling about his compound at night, unless he had reasonable grounds to suppose that the party was about to force his way into the house

~~The right of defence ends with the necessity for it. Where the injury is to the person, the right ceases with the apprehension of danger (s. 102); that is, as said before, with the apprehension of such danger as would justify the particular form of violence employed in self-defence; 2 W. R. Cr. 43; 22 W. R. Cr. 51. Where a man is attacked by another with a sword, he is, as we have seen, justified in killing him. But if the sword is~~

broken, or the assailant is disarmed, so that all apprehension of serious harm is over, the party attacked would be committing murder, or culpable homicide at the least, if he were still to proceed to the death of his opponent; *1 East, P. C. 293*, 14 K. L. R. 61=1 Cr. L. J. 593. But a man who is assaulted is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued, 13 C. W. N. 1180=10 Cr. L. J. 391=3 Ind. Ca. 867. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger, and if, in a conflict between them, he happens to kill, such killing is justifiable. *Foster, Cr. L. 273*; 28 M. 454=3 Cr. L. J. 43; 1905 P. L. R. 21=3 Cr. L. J. 232. And, of course, where the assault has once assumed a dangerous form, every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger.

79. Commencement and continuation of right of defence of property.—The right of defence against injuries to property is governed by the same principle, viz, the continuance of an injury which may be prevented (s. 105). Therefore, resistance, within the justifiable limits, may be continued so long as the wrongful act is going on. But when the robber, for instance, has made his escape, the principle of self-defence would not extend to killing him if met with on a subsequent day. If, however, the property were found in his possession, the right of defence would revive for the purpose of its recovery; 3 N.L.R. 177=7 Cr. L.J. 49. It by no means follows, however, that the right would revive to the same extent as it formerly existed at the
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and if he resists by means which create no apprehension of death or grievous hurt, he cannot be killed, by virtue of anything contained in these sections. This is the ground of the distinction drawn in Explanations 2 and 3 between theft and robbery. In the former case, the right of defence appears to last longer than it does in the latter. What is meant is, that the right of defence against robbery, *as such*, only lasts as long as the robbery. While the fear of death, hurt, or wrongful restraint, which causes theft to grow into robbery (s. 390), continues the offender may be killed. But when he takes to his heels with the booty the robbery is over, and the right of defence is reduced to what would have been admissible against a pick pocket. A similar remark applies to Explanation 5. The right of defence against housebreaking *as such*, only lasts so long as the house-trespass continues—that is (s. 442), so long as the criminal is within the building. It would appear that if he died of a shot fired at him after he had effected his escape from the house, this would be an unlawful killing, though if he did not die, but was maimed for life, it would be all right (s. 104).

The same principle applies where the property is land. Where an unlawful entry is made upon land, the mere trespass *as such* (*see ante*, § 76) cannot be resisted with violence unless it is accompanied by some act which makes it punishable as mischief or criminal trespass; 18 W.R. (Cr.) 29; 10 W.R. (Cr.) 9; 13 K.L.R. 294 = 1 Cr., L.J. 285; 12 W.R. (Cr.) 43; 1885 P.R. No. 25; 1876 P.R. No. 17; 1882 P.R. No. 2. And where the mischief has been completed, and there is no reason to apprehend a renewal of it, an attack upon the aggressors cannot be justified on the ground of self-defence, 7 W. R. Cr. 34.

*80. **How far one may go to defend another.**—Every person, by s. 97, is entitled to do, in defence of the person or property of another, any act which the person primarily concerned would be authorized to do for himself. The earlier English writers seem to have been inclined to limit this right to the case of

persons who were in a sort of community of interest, as husband and wife, parent and child, master and servant, lodger and landlord, companion or neighbour. Lord Hale rests this right upon the general principle that "every man is bound to use all possible lawful means to prevent felony, as well as to take the felon; and if he doth not, he is liable to fine and imprisonment"; but he seems doubtful how far the rule would apply in favour of a mere bystander, *1 Hale, P. C. 434*. It is now, however, settled that on a fitting necessity every one may interfere; *1 East, P. C. 289, 292, Foster, Cr. L. 274*. A son was held excusable where he killed his own father whom he honestly and reasonably believed was trying to kill the son's mother; *R. v. Rose, 15 Cox, 540*. So, where a private person had broken into the house of another, and imprisoned him to prevent him killing his wife, Chamber, J., said, "It is lawful for a private person to do anything to prevent the perpetration of a felony." *Handcock v. Baker, 2 B. & P. 260*. It is obvious, however, that considerable caution would be required, where a stranger interfered in a matter the merits of which were not clearly beyond dispute. If he found two persons, A and B, engaged in a deadly struggle, the fact being that A would have been justified in killing B, while B was not justified in harming A, and if the stranger took the part of B, and killed or otherwise injured A, he certainly would not be justified by s. 97, as A was not committing any offence. He would have to fall back upon s. 79, and to urge that he was mistaken in the facts. It is quite clear that he would be justified in interfering to part the two, and would then be justified in his own defence in using any violence against either that was necessary for his own protection. But it is by no means clear that a man can rely on a mistake of fact, when he suddenly chooses one of two alternatives without any apparent reason for preferring one to the other. See *1 East, P. C. 290; 292*. In *10 Bur. L. R. 92*.

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221=12 Cr. L. J. 477=12 Ind. Cas. 85. See also 4 Bur. L. T. 268=13 Cr. L. J. 53=13 Ind. Cas. 389.

A question that has been much discussed, and seems hardly settled, is, how far strangers are justified in interposing on behalf of one who is being arrested, or otherwise interfered with, by persons professing to act under legal authority, but who are not warranted in their action. In *Hugget's case*, **Kelyng 59=84 E. R. 1082**, a man had been impressed, and was going quietly along with his captors. The defendant and others followed them, and asked to see their warrant, and, on being shown it, said it was no warrant, which appears to have been the fact. They then drew their swords to effect a rescue, and a scuffle ensued, in which one of the press-gang was killed. In *Tooley's case*, **2 Ld. Raymond, 1296**, a woman was being led away to prison as an improper character, without any proper warrant. She also was making no resistance. The defendant and others intervened in the same way. After she was lodged in prison, the same persons made a fresh attempt to rescue, with the same fatal result to one of the constables. In each case the judges were of opinion that the mere resistance to the officers was warranted by the illegality of their acts. They considered the killing to be manslaughter, apparently because the violence used was unnecessary, but only manslaughter, because the spectacle of an illegal arrest was provocation to all other men, not only the friends of the person who was arrested, but strangers. See these cases discussed, *Foster, C. L. 312—317*; *1 Hawk., P. C. 103*; *3 Steph. Crim. L., 71*, where the latter author agrees with Foster in disapproving of Lord Holt's doctrine as to general provocation, except where the wrongful arrest causes a breach of the peace; *Steph. Dig., art 221c*. In *R v Osmer*, **5 East, 304**, a man was being arrested under a good warrant by a constable who had no authority to execute it. The defendant and others assaulted and imprisoned the constable, and were convicted of an assault. The conviction was held bad. Lord Ellenborough, **C J**, said, "If a man without authority attempt to arrest another illegally, it is a breach of the

peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose." In the cases of *Hugget* and *Tooley*, there had been no breach of the peace, as the persons arrested had submitted quietly, while in *Tooley's* case the arrest was completed. These cases were all relied on in the case of *R v Allen*, the whole facts of which will be found in Stephen's "*Digest of the Criminal Law*," pp. 366—374. There two men had been arrested on suspicion of felony, and were afterwards remanded from time to time on a warrant, which charged them generally with felony, but did not specify any particular offence. While the accused were being driven back to prison in the police van, a rescue was attempted by the prisoners, in the course of which one of the constables was killed. The prisoners were indicted for murder, and tried by a special commission, consisting of Blackburn and Mellor, JJ., before whom they were convicted and sentenced to death. The only defence was that the illegality of the arrest reduced the case to manslaughter. The prisoner's counsel applied to the judges to submit the case to the Court of Criminal Appeal. They refused, and their reasons were stated by Blackburn, J., in a letter which contained the following passage (p. 373)

"The cases which you have cited are authorities that, where the affray is sudden and not premeditated, where, as Lord Holt says in *R v. Tooley*, 2 *Ld. Raym.*, 1300 = 2 *Hale*, 79 n., it is acting without any precedent malice or desire of doing hurt, the mere fact that the arrest was not warranted may be a sufficient provocation. But in every one of these cases the affray was sudden and unpremeditated. In the present case the form of warrants adopted may be open to objection, and probably might, on application to the court for a writ of *habeas*, have entitled the prisoners to be

conspiracy to attack the police with fire arms, and shoot them, if necessary, for the purpose of rescuing the two prisoners in their custody, and that they were all well aware that the police were acting in obedience to the commands of a justice of the peace, who

had full power to commit the prisoners to gaol if he made a proper warrant for the purpose. It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant; [see as to this point *R. v. Dadson*, 2 Den. C. C., 35=20 L. J. (M. C.) 57] and that they knew well that if there was any defect in the warrant, or illegality in the custody, that the courts of law were open to an application for their release from custody. [35 C. 103=7 Cr. L. J. 123] We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter. To cast any doubt upon this subject would, we think, be productive of the most serious mischief, by discouraging the police in the discharge of their duties, and by encouraging the lawless in a disregard of the authority of the law."

It will be remarked that *Allen's case* differed from those of *Hugget* and *Tooley* and *R. v. Osmer* in this respect, that in it the constable was acting under a warrant which he was bound to obey; whereas, in the earlier cases, the constable had no legal authority whatever. But even if that difference had not existed, the remark that the prisoners well knew that the courts of law would set right any injury resulting from the illegality of the custody, would, under s 99, cl. 3, be a complete answer to the plea of private defence.

CHAPTER IV

COMPLICITY WITH CRIME.

81. Various modes of complicity with crime.—The object of this chapter is to examine various sections of the Code in which the accused, though he has not with his own hand committed the substantive offence, has become in a subordinate or secondary manner mixed up with it. Such modes of crime are treated in English law books under the head of principals in the first or second degree, and accessories before or after the fact. In the Code they are dealt with according to the particular manner in which the defendant becomes associated with the crime.

Most of the provisions of Chapter V of the Penal Code applies to abetment of *all* offences, whether under the Code or under Special or Local Laws. See the General Clauses Act X of 1897, s. 3 (1) & (37) and s. 40, I. P. C. Thus where a pleader sent a circular round to other pleaders, inviting them to send him their cases, offering to share with them his fees, he was adjudged guilty of the abetment of an offence under s. 36 of the *Legal Practitioners Act*, 17 A. 498 at 504 (P.C.), but the meaning of the expression "Special Law" ought not to be extended to mere Departmental rules, 1894 P. R. No. 23

There are four ways in which a person may become criminally responsible in respect of any offence: *First*, he may personally commit it. *Second*, he may share in the commission, though he does no personal act. *Third*, he may set some other agency to work with a view to the commission of the offence. *Fourth*, he may help the offender after the act, with a view to screen him from justice.

82. Joint Acts.—*First*. No difficulty, of course, can arise under this head, where a single act is done by a single person. Where an offence is committed by means of several acts, whoever does any of these acts in furtherance of the common design, is guilty of the whole offence (s. 37). If one person steals goods in a house, and hands

them to an accomplice outside, who carries them away, both are guilty of the theft. *R. v. Perkins*, 2 Den. C.C., 459=21 L. J. (M. C.) 152. If, however, the person outside knew nothing of the intention to steal till the goods were handed to him, he could not be charged with the theft; his offence would be that of receiving stolen property. *R. v. Hilton, Bell*, C. C. 20. On the other hand, two persons engaged in the same criminal act may be guilty thereby of different offences (s. 38), 1882 A. W. N. 23. For instance, to take the last illustration of *R. v. Perkins*, if the person who first removed the goods was the servant of the owner, he would commit an offence under s. 381, while the accomplice would only be punishable under s. 379. If, however, the accomplice knew that his associate was a servant, and urged him to steal his master's property, he would apparently, under s. 109, be liable to the aggravated penalty of s. 381.

Second.—Where several persons unite with a common purpose to effect any criminal object, all who assist in the accomplishment of that object are equally guilty, though some may be at a distance from the spot where the crime is committed, 36 B. 524=14 Bom. L. R. 147=13 Cr. L. J. 426=14 Ind. Cas. 970, and ignorant of what is actually being done (s. 34).

"Several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned to him—some to commit the act, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it, for it was made a common cause with them, each man operated in his station at one and the same instant toward the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprise." *Foster*, Cr. L. 350; 3 B. L. R. (P. C.) 44=12 W. R. (P. C.) 38; 21 A., 263; L. B. R. (1893-1900) 112 & 233; 19 M. 483; 1 B. 342; 3 A. 776; 4 W. R. (Cr.) 35 (*A fortiori*, if the accused is present when the criminal transaction takes place, and takes a part in it; as where a servant receives the money at a sale which is rendered criminal by statute, 29 C. 196; 9 Bur. L. R. 16; 3 L. B. R. 264=5 Cr. L. J. 414; 17 W. R. (Cr.) 15; 1 Bom. L. R. 351.) Those that are present are all guilty of the principal offence, not of abetment, 3 L. B. R. 264. For the

difference in the application of ss. 34 and 114, I. P. C., see 4 L. B. R. 271=8 Cr. L. J. 472. The case in 36 B. 523, referred to above also illustrates the difference. There the prisoner, in a Native State abetted through human agency a forgery in British territory. The offence of abetment was completed in British territory and the instigator was held liable under the combined effect of ss 34 and 109, I. P. C. Thus if A asks B to go to a place and instigate C to commit an offence, A commits no offence (unless it be one under s. 120-B) until C is instigated by B and when B does so, A's offence is complete at the place where the instigation takes place. (For the difference in the effect of the language as used, in ss. 34 and 149, see per Jackson, J., in 11 B. L. R. 347 (F. B.) & 8 C. 739=12 C. L. R. 233). In the last case Field, J., states at p. 751 that where a prisoner is constructively guilty of murder under s. 34, it is doubtful if he can be said to have committed the offence of murder within the meaning of s. 149, so as to make other prisoners, by a double construction, guilty of murder. When a person is charged by implication under s. 149 he cannot be convicted of the substantive offence by applying s. 34, as the considerations which govern the latter section are altogether different. 16 C. W. N. 1077=13 Cr. L. J. 502=15 Ind. Ca. 616; 16 C. L. J. 440, 9 A. L. J. 180=13 Cr. L. J. 265=14 Ind. Ca. 649. Section 34 covers the case of a single act done by several persons. L. B. R. (1893-1900) 150. To make one constructively liable under s. 149 the actors must be five or more in number, while there is no such limitation to the application of s. 34. 11 C. W. N. 1035=6 Cr. L. J. 301.

If several unite for the purpose of committing a particular offence, such as housebreaking, and in the committal of it one of the inmates of the house is killed, it does not necessarily follow that those who were watching outside would be guilty of murder. It would be a question of fact whether it was the common purpose of all, not only to break into and rob the house, but to effect their object by violence if resisted. If those who entered the house had arms, and were known by the others to have them, such an inference would be legitimate. *Dacres' case*, 1 Hale, P.C. 439, 443; *Duffy's case*, 1 Lewin 194; 23 C. 975 at 978. The inference would, of course, be still stronger against those who were actually present when the violence was committed, though themselves unarmed. Where a number of persons combined to take a man by force to the *tannah* on a charge of theft, and some of them beat him on the way, Peacock, C.J., pointed out that while, on the one hand, it did not necessarily follow that the beating was part of the common design, so as to render those liable who were present, but did

not join in the beating; so, on the other hand, the fact that they were present and did nothing to dissuade the others from their violent conduct, might very properly lead to an inference that they were all assenting parties, and acting in concert, and that the beating was in furtherance of a common design. *B. L. R.*, (Sup. Vol.) 443=5 *W. R. (Cr.)* 45. Three soldiers went together to rob an orchard, two got upon a pear-tree, and one stood at the gate with a drawn sword. The owner's son coming by collared the man at the gate, and asked him what business he had there, upon which the soldier stabbed him. It was ruled by Holt, C.J., to be murder in him, but that the men on the tree were innocent. They came to commit a small inconsiderable trespass, and the man was killed upon a sudden affray without their knowledge. "It would," said he, "have been otherwise if they had all come thither with a general resolution against all opposers." *Foster, Cr. L.* 358; see 11 *B. L. R.* 347=20 *W. R. (Cr.)* 5; 19 *M.* 483; 1907 *U. B. R. (P. C.)* 5=7 *Cr. L. J.* 205=14 *Bur. L. R.* 264; 36 *C.* 659=13 *C. W. N.* 680=10 *Cr. L. J.* 186=2 *Ind. Cas.* 841; 1887 *A. W. N.* 230 at 237 per Mahmood, J.; 24 *W. R. (Cr.)* 5; 1887 *P. R. No.* 4. In *Ratanlal* 14, six persons were members of an unlawful assembly, two of them being armed with wooden bars, which they used effectively to kill the person, to beat whom was the common object of the assembly. It was held the four unarmed persons were entitled to the benefit of s. 116, and were only guilty of an offence under s. 323, read with s. 119, *I. P. C.* See 16 *O. C.* 19=14 *Cr. L. J.* 241=19 *Ind. Cas.* 497. In the English case dealt with by Holt, C.J., it will be observed, the sword carried by the soldier was part of his every-day wear, and it does not appear that his companions knew he had drawn it. Still less can there be any joint liability where the act done by one is wholly foreign to the common purpose of all. Some soldiers who were employed in helping to apprehend a person, unlawfully broke open a house in which he was supposed to be, and some of them then stole some articles that were there. This was held only to be the offence of the actual thieves. *Anon.* 1 *Leach* 7 n. Nor, finally, can a mere bystander be liable for a

crime committed in his presence, though he neither attempts to prevent it, nor gives information against the offenders. 1 Hale, P. C. 349, 14 B. 115 at 125; 21 C. 328; 27 C. 144.

Sometimes an act which is in itself lawful becomes unlawful, or *vice versa*, if done with a particular intention or knowledge. The killing of a housebreaker found committing theft by night in a dwelling house is lawful but might be
(ante, § 76)

leave is *prima facie* theft, but may be only a civil trespass if they are honestly believed to belong to the taker. Now, if several persons join in either act, those who are honestly exercising their right of self-defence against the housebreaker will be innocent, those who are assaulting him from mere malice will be guilty. Those who carry away the goods under a claim of right will be innocent, those who know that there is no such right will be guilty. Each of the guilty parties will be responsible for the whole crime, though the deadly blow, or the actual removal of the property, was only the act of one (s. 35).

83. Abetment.—A person who does not actually commit a crime may help to bring it about, and thereby be guilty of the offence of abetment, or, in the language of English law, be an accessory before the fact. He may do so in one or other of three ways: (1) By instigating it; (2) by engaging in a conspiracy to do it; (3) by aiding in the doing of it (s. 107). 21 W. R. Cr. 8.

(1) *Abetment by instigation.*—A person instigates a crime who incites or suggests to another to do it, or who impresses upon his mind certain statements, whether true or false, with the intention of inducing him to commit a crime (s. 107, Expln. 1). The term instigation as used in this section may be of an unknown person, 12 Bom. L. R. 105, as is usual in the class of cases for which special provision was made by the *Newspapers (incitements to offences) Act*, VII of 1908. A master who orders or facilitates the commission of an offence by his servant, would be guilty of abetment, 12 W. R. (Cr.) 51; 18 W. R. (Cr.) 8, where orders were given to assault a particular person, 7 W. R. (Cr.) 97, but not if no definite

orders were given, **31 C. 710**. Again, the absence of any illustration to s. 108, would not render illegal a conviction of A for abetment, when the incitement has been to induce B and C to join with himself in committing an offence, **25 B. 90** at p. 99 = **1 Bom. L. R. 653**. A person who harps upon the real injuries which A has suffered from B, for the purpose of exciting A to revenge them; or a person who, knowing that B is about to have a private meeting with A's wife for some perfectly innocent object, suggests to A that there will be a criminal meeting between them, in the hope of causing A to commit violence upon B, will be guilty of abetting A in the crime to which he wishes to impel him; and it makes no difference that he does not in terms suggest that A should commit any unlawful act, or even that he affects to dissuade him from it. In its lowest form instigation may consist in mere encouragement given in words or by conduct, **2 A. 253**. Not only a wilful misrepresentation, but also a wilful concealment of a material fact which he is bound to disclose, constitutes an abetment by instigation (s. 107, Explan. 1). The concealment must be prior to the commission of the offence, and must have a direct tendency to bring it about. Suppose a person desiring for purposes of plunder, to cause the destruction of a train, were to conceal from the railway authorities the fact that a bridge had broken down a short distance ahead; this would be an abetment of any injurious consequences that might follow. And so it would be if a witness at a trial, in pursuance of a conspiracy to get an innocent man punished, were to conceal some material fact which he ought to disclose; the concealment of an offence after it has taken place cannot be said to cause, or procure it to be done. See **4 B. L. R., (A. Cr.) 7**, which might be brought within s. 107, cl. 3, but not under Explan. 1; see *post* § 85, also **9 Bom. L. R. 161** = **5 Cr. L. J. 176**; & **9 Bom. L. R. 159** = **5 Cr. L. J. 173**. It is equally an offence to instigate A to instigate C, and so on indefinitely, provided the object is ultimately to arrive at somebody who will be influenced to the commission of a crime (s. 108, Explan. 4). *Earl of Somerset*, **2 St. Tr. 951** at **965**. But the mere refraining to dissuade another from the commission of a crime which he is contemplating, or

even passively acquiescing in the idea, is not an abetment; mere silence is not necessarily an illegal omission, 3 L. B. R. 222=4 Cr. L. J. 483, nor can deliberate absence from the seat of offence amount to instigation, 4 C. W. N. 500; nor will the fact that a man undertook to be a stake holder and agreed to pay the stake to the winner of a prize-fight, as the result of which one of the combatants died, make the stake holder an abettor. *Taylor*, L. R., 2 C. C. R. 147=47 L. J. (M.C.) 67. A person who is merely present at (27 C. 144) or cognizant of (21 C. 328) a crime cannot be treated as an abettor. "As if A says he will kill J. S., and B says, you may do your pleasure for me, this makes not B accessory" 1 Hale, P. C. 616, 14 C. P. L. R. 192; 1898 A. W. N. 147.

The offence of abetment by instigation is complete as soon as the abettor has incited another to commit a crime, whether the latter consents or not, or whether, having consented, he commits the crime; 12 Bur. L. R. 70. Nor does it make any difference in the guilt of the abettor that the agent is one who, from infancy or mental incapacity, would not be punishable; or that he carries out the desired object under a mistaken belief that the act he is employed to do is an innocent one. In 7 N.-W. P. H. C. R. 134, A who was in the habit of making a record out of what B read out, was got to make a false record by B who made and read out false abstracts. B was found guilty though A was innocent, having no guilty intention or knowledge in the matter. See also 1905, P. R. (Cr.) 55=1905, P. L. R. 201=3 Cr. L. J. 135. Again, where a mechanic is employed to make moulds for coining, without knowing the purpose for which they are to be used; or that he falls in with the plans of the abettor, knowing his criminal purpose, but intending to cause its detection, 4 C. 366, 1 B. 15, he cannot be held liable, though the person who instigated him is guilty. The offence consists in the abetment. The consequences are only material as aggravating the punishment. But under English Law, if the person incited does not know that what he is urged to do is illegal, the person inciting is liable as a principal and not merely for incitement; *R. v. Welham*, 1 Cox C. C.

193; *R. v. Williams*, 1 Den. C. C. 39; but under the Code the law is different, see s. 108, exception 3. In Weir I. 48, the accused in a lease included in addition to his own property, some property belonging to Government. The lessee having sublet, the sublessee *bona fide* entered on Government land. Held the execution of the lease by the accused did not constitute an abetment of trespass, if he did not suggest the illegal entry. But if the accused had the intention of getting his lessee to do an unlawful act, he would be guilty even though the lessee acted *bona fide*; see also 1898 A. W. N. 147.

It is, however, necessary that the act abetted should be in itself an offence, although the person doing it may, from youth or other incapacity, be excused for the commission of it, or the means employed are insufficient to produce the intended effect; 1885, P. R. No. 20, *c.g.*, abetment of murder by sorcery. In 10 B. H. C. R. 75, doubt was expressed whether this would be an offence at all. But there can be no doubt the abettor will be liable if the result intended is attained by other means. A man was indicted for abetting a bigamy. The alleged bigamy consisted in the fact that he, being a Mahomedan and the guardian of a young gul, caused a marriage ceremony to be performed in her absence and without her knowledge, the effect of which was alleged to be that she, being already married before, became the wife of a second man. It is evident that in this case, assuming that the ceremony did amount to a valid marriage, the gul could not possibly have been indicted under s. 494 in respect of an act of which she knew nothing. Therefore there was neither an offence nor an offender, and of course there could not be an abetment of that which did not and could not exist; 4 C. 10=3 C. L. R. 81. This case then establishes that an abettor must either be an instigator or a conspirator, consequently a married woman cannot be held to abet her own abduction; 1866, P. R. No. 40; 1871, P. R. No. 5; 1875, P. R. No. 14; 1883, P. R. No. 11 overruling 1868, P. R. No. 17; see 6 C. W. N. 343, where a Hindu father in bigamously contracting a marriage to his minor daughter fared differently from the Mahomedan guardian in 4 C. 10=3 C. L. R. 81. Query.—Can a man abet an

attempt to commit an offence, and be liable even though the attempt has never been made—see **Ratanlal 966**. Having regard to Explan 2 to s 108, the offence may be abetment of the complete offence itself, but it is not impossible to attempt an abetment, **1887 P. R. Cr. 49**. Where a prisoner asked a witness to suppress certain facts in giving his evidence, it was held this amounted to an abetment of giving false evidence, **2 M. H. C. R. 438**.

T	girl under
sixt	care of her
grat	<i>Tukaram.</i>

Baku, under the direction of Tukaram, took the girl into the Nizam's territory, and there dedicated her to the goddess Amba in circumstances which clearly amounted to an offence under s 372. Baku was tried in Sholapur for an offence under s. 372, and Tukaram for abetting her offence, and both were convicted. It was held on appeal that the conviction of Baku was wrong, as the offence had been committed out of British India, and the necessary steps had not been taken to give jurisdiction to the Magistrate in British India under s 168, Cr. Pr. Code. As regards Tukaram the High Court held that he could not be tried for abetment under s 108-A of the Penal Code.

"In the present case, beyond the mere intention and indirect preparation, there was no distinct offence by way of instigating the act committed out of British India. Mere intention not followed by any act cannot constitute an offence, and an indirect preparation, which does not amount to an act, which amounts to a commencement of the offence does not constitute either a principal offence, or an attempt or abetment of the same. The intentions either of Baku or Tukaram, while they were stay-

The illustration to s. 108-A is:—"A in British India instigates B, a foreigner in Goa, to commit a murder in Goa. A is guilty of abetting murder." If A had met B in British India, had persuaded him to murder some one in Goa, and had then started him off to Goa with the necessary funds to get there, and with a pistol

to commit the murder, he would apparently have been held guilty of abetment by instigation. It is difficult to see the difference between such a case and that of Tukaram, who directs his wife to give up his grand-daughter to prostitution in foreign territory, hands the grand-daughter over to her for that purpose, and starts them off together on their way to carry out that purpose. What more could he have done by way of instigation under s. 107, cl 1 ?

Lord Hale says "A commands B to kill C, but before the execution thereof, A repents, and countermands B, and yet B proceeds in the execution thereof. A is not accessory, for his consent continues not, and he gave timely countermand to B; but if A had repented, yet if B had not been actually countermanded before the fact committed, A had been accessory." (1 Hale, P. C. 618) This may be good English law, as depending on the peculiar relation of accessory and principal, which apparently must be in existence at the completion of the act. So, also, no one can be liable as accessory, unless a substantive felony has been committed. But the mere inciting of another to commit a crime is itself a misdemeanour by English law, though no offence is committed in pursuance of the incitement. *R. v. Higgins*, 2 East, 5; *R. v. Gregory*, L. R., 1 C. C. 77 = 36 L. J. (M.C.) 60 = 10 Cox 459. There seems to be no reason why this offence should be purged by repentance and countermand, any more than a theft is by restitution, (1 Hale, P. C. 533; 1 Hawk, P. C. 213,) or a criminal conspiracy by withdrawal from it. See *per Coleridge, C.J., Mogul Steamship Co v. McGregor*, 21 Q. B. D., p. 549. The ruling in 8 W. R. (Cr.) 78 seems to be not correct. 10 B.H.C.R. 497 only deals with liability under s. 114, I P C. It is evident that the person incited might be much more powerfully influenced by the original instigation than by the subsequent repentance. Where the instigation is by letter, the abetment is not complete until the letter is read by the person whom it is intended to incite, 16 A. 389. If it never reaches him, or is handed over by him to someone else before reading it, the act is only an attempt to abet; *R. v. Ransford*, 13

Cox, 9, as to which see **1887 P. R. No. 49**; see **1882 P. R. No. 24** as to a case of abetment on the part of A to abet B to have a crime committed by A himself.

84 Abetment by conspiracy.—The recent amendment of the Penal Code whereby Chapter VA has been newly introduced, creating the substantive offence of *criminal conspiracy*, thus assimilating the Indian law to what has been the law of England, has to a large extent diminished the importance of this mode of abetment. Though conspiracy is thus made a substantive offence, a prosecution can be launched only subject to certain safeguards and consequently s 107 has been left untouched, so that, in many cases it will be merely a matter of convenience regarding procedure whether an accused is dealt with under Chapter VA for the substantive offence of *criminal conspiracy* or under Chapter V for *abetment by conspiracy* as defined in s 107.

A conspiracy is where two or more persons plan or act together to effect the commission of a crime. (See fuller discussion in next Chapter.) It is not necessary that all the conspirators should be in communication with each other, or even that they should know of each other's existence (s. 108, Expln 5) Some of them might be intermediaries, **11 Bom. L. R. 1153**.

But they must all be acting in furtherance of a common object, and in accordance with the same concerted plan. So long as the conspiracy rests in mere plotting, it does not amount to an abetment under s 107, cl. 2. **1879 P. R. No. 16**, though the plotting in itself might amount to an offence under s. 120-B in the new Chapter VA recently added. To constitute abetment by conspiracy some act or illegal omission must take place in pursuance of that conspiracy, and in order to the doing of that thing; **28 C. 797 at 803**; **24 M. 523 at 546**; **21 W. R. (Cr.) 35**. The act done need not be in itself illegal, nor need the acts and omissions, taken together, go so far as an attempt; but they must amount to a preparation for the crime intended, sufficiently to show that there is a plan in actual progress. In this respect the law of *Criminal Conspiracy* in Chapter VA of the Penal Code has been

recently assimilated to the English law of conspiracy, where the offence consists in the mere unlawful combination, though nothing is done in furtherance of the common object — *Per Coleridge, C.J., Mogul Steamship Co. v. McGregor*, 21 Q. B. D., p. 549, approved in *R. v. Whitchurch*, 24 Q. B. D. 420; *Mulcahy v. R*, L. R., 3 H. L., p. 317.

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by anyone of such persons in reference to their common intention, after the time when such intention was first entertained by anyone of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy, as for the purpose of showing that any such person was a party to it " S 10, Ind. Evi. Act—See Illustration to the section.

Prior to the enactment of Chapter VA of the Code, the prosecution had to prove that the accused was engaged in the conspiracy down to the time when the offence was committed or when the act was put in the course of actual execution, 10 B. H. C. R. 497; 26 A. 197=1903 A. W. N. 233; otherwise mere conspiracy was not an offence unless it falls within a special section like ss. 115, 116 or 121-A and a conviction for conspiracy could not stand when the charge against the other alleged conspirators has failed, 9 C. L. J. 663; see *Plummer* [1902] 2 K.B. 339=71 L. J., (K. B.) 805=86 L.T. 836=20 Cox. 269=51 W. R. 137. But now, under certain safeguards, conspiracy *per se* has been made into a substantive offence punishable under s 120-B, I. P. C. A conspiracy may be proved by other than oral evidence; it may be proved by the evidence of surrounding circumstances and the conduct of the accused both before and after the alleged commission of the crime, 9 Bom. L. R. 347, and the accused must be connected to have taken part not only in those steps of the transaction which are innocent, but in some way or other it is absolutely necessary to secure a conviction to connect him with those steps of the transaction which are criminal; 20 W. R. (Cr.) 41.

It has been laid down by the Calcutta High Court that a person cannot be convicted of abetment of a false

charge, under ss. 109 and 211, solely on the ground of his having given evidence in support of such charge. The case was one referred by the sessions judge under s. 438, Cr P C., and in his letter of reference he made the following observations.—

"After careful consideration, I hold that s. 109 does not contemplate any acts of subsequent abetment, and that the Code does not provide for the punishment of such offences, except when they are such as are defined in ss. 212 to 218 of Chap. XI of the I. P. C. Many very excellent reasons could be assigned for this apparent, though not real, omission. It will, however, suffice for the purpose of this reference to point out that if the inferior and theoretically less experienced criminal courts were allowed to punish as abettors persons who gave evidence in support of false charges, or rather charges found by the said courts to be false, the provisions of the Procedure Code by which the punishment of the crime of false evidence can only be inflicted by the Sessions Court would be practically neutralized and set at naught. It is, I think, obvious that this was never intended, and that the framers of the Cr P Code, although they allowed the lower criminal courts to punish for false charges, never vested them with authority to punish those who supported such charges, not by previous acts, but by evidence only." 9 B. L. R. (App.) 16=18 W. R. (Cr) 28; see also 10 C. L. R. 4

The High Court simply expressed their concurrence with the sessions judge, and set aside the sentence

The decision was, no doubt, right in the particular instance stated. Where there was no case whatever against the prisoners, except that they had given evidence which the Court considered to be false, it is plain that they ought to have been charged with that as a substantive offence. It is an evasion of the law to twist a primary into a secondary offence, merely for the purpose of introducing a different jurisdiction, or a lower scale of punishment. (Accordingly, in the case of *Queen v. Boulton*, 12 Cox 87, where the evidence, if believed, established the systematic commission of unnatural offences, while the Crown had limited the indictment so as only to charge a misdemeanour, Cockburn, C. J., directed the jury to acquit.) But the reasons given by the sessions judge, and apparently concurred in by the High Court, seem to be of very questionable soundness. It is quite true that assistance given to another,

subsequent to and independently of the substantive offence, does not amount to an abetment of it. But if the assistance was given as part of the original scheme for committing the offence, and for the purpose of furthering or facilitating it, the case would fall under the second and third clauses of s. 107. For instance, the mere harbouring of a murderer is punishable under s. 212, and not as an abetment of the murder. But if it were arranged that a murder should be committed at a particular place at night, and that the prisoner should leave his house door open so that the murderer might at once slip in and so escape observation, there can be no doubt that the proper way to charge the offence would be as abetment. So, if it were determined to crush a particular man by a false charge, and the part of the plot assigned to one or more of the conspirators was the supporting of the charge by false evidence, there can be no doubt they would be legally punishable as abettors of an offence under s. 211. Nor is there anything conclusive against this view in the fact that the charge would be cognizable by a tribunal inferior to that which could try a charge of false evidence. Suppose the person who had actually preferred the charge had himself sworn to its truth. It could not be contended that this would be a ground for quashing his conviction under s. 211. If not, there is no greater anomaly in allowing his confederates to be indicted for abetting him. There might very well happen to be difficulties in procuring a conviction for giving false evidence, which would vanish if the charge were limited to one under s. 211.

As to the effect of complicity in a *Suttee*, see 3 N.-W. P. H. C. R. 316; *Ratanlal* 207. Under the Law as it now stands, the prosecutor would seem to have an option whether he would charge under s. 120-B with the substantive offence of criminal conspiracy, or proceed under the abetment chapter.

85. Abetment by aiding.—A person abets by aiding, when by any act or illegal omission, done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate, the commission

thereof (s. 107, cl. 3, Expln. 2). **12 W. R. (Cr.) 52.** "Mere intention not followed by any act cannot constitute an offence, and an indirect preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence, or an attempt or abetment of the same." *Per* Ranade, J., **24 B. 287**, at **291=1 Bom. L. R. 678; 20 W. R. (Cr.) 41; 1 Bom. L. R. 351; Weir, l. 47.** Of course, mere presence at the commission of a crime cannot amount to intentional aid, unless it was intended to have that effect. **Ratanlal, 708, 844; 1896 A. W. N. 149.** The priest who officiates at a bigamous marriage intentionally aids it, but not the persons who are merely present at the celebration, or who permit its celebration in their house, where such permission affords no particular facility for the act. **16 K. L. R. 57=3 Cr. L. J. 488; 6 B. 126.**

Where the prisoner procured a dose of corrosive sublimate to a pregnant woman with a view to cause abortion of which she died and it appeared though the prisoner knew the purpose for which it had been obtained still he had dissuaded her from taking it, and in fact had only procured it under a threat by her of suicide and in the belief she may change her mind, it was held he was not an abettor of murder. *Fretwell, L. & C. 161=31 L. J. (M.C.) 145.* Here procuring calomel was not an illegal act. But if the initial act was an illegal act, the author might be held liable as having abetted the unintended consequence thereof, **7 W. R. (Cr.) 97.** In **2 Agra H. C. (Cr.) 21**, a leper, who desired to commit suicide, was helped by certain Zemindars who got wood and had a pit dug up to kindle the sacrificial fire, and they were held guilty of having abetted the suicide.

The writer of a forged document is liable as an abettor, even though it is not he that forged the signature of the alleged executant. **25 C. 207=1 C. W. N. 631; 3 M. 4.** If several persons combined to forge an instrument and each executes by himself a distinct part, and they are not together when the instrument is completed, they are nevertheless all guilty as principals according to English Law, *Bingley, (1821) R. & R. 446.* A Zemindar

who places at the disposal of an investigating police, a house wherein to torture suspected criminals with a view to extort confession is guilty of abetment. 1896 A. W. N. 194. A debtor paid a sum of money and asked for a stamped receipt, but was unable to obtain one, the creditor having no stamp. He then accepted an unstamped receipt, saying he would affix a stamp, which he did not do. He was indicted for abetting, under s. 107, the offence of making an unstamped receipt. It was held that he could not be convicted. He had done nothing, and he had omitted nothing which it was in his power to effect, 8 A., 18; 7 B. 82, but see 23 M. 155; 10 C. P. L. R. (Cr.) 1; 11 Bur. L. R. 34; 7 C. P. L. R. 21; 1895 P. R. No. 18; 20 A. 440=1898 A. W. N. 108; 1883 A. W. N. 145; 1888 A. W. N. 37; 1 N. L. R. 163. On the other hand, a head peon who, knowing that certain persons would be tortured to confess, purposely kept out of the way, was held guilty of abetment 5 W.R. (Cr.) 49; 21 W.R. (Cr.) 11; Cf. 4 C. W. N. 500, where deliberate absence was held not to amount to instigation. See also Ratanlal, 303 & 844; Weir, I. 50 & 52; 8 C. 728=11 C. L. R. 223; 20 B. 394. The mere fact of supplying food to a person who is known to be about to commit a crime, is not necessarily an act done to facilitate its commission, unless such a supply was part of the arrangement by which the crime was to be effected. 2 M. 137. For other instances of aiding, see 19 K. L. R. 40=10 Cr. L. J. 19; 24 W. R. (Cr.) 26; *R. v. De Marny* [1907] 1 K. B. 388; 2 P. W. R. (Cr.) 97=6 Cr. L. J. 411. Mere subsequent knowledge of the offence is no evidence of the abetment of that offence, 2 W. R. Cr. 40; 1869 P. R. No. 11; 1871 P. R. No. 5; see 26 A. 197=1903 A. W. N. 233, where 19 A. 109 & 2 C. W. N. 81 are followed and the view in 1 M. 173 not approved of. See to the same effect 1894 P. R. No. 8; 1893 P. R. No. 13; 27 C. 1041 (F. B.) and other cases discussed in dealing with the offence of kidnapping, as to whether it is a continuing offence or not.

Abetting by illegal omission is the intentional abstaining from doing an act which it was the person's duty to do, and which it may be assumed he would have done, if

he had not wished to further the commission of the crime, *e.g.*, wilfully withholding the information which everyone is bound to give under ss 44 and 45, Cr. P. C. 1868 P. R. (Cr.) 30. So if a servant were intentionally to leave a door unlocked, in order to facilitate the entrance of a burglar; if a nurse were intentionally to refrain from giving a sick man his medicine, in order to hasten his death. The intention is essential to make the omission amount to an abetment. Without that intention it may be punishable civilly or criminally, but not under s. 107. 24 W.R. (Cr.) 26 at 27—28, Ratanlal 35

Where the parties indicted as principal and abettor stand in the relation of master and servant, and where the acts of the latter are not in themselves unlawful, the guilt of each party will depend upon the knowledge and intention with which such acts were done. 12 W.R. (Cr.) 51; 18 W.R. (Cr.) 8; 3 W.R. (Cr.) 2. Where the keeper of a place of public resort left his premises in the management of a servant, and prostitutes were suffered to meet together and remain there, contrary to law, it was ruled, that if the servant, in knowingly suffering the prostitutes to meet together and remain, was carrying out the orders of his master, the master was guilty as a principal, and the servant as abetting *Wilson v Stewart*, 3 B. & S. 913=32 L. J. (M. C.) 198=9 Jur. N. S. 1130, 29 C. 496. And so the loading of his master's gun by a servant might be an innocent or a guilty act, according as he thought his master was going to shoot a tiger or to commit a dacoity

A person may abet the commission of an offence upon himself, provided he would have been criminally punishable if the offence had been completed. For instance, a woman may be punished for conspiring with others to cause herself to miscarry, for it is an offence in her, as well as in those who help her, if it is carried out, section 312, I. P. C., *R v Whitchurch*, 24 Q. B. D. 420; *R. v Jones*, (1896), 1 Q.B. 4. But a girl under ten could not be charged for abetting a rape upon herself under s 375, cl. 5, because the prohibition in the Penal Code is intended for her own protection, and does not contemplate

her being punishable. See *R. v. Tyrrell*, (1894), 1 Q. B. 310. And so it is expressly provided by s. 497 that the wife shall not be punishable as an abettor of adultery with herself, she not being punishable under that section [See *ante*, § 83, at p. 244.]

The result of an abetment will be either that no offence is committed, or that the offence is committed which was intended by the abettor, or that a different offence is committed. In any event, under the Code, abetment of an offence is a separate offence quite independent of the offence abetted, 18 W. R. (Cr.) 32; 4 C. 366=3 C. L. R. 525; 1864, W. R. (Cr.) 2; but where at the trial of the principal offender, it is found that the offence has never been committed at all, it will be a serious question whether abetment of an offence that has not been committed, should be taken cognizance of; 1866 P. R. No. 7. The mere abetment of an offence which comes to nothing is punishable by ss 115 and 116, according to the gravity of the intended crime, and by s. 117 according to the number of persons who were instigated. When the crime proposed is actually accomplished, the abettor is treated as being equally guilty with the actual perpetrator, whether he were absent or present at the actual committing of the crime (ss. 109—114) 1 Ind. Jur. (O. S.) 105; 1 W. R. (Cr. Let.) 9; 2 W. R. (Cr. Let.) 8; 14 M. 364; 16 A. 88; 6 C. W. N. 343; 26 M. 463. The only case that ever creates any difficulty is the last, *viz.*, where one offence is abetted and another is committed. In this case the abettor will not be answerable at all, if the offence is not committed in consequence of the abetment (s. 109, Explan., & s. 111.) If a person, by suggesting to another a particular crime, simply rouses the criminal propensities of that other, the former is not responsible if those propensities break out in a different direction. If A incites B to gamble, he is not liable if B steals or commits breach of trust to supply himself with funds. Foster, Cr. L. 369. Nor would A be liable if he instigates B to commit a particular crime, and B commits a crime of the same sort, but different from the one suggested: as, for instance, if he incites him to kill X, or to break into and rob the house of Z, and B

falls in with the general idea, but goes and kills Y, or breaks into his house. "A adviseth B to burn the house of C, which house B well knoweth. He spareth the house of C and burneth the house of D. A is not accessory before the fact." *Plowden*, 475. And so it would be if A advised B to steal the horse of C, and he steals his cow; or if he incited him to burn the house of C, and he killed C or robbed him; or to take C and carry him away, and if he robbed C of his jewels. 1 Hale, P. C. 617. "But if the principal in substance complies with the temptation, varying only in circumstances of time or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact (abettor), if present, a principal." As if A commands B to poison C, and he kill him with a sword. "So where the principal goes beyond the terms of the solicitation, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such order or advice will be an accessory to that felony." For instance, if A incites B to burn the house of X, and any inmate of the house is burnt in it, or if the fire spreads to other houses. So if a Zemindar orders a number of his followers to arm themselves with clubs, and to take forcible possession of the lands of an adjoining proprietor, and a man is killed in the fight which ensues. *Foster*, Cr. L. 369, 370; s. 113, I. P. C. Whether a man who abets a robbery or a housebreaking will be criminally responsible if the person assailed resists and is killed, would depend upon the answer to this question: Was the mode in which the abettor advised that the crime should be effected, and in which he might reasonably have supposed that it would be effected, likely to result in such violence as might probably be followed by a death? See 6 A. 491, where *Straight*, Offg. C. J., took a more merciful view than the early English writers would have done. See 1 Hale, P. C. 617; *Foster*, Cr. L. 370, *Steph. Dig.*, art. 41, illus. 2, cf. 12 W. R. (Cr.) 51. If death was not the natural or probable result of the abetment, the abettor would be liable only for assault or hurt. 5 W. R. (Cr.) 75; 7 W. R. (Cr.) 97; 31 C. 710. A good deal would depend on the intention of the abettor and the nature of

the act abetted ; 21 W. R. (Cr.) 8 ; *Skeet*, 4 F. & F. 931. Thus *prima facie* it would be difficult to abet an attempt at murder, any incitement to use violence would be either to cause death or to cause hurt, grievous or simple. 9 Bur. L. R. 190.

A case which has caused much difference of opinion among the English writers is this : If A incites B to kill X, and he by mistake kills Z, or aiming a blow at X kills Z, will A be guilty of murder ? Lord Hale, following some earlier authorities, says A is not accessory to the murder of Z, because it differs in the person. 1 Hale, P. C., 617 Foster says that the answer must depend upon whether the killing of Z was or was not, the probable result of B's acting upon the instigation of A. If A tells B that X will pass a particular lonely place on his way home at night, and B waits for him there, and kills Z, whom he supposes to be X, Foster says that A is as guilty as B, and Sir James Stephen accepts that view. Foster, Cr L 370, Steph Dig., art. 41, illus 1. Suppose that X really did come as expected, and was accompanied by Z, and that B fired at X, but killed Z, or that in attempting to kill X a fight ensued, in which B either intentionally or accidentally killed Z, I should think the same decision would be given *Saunders's case* (Plowden 475), which was the source of this discussion, was as follows Saunders wanted to kill his wife, and Archer advised him to put poison into a roasted apple and give it to her to eat She ate part of it, and gave the rest to her child ; Saunders was standing by, but was afraid to interfere, and the child ate the poison and died. Saunders, of course, was guilty of murder, but it was agreed by the judges upon conference that Archer was not accessory to the murder, it being an offence he neither advised nor assented to. Foster agrees with this decision, and distinguishes it from the first case put, because there was no mistake on the part of the father for which the adviser could be responsible ; the father stood by, and suffered the child to eat the poison prepared for the mother. Sir James Stephen also adopts it Foster, Cr. L. 372 ; Steph. Dig., art. 41, illus. 3. It does not appear from the case whether Archer

had understood and expected that Saunders would himself give the poison to his wife, and see that she ate it, and that nobody else did. If that were so, he would be protected by the terms of s. 111. If he advised Saunders to put poison in food prepared for her, and run the risk that no one else would take it, the case would come very near illustration (a) to that section. It is plain that in Foster's opinion the only thing which saved Archer was Saunders's presence, which thereby gave a definite direction to the poison which Archer had not intended.

Though the offence depends upon the intention of the person who abets, 21 W. R. (Cr.) 8, an abettor may succeed in rendering himself liable for two offences, when he only intended to bring about one, if the one which he intended causes another which he ought to have anticipated, and if they are both distinct offences, so as to be subject to distinct punishments (s 112). He may even commit a more serious crime, and subject himself to a heavier penalty than his agent, who actually does the act. Suppose A, desiring to cause the death of X, tells B that he will find X in the bedroom of B's wife, and B rushes there, and finding X, kills him. The provocation might reduce the offence of B to culpable homicide not amounting to murder (s 300, Excep. 1). A has received no provocation, and will be punished exactly as if he had induced B to kill any man in the street (s 110). But if A had no such intention, but merely wanted to inform B of the conduct of his wife, he would not be guilty at all. 1872 P. R. No. 30.

Except that the mistake has actually been made, one should have thought it unnecessary to point out that a person who has been convicted of an offence, as principal, cannot also be punished for abetting it. 4 W. R. (Cr.) 23 & 37. Nor can an Appellate Court convert a conviction for a substantive offence into one of abetment, 33 M. 264=20 M. L. J. 84=7 M. L. T. 79=11 Cr. L. J. 49=5 Ind. Cas. 145; 13 Cr. L. J. 203=14 Ind. Cas. 203; 13 Cr. L. J. 223=14 Ind. Cas. 319; 11 B. H. C. R. 240, explained in 23 M. L. J. 722=1912 M. W. N.

725=12 M. L. T. 203=13 Cr. L. J. 453=15 Ind. Cas. 85. A man cannot be convicted both for abetment of theft and for receiving stolen property, the proceeds of the theft; 3 A. 181; 1901 P. R. No. 15.

86. Concealment of Offences.—Sections 118, 119, 120, and 123 are all different forms of the same offence, viz the case of a person who, intending to facilitate, or knowing that he will be likely to facilitate, the commission of an offence by another [1 Ind. Jur. (O. S.) 105; 1 Bom. L. R. 351] voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design. The concealment must be the result of some conduct directed to that end and different from mere passive non-disclosure. Thus mere denial of the existence of a design to commit an offence does not constitute concealment. 28 A. 302; 1882 P. R. No. 34; 14 W. R. (Cr.) 2. If it is an omission, it must be (1) on the part of one bound to reveal and (2) must be shown likely to have facilitated the commission of the offence; 1 Agra H. C. R. 37. Of these sections all but s. 119 may be committed by anyone, and only differ in regard to the gravity of the offence intended to be furthered. Section 119 can only be committed by a public servant, in respect to offences the commission of which it was his duty, as such public servant, to prevent. All the acts punishable under these sections would probably be acts of abetment under s. 107. Probably the sections were inserted, *pro majori cautela*, to include cases where the application of s. 107 was doubtful. The only difficulty that can arise as regards them is as to the meaning of the words "illegal omission." This means something different from the offence, now practically obsolete in English practice, of *misprision*, which is defined by Lord Hale as being "when a person knows of a treason or felony, though no party or consentor to it, yet conceals it, and doth not reveal it in convenient time." There was no such offence as *misprision* of a misdemeanour 1 Hale P. C. 371, 374; 1 Hawk., P. C. 60, 73; Steph Dig., note ix, 348. This offence assumed that the substantive crime had been already

completed, whereas the illegal omission in the sections under discussion are something antecedent to the commission of the offence, and intended to help in its execution.

Probably every public servant is under a legal obligation to disclose a design to commit any offence which would affect the particular state department to which he belongs. A policeman has a general duty to prevent all crime, and is therefore bound to give information of any crime which he may know to be contemplated. (See Act XXIV. of 1859, s. 21; V. of 1861, s. 23; XVI. of 1873, s. 8; XV of 1887, s. 6, Bombay Act, VIII. of 1867, s. 6.) In other branches of the public service the duty is more restricted: a soldier would be bound to give information of a design to mutiny, to attack military posts, to steal arms or ammunition. An officer in the customs, the stamp, salt, or opium department, would be bound to give notice of frauds going on or contemplated in those departments. So a revenue officer, in regard to frauds on the land revenue, or an officer of any court in regard to the funds in its custody. The same obligation, it seems to me, would attach upon an officer of any private trading company, such as a railway or a bank. Possibly even upon private servants, as regards the particular sorts of property under their charge. The concealment of a design to commit an offence in reference to any subject-matter as to which the accused has a duty, for the purpose of facilitating commission of the offence, would almost necessarily be an abetment of it within s 107, Explan 1. The breach of this obligation would, at the very least, justify the summary dismissal of the offender, without notice and with loss of pay or pension, and this assumes that the act relied on as a justification is a breach of duty. See the definition of *illegal*, s 43, I P. C. It would follow that such abstaining to give information for the express purpose of facilitating an offence, must be an illegal omission.

There are also many cases in which the law imposes a direct obligation to give information of intended crimes. See ss. 44 and 45, Cr. P. Code, and commentaries thereon.

Similar provisions are contained in the Lower Burma Towns Act, IX. of 1892, s. 4.

Under ss. 176 and 177, persons who are legally bound to give notice, or to furnish information to public servants, are punishable if they omit to give notice or information, or furnish false information, and special punishment is imposed if the information is required concerning the commission of an offence, or to prevent its commission, or for the apprehension of an offender. It has been held by the Madras High Court that the words "legally bound" in these sections must be taken in the sense defined by s. 43, as something which it is illegal to omit, and which illegal omission is an offence, or is prohibited by law, or would furnish ground for a civil action, and therefore that it does not apply to omissions, which are merely a breach of departmental rules, 14 M. 484. To justify a conviction under s. 177, it is not necessary to prove that false information was given fraudulently. It is enough to show that the information was either known to be false or not believed to be true. *Weir* I. 107. Sections 201—203 have special reference to similar offences, whose object is to prevent the detection of crime that has been actually committed (see *post*, Chapter VII).

87. Harboursing.—The fourth mode of criminal responsibility referred to in s. 81, is where a person keeps the offender after the act, with a view to screen him from justice. A person who does so is called in England an accessory after the fact. In the Penal Code he is said to harbour an offender. By s. 212, whenever an offence has been committed, whoever harbours or conceals a person whom he knows, or has reason to believe to be the offender, with the intention of screening him from legal punishment, is liable to a punishment which varies according to that applicable to the offence of the person harboured. By s. 216, whenever any person convicted of, or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that

person with the intention of preventing him from being apprehended, is punishable in a similar manner. By s. 216A, whoever knowing or having reason to believe that any persons are about to commit, or have recently committed robbery or dacoity, harbours them with the intention of facilitating the commission of such robbery or dacoity, or of screening them from punishment, commits a punishable offence. Harboursing any officer, soldier, or sailor, in the army or navy of the king, who is known, or whom there is reason to believe, to be a deserter, is also an offence under s. 136. All these sections exempt from criminality the wife of the offender, when the harbour is given by her to her husband. The law in England is the same. The case of *Mary Good*, 1. C. & K. 185, exemplifies the scope of the exception to s. 212. The prisoner was indicted for harbouring a murderer and it appeared she considered herself as his wife and lived with him as such for years. She was held entitled to the benefit of the rule, even though the marriage was in some respects irregular and probably invalid. If, on the other hand, the husband harbours his guilty wife, he would not be protected by the English Law, which protects only a *feme covert*; 1 Hale, P. C. 621, but under the Code, the benefit is mutual to the spouses. Having made this departure from English Law, the Legislature did not deem it wise in spite of the peculiar demands of the Hindu Joint Family to extend the exception any further. No such exemption as the one embodied in the *exception* to s. 212 is to be found in s. 130, which relates to assisting a State prisoner, or prisoner of war, to escape, or rescuing him, or resisting his recapture, or harbouring and concealing thereafter his escape from lawful custody, nor in s. 157, where the person harboured is one who has been hired or engaged to join an unlawful assembly. Sections 225 and 225B provide for resistance or illegal obstruction to the apprehension of any other person for an offence, and for rescue or attempt to rescue from lawful custody for an offence. Aiding, or permitting the escape of offenders who have been committed to custody, is punishable under different circumstances by ss 123, 129, 130, 221, 222, and 223.

By English Law a man can only be an accessory after the fact to a felony. 1 Hale, P. C. 618. By the Penal Code any of the above acts are punishable where the person assisted is charged with any offence as defined in s. 40. And in cases within ss. 212 and 216, the word "offence" is extended to certain charges founded on acts which are crimes in British India, but which were committed out of it. The term "harbour," which was previously unexplained, is now defined by s. 216B, as including "the supplying a person with shelter, food, drink, money, clothes, arms, ammunition, or means of conveyance, or the assisting a person in any way to evade apprehension." The word "assists" must be construed *ejusdem generis* with the words preceding so that telling lies to the police as to the whereabouts of an absconder with intent to prevent his apprehension could not constitute "assisting" him in any way within the meaning of the definition, 25 A. 261. But where a proclaimed offender was arrested in the act of cooking his meals at the palace of a Zemindar and in the presence of the Zemindar, the latter was held liable for harbouring as defined in s. 216B. 6 A. L. J. 127n. This definition, however, is said to apply only to the use of the word in ss. 212, 216, and 216A. One cannot understand why it is not to apply to ss. 130 and 136 where the same word is used. Probably the omission is a mere oversight. The definition in itself is a compendium of the principal acts which at Common Law rendered a man an accessory after the fact. Hawkins summarises them as follows:—

"Any assistance whatever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose. as where one assists him with a horse to ride away with, or with money or victuals to support him in his escape; or where one harbours and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbours in his house, and openly protects such a felon, by reason whereof the pursuers dare not take him. Also I take it to be settled at this day that whoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessory to the felony. Also some have said that all those are in like manner guilty who oppose the apprehending of a felon." 2. Hawk, P. C. 445

It will be seen that under the Penal Code all the above acts are provided for under special sections. A person who employs another to harbour an offender may be liable under s. 212 though he himself did no act of supplying, etc., as defined in ss. 216B — *Jarvis*, 2 M. & Rob. 40.

The word "harbour" in s. 216 must be construed liberally. The person at whose instance harbouring is effected commits the offence, although the house in which the harboured person stays may belong to a different person. 14 Bom. L. R. 583=13 Cr. L. J. 701=16 Ind. Cas. 509.

As, under English Law, a man could only be accessory after the fact to a felony, it followed that the felony must have been actually committed and complete at the time he became an accessory. If a wound which was not a felonious act, was given to a man who afterwards died of it, one who harboured the person who gave the wound before the death occurred would not be an accessory after the fact. 2 Hawk, P. C. 448. Under the Penal Code, of course, the wound would itself be an offence, and harbouring the person who gave it would be punishable under s. 212, irrespective of the consequences which ensued. It would, however, be a matter of the greatest importance as to the form of the charge, and the penalty, whether the consequences had taken place at the time of the harbouring or not. If the death had actually taken place, and amounted to murder, the harbourer would be charged and punished under the first clause of s. 212. If it had taken place and amounted to culpable homicide not amounting to murder, he would be charged and punished under the second clause. If, however, the injured person was still living, the only offence then committed would be one of the forms of hurt or negligence, and although, if the man subsequently died, his assailant might be guilty of the murder, the harbourer could only be convicted with reference to the offence which had actually been committed at the time of

merely suspected to have been committed. A charge under s. 212 alleged that Sitaram had been murdered, and that the accused harboured Reoti, knowing, or having reason to believe, that Reoti was the murderer. It appeared that there was no proof that Sitaram's death was caused by the unlawful act of any person, and Reoti, when tried for murder, was unhesitatingly acquitted. It was held that a conviction for harbouring could not be sustained; 12 A. 432. If, however, a warrant had been issued against Reoti, or if he had been taken into custody on a charge of murder and had escaped, the defendant might have been convicted under s. 216, though no offence had been committed in fact, provided he knew of the escape, or order for apprehension.

Under s. 212 not only must it be shown that there was an offence committed, but that the accused had knowledge or information which would lead him to believe in the commission of the offence, and the guilt of the person harboured 2 Hawk P.C. 29, s. 39; 12 A. 432; 11 C. 619, (a decision on s. 201). Suppose, however, that an offence had been committed, and that the accused harboured the offender, believing he had committed quite a different offence, as, for instance, if a murderer asked for refuge in the defendant's hut, saying that he had assaulted a policeman, who was pursuing him. The defendant certainly could not be convicted under cl. 1 of s. 212, because he did not know or believe that the fugitive was a murderer. Nor could he be convicted under any other clause. It might be truly alleged that he harboured a person whom he supposed to have committed an offence punishable with two years' imprisonment under s. 353. But, then, no such offence had been committed, or could be alleged to have been committed. Again the offence of harbouring being a continuing one, it is quite possible one to whom shelter was given in ignorance may by his talk or demeanour induce the necessary degree of knowledge in his host so as to render the latter liable for continuance of the assistance after the dawn of such knowledge.

The act which is charged as harbouring must be something which is a personal assistance to the criminal

himself. The mere receipt of the produce of a robbery is not such an act, however punishable it may be under other sections. 1 Hale, P. C. 619; *R. v. Chapple*, 9 C. & P., 355.

"But," Lord Hale says, "it seems to me that if B had come himself to C, and had delivered him the goods to keep for him, C knowing that they were stolen, and that B stole them, or if C receives the goods to facilitate the escape of B, or if C knowingly receives them upon agreement to furnish B with supplies out of them, and accordingly supplies them, this makes C accessory, for it is relieving and comforting." 1 Hale, P. C. 620

The acts which amount to harbouring must, under s. 212, be done with the intention of screening the offender from legal punishment, and, under s. 216, with the intention of preventing him from being apprehended. **Ratanlal 775.** If a person from mere motives of humanity, and without any intention of enabling the fugitive to escape from justice, were to give food to a man who was starving, or surgical assistance to one who was wounded, even with a full knowledge of his character, it would seem that he had committed no criminal act. See the cases put, in 1 Hale, P. C. 620, 621. They all, however, are cases of relief or assistance to a person who is actually in custody or out on bail. In no case does mere omission amount to harbouring, as, for instance, failure to give information, or to levy hue and cry upon an offender, or to pursue him when hue and cry is levied, or to arrest him when there is an opportunity. Such omissions may be punishable as substantive offences (see ss 176, 202), but they do not amount to harbouring under the Penal Code, nor did they make anyone an accessory after the fact under English law. 1 Hale, P. C. 618, 619

In England it has been held, "a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting him to escape." *Foster, Cr. L. 123.* Such conduct would, of course, be punishable under ss 212 and 216. The distinction between the scope of s. 212 and that of s. 216 must be borne in mind. Section 216 is an aggravated form of the

offence as the punishment would imply. It is an offence under s. 216 to harbour a person who has been tried and convicted and for whose apprehension, with a view to execute the sentence, an order has been issued. 11 C. L. J. 109=11 Cr. L. J. 95=5 Ind. Cas. 311.

88. Screening Offender.—Under s. 213, "whoever accepts, or attempts to obtain, or agrees to accept, any gratification (see s. 161, Expln.) for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing any offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment," is liable to penalties which vary according to those which may be awarded for the offence. Section 214 renders similarly punishable "whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment."

It has been decided upon the analogous ss. 201, 203, 212 and 216 (see *post*, Chapter VII, *ante*, § 87,) that it is essential to show that an offence was actually committed and not merely suspected. The same construction should obviously be put upon the word "offence" in ss. 213 and 214. The Madras High Court, however, has gone further, and has decided that in cases under ss. 213 and 214 it is necessary to show that the person whom it was intended to screen had actually committed the offence of which he was or might have been accused. The Court said: "As pointed out by Jackson, J., in 20 W. R. (Cr.) 66, we think the intention was to discourage malpractices where offences have been actually committed, or when persons really guilty are screened, and not to ensure general veracity on the part of the public in regard to imaginary offences or offenders." 14 M. 400=1 M. L. J. 163; Weir 1.

196; 23 C. 420. In the case cited, which was brought under s 203, Jackson, J., said nothing about offenders, but only that the lower court was wrong in holding that it was not necessary that the commission of any offence should be made out, so long as the party charged had reason to believe that the offence had been committed. He said .

" In this opinion I am unable to agree . It appears to me that the object of the Legislature was not to insure general veracity, or the making of correct statements in regard to supposed offences, or to offences the commission of which might be falsely or incorrectly reported, but to discourage and punish the giving of false information to the police in regard to offences which had been actually committed, and which the person charged knew or had reason to believe had been actually committed "

The Madras High Court also relied upon three other decisions, in **3 A. 279; 12 A. 432; 11 C. 619**, and considered that the construction placed by them upon similar words in s. 201 applied to s. 214 also. But those decisions also referred to nothing beyond what had been settled in **20 W. R. (Cr.) 66**; they did not touch the point now under discussion . On the other hand, it has been held in several cases in Calcutta, e g., **8 W. R. (Cr.) 63; 3 C. 412 = 1 C. L. R. 483; 1864 W. R. (Cr.) 5**, upon ss 201, 217 and 218, that the guilt of the person screened was immaterial . In s. 201 the words are " causing evidence to disappear with the intention of screening the offender from legal punishment " . In ss 217, 218, public servants are punishable if they do certain acts " with intent to save any person from legal punishment " . **8 W. R. (Cr.) 27; Ratanlal, 405. 1871 P. R. (Cr.) 18** was a case where the intention was lacking . The police arrested certain persons on suspicion, of having committed an offence under s 304, I. P. C., had their hands tied up and

217 as it was found they merely waited for daylight before starting from the village and the disobedience of the rule of law was not accompanied by the necessary intention. They might be guilty under the Police Act though not under this section, **15 W. R. (Cr.) 17**. Upon all these

sections it may well be that the Legislature does not concern itself with cases where no offence has been committed. But where there has been an offence, it is a matter of public interest that it should be fully investigated, and that all charges against persons reasonably suspected should be inquired into. If a person who is in possession of information pointing to the guilt of a particular individual, consents from corrupt motives to keep back his knowledge, or to stifle a prosecution against him, this is itself a grave offence against public justice. Also all who endeavour to stifle the truth and prevent the due execution of public justice are highly punishable, as are those who dissuade, or but endeavour to dissuade, a witness from giving evidence against a person indicted (1 Hawk, P.C. 64). It is difficult to see how this offence can depend upon the fact that the guilt of the person screened from justice cannot be proved, or even that he is subsequently tried and acquitted. Either of these results may follow from the very conduct which is charged under ss. 213 or 214. It would be curious if that which constitutes the evil should condone the offence. (See as to the analogous ss. 201, 202, 203, *post*, Chapter VII.) As regards the offence under s. 214, this offence may be committed not only in respect of a completed offence but also in respect of an offence which it is proposed to commit. 1894, 1 U. B. R. (1892—1894 vol.) 196.

The stat. 18 Eliz., c. 5, s. 4, rendered it a punishable offence, "if any person by colour or pretence of process, or without process, *uj* of offence against any . . . ; take any money, *rew* ; this statute, which was passed to discourage malicious informers on penal statutes, and to provide that offences, when once discovered, should be duly prosecuted, it has been decided that the offence of compounding a charge is complete, whether the person from whom money has been taken could or could not have been convicted. *R. v. Gotley*, Russ. & Ry. 84; *R. v. Best*, 2 Moody, 124. = 6 C. & P. 368. This shows that the offence is complete as soon as a corrupt agreement has been made, or attempted, to suppress evidence which might result in the detection

of crime. Accordingly, it has been held in England, that where such a corrupt agreement has been made, the offence is not altered by the fact that the person making it afterwards prosecuted the criminal, and procured his conviction. *R v Burgess*, 16 Q. B. D. 141. The use of the word "*agrees*" in s 214 involves the idea of something in the nature of a demand, 1895—1 U. B. R. (1892—96 vol.) 158. When two of the accused offered a gratification to a public servant in consideration of his not proceeding against them and others, whose notes and papers he had seized, the offer was held to be an offence under s 214 rather than abetment of bribery 1831 P. R. No. 13. *Weir* l. 194. In 6 L. B. R. 48=13 Cr. L. J. 574=15 Ind. Ca. 990, under similar circumstances, the offer was held to be no offence under this section, as the original act to escape the consequences of which money was offered was compoundable though not by the officer to whom the offer was made

The exception to s 214 provides that the provisions of ss 213 and 214 do not apply to any case in which the offence may lawfully be compounded. The whole law as to compounding offences is now laid down in s 345 of the Crim. Pro Code

Composition is to be treated as an acquittal, and must be pleaded as such when the prisoner is put on his defence. Compounding between the parties cannot operate as an acquittal of a person who has been convicted. There is no longer anything to compound, as the offence is merged in the conviction and the sentence following upon it, and of this the record is conclusive proof

Where a person who is charged with an offence pleads that it has been compounded, it lies upon him to prove that there has been a composition which is valid in law. In general, the person compounding the offence receives some gratification, not necessarily of a pecuniary character, as an inducement. Probably such an agreement would not come within the provisions of the Contract Act, s 25, as to the necessity for consideration, but the proof of the arrangement must be similar

to that which the court requires for the proof of any agreement which is in issue. Unless it appears that the parties were free from influence of every kind, and were fully aware of their respective rights, it would be impossible to give effect to a so-called arrangement or composition. Accordingly the plea that an offence was compounded, in a case where a planter had acted illegally to some coolies, was held in **21 C. 103**, not to be established by a document signed by the coolies, for which no motive was shown, and it did not appear that they thoroughly understood the contents.

In the trial of summons cases under Chapter XX. of the Code of Cr. Pr., it is provided by s. 248 that if a complainant, at any time before a final order is passed in any case under that chapter, satisfies the magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the magistrate may permit him to withdraw the same, and shall thereupon acquit the accused. But a person who sets the police in motion by a complaint, upon which they take action, is not a "complainant," and cannot withdraw the charge. **23 M. 626**.

On the trial of warrant cases under Chapter XXI., s. 259 of the Code provides that when the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent and the offence may be lawfully compounded, the magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

When this course has been taken the discharge of the accused does not operate as an acquittal, and the proceedings may afterwards be revived if it is thought necessary, **1 B. 64** (decided on s. 215 of 1872 Crim. Pr. C.). By s. 494, any public prosecutor appointed by the Governor-General in Council or the Local Government may, with the consent of the court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person; and, upon such withdrawal,

(a) if it is made before a charge has been framed, the accused shall be discharged ,

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted.

In cases of contempt of the lawful authority of a public servant, the complainant is the public servant whose authority has been resisted, and not the private person injured by the resistance. The withdrawal, therefore, of such a charge must be based upon the application of the public servant resisted, or of the authority who sanctioned the proceedings; 2 B. 653. In India, the rule that a felon should be prosecuted before he is sued for a tort has no application. Thus when money is embezzled, a suit may be brought to recover the same even though the defendant is guilty of a criminal breach of trust. 3 M. 6, 4 M. 410, 6 W. R. (Civ. Ref.) 9.

89. Corrupt Restitution of Property.—By s 215 of the Penal Code, whoever takes, or agrees or consents to take, any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. To sustain a conviction under this section, it must be proved that the person has been deprived of movable property by an offence punishable under the Code. When a buffalo merely disappears, there is no presumption that an offence has been committed in respect of it. 11 Cr. L. J. 295=6 Ind. Cas. 250.

This section is borrowed from a series of English statutes, the first of which, 4 Geo. I. c. 11, s. 4, was passed to put a stop to the trade of the notorious Jonathan Wild, who was ultimately convicted under it and executed. 2 East, P. C 770.

The primary aim of the section is to punish all trafficking in crime, by which a person knowing that property has been obtained by crime, and, knowing the criminal, makes a profit out of the crime, while screening the offender from justice. It is not an offence to take money from another in order to help him to find the property and to convict the thief. It is an offence for one who knew of the commission of the crime, and who could at once have informed upon the offender, to wait till a reward is offered, and then to take money from the owner of the property under colour of getting the property back for him. The section is not intended to apply to the actual thief, but to some one who, being in league with the thief, receives some gratification on account of helping the owner to recover stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of his offence 23 A. 81; *R. v. King*, 1 Cox, 36; *Weir* l. 196; 13 Bur. L. R. 67=4 L. B. R. 199=7 Cr. L. J. 464, (F. B.) It is also an offence to assist the owner of stolen property to purchase it back from the thieves, not meaning to bring them to justice. *R. v. Pascoe*, 1 Den. 456=18 L. J. (M. C.) 184. And the offence is equally committed where a person has accepted or bargained for any gratification under pretence of helping the owner to goods stolen from him, though the prisoner had no acquaintance with the thief, and did not pretend that he had, and though he had no power to apprehend the original criminal, and though the goods were never restored, and the prisoner had no power to restore them. *R. v. Ledbitter*, 1 Moody, 76.

Section 215 only applies to persons who receive or bargain for a gratification, for the purpose of helping another to recover property which has been unlawfully taken, but, of course, anyone who instigates such an offence will be punishable as an abettor. Great caution will, therefore, be necessary in offering rewards for the recovery of stolen property. Under 9 Geo. IV., c. 14, s. 112, now repealed, it was made an offence to publish any advertisement for the return of property, where any words are used purporting that no questions will be asked.

or that a reward will be paid without seizing, or making an inquiry after, the person producing such property. The spirit of this Act will probably guide the courts if any indictment is preferred for abetting an offence under s. 215. Every such advertisement should stipulate for such information as may lead to the apprehension of the criminal

When the gratification has not been actually received it is necessary to prove a definite agreement. Where the evidence showed that one party had demanded thirty rupees while the other had refused to give more than fifteen, it was held that there had been no agreement or consent to take a gratification within the meaning of s 215 20 A., 389. But, under the circumstances, there is no reason why the accused should not be held guilty of an attempt to commit the offence 2 L. B. R. 310 = 1 Cr. L. J. 1116, where 20 A. 389 was *dissented from*.

An advertisement saying, on return of stolen or lost property, a reward would be given but no questions asked would equally constitute abetment. *Mirams v. Our Dogs Publishing Co*, L. R. [1901] 2 K. B. 564 = 70 L. J. (K. B.) 879 = 85 L. T. 6 = 49 W. R. 626.

CHAPTER V.

OFFENCES OF A PUBLIC CHARACTER.

OFFENCES AGAINST THE STATE.

90. **Persons within the scope of Ch. VI., I. P. C.**—Chapter VI. of the Code deals with offences against the State in its corporate capacity; that is, offences which attack the existence or constitution of the State itself, as distinguished from those acts which are offences against the State by reason of their injurious effect upon the subjects. Of these, sections 121, 121A, and 124A are those which alone require any detailed notice.

First of all as to their application. It will be observed that the general word "whoever" which commences each section makes no distinction as to nationality. Every person who, being within the jurisdiction of the Indian Government, makes any attempt to overthrow it or its allies is equally guilty. This was expressly intended by the framers of the Code [Second Report, 1847, s. 13, p. 343] and is in accordance with the law of England, and indeed of every other country. In 1781, one De La Motte, a Frenchman resident in England, was indicted for holding treasonable communications with the French Government. Buller, J., in sentencing him, said, "During your residence in this country, as well as during the course of the trial, you have received the protection of the laws of the land; as such you owe a duty to those laws, and an allegiance to the King whose laws they are" *R. v. De La Motte* 1 East, P. C. 124=21 St. Tr., 687, at 814. See *De Jager v. Att.-Gen. of Natal* [1907] A.C. 326 at 328-9 & 22 B., 54. The same rule applies to those foreigners who have only entered the country for the purpose of attacking it. "An alien enemy, if he comes into the realm, does not owe any allegiance, and cannot be indicted for treason, but shall be punished by martial law." *Com. Dig.* 544, citing *Calvin's case*, 7 Rep., 6b. But this is only true as regards aliens who belong to a nation which is actually at war with Great Britain. In 1837-38 a rebellion took

place in Canada, and a number of citizens of the United States crossed the border in arms, to assist the rebels. They were defeated, and some remained as prisoners in the hands of the Canadian Government, who felt a difficulty as to the mode of dealing with them. The question was referred to the English law officers (Sir John Campbell, afterwards Chief Justice and Chancellor, and Sir R. M. Rolfe, afterwards Lord Cranworth, Chancellor), and they advised unhesitatingly that the prisoners should be tried for treason in the ordinary courts. They said,

"An alien enemy occupies a portion of the British territory, as the territory of his own sovereign; the laws of his own country are supposed to prevail there, as far as he is concerned, and he owes exclusive and undivided allegiance to his own sovereign. If he is captured, he is to be treated as a prisoner of war; he can in no shape be tried as an offender for any act of hostility in which he may have participated. An alien *ami* is subject to the law of the country where he is, and he cannot be permitted, without authority from his own or any foreign Government, to absolve himself from this obligation by saying that he entered the country as an enemy. He cannot claim to be treated as a prisoner of war, or to be ransomed or exchanged." Forsyth, 200.

If an alien whose sovereign is at war with Great Britain chooses to live in British territory, he is under the same obligation to allegiance as if the two countries were at peace. For he accepts a protection, which carries with it the obligation to obey. In 1707, when England was at war with France and Spain, the judges assembled to consider such questions by the Queen's command, and laid down the further rule, that

"If such alien, seeking the protection of the Crown, and having a family and effects here, should, during a war in his native country, go thither, and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and though his person was removed for a time, his effects and family continued under the same protection." *Foster*, Cr. L. 185

A different case arises where a British subject is captured among the armed forces of a lawful belligerent. When Wolfe Tone fell into the hands of the Irish Government under the circumstances already detailed (*ante*, § 40,

p. 104) he appears to have claimed a different treatment from that of an ordinary rebel, on the ground that he held a commission as an officer in the invading force from the French Government. He committed suicide before that, or any other point, could be raised on his behalf. It is clear, however, that it could not have availed him. In the days of Queen Elizabeth Dr Story was indicted for treason. It was admitted that he had been born in England, but he pleaded that he was, and had been for seven years, a subject and serjeant of the King of Spain. The plea was held bad. *Dyer*, 300b. In the rebellion of Prince Charles in 1745, Macdonald was captured, and tried for treason. He pleaded that he was born in France, which would have been a good defence, but was found against him. He admittedly had lived from childhood, and been educated in France, and he held a French commission, dated 1st June, 1745, which appointed him commissary of the troops of France, which were then intended to embark for Scotland, France and England being at the time at war. These facts were held to be no defence. The Court said,

"It never was doubted that a subject born, taking a commission from a foreign prince, and committing high treason, may be punished as a subject for that treason, notwithstanding his foreign commission. It was so ruled in *Dr Story's* case; and that case was never yet denied to be law. It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown." *Foster*, Cr L. 59.

As regards naturalization abroad, the law has been altered by stat. 33 & 34 Vict., c. 14, s. 6, which provides that "any British subject who has at any time before, or may at any time after the passing of this Act, when in any foreign State, and not under any disability, voluntarily become naturalized in such State, shall, from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien." It will be observed that it is not sufficient that he should have adopted the foreign country as his permanent residence, so as to be

domiciled there. That is quite consistent with his continuing to be a British subject. He must, by a formal act, have been accepted by the foreign country as its subject, for whose acts they become responsible. A British subject cannot become naturalized by an enemy State during a period of war, and the act of becoming naturalized is no defence to a charge of having joined the enemy's forces, and is itself an act of high treason (*R. v. Lynch* [1903], 1. K. B., 444=72 L. J. (K. B.) 167=20 Cox. 468=88 L. T. 26).

Further, "when by treaty, especially if ratified by Act of Parliament, our Sovereign cedes any island or region to another State, the inhabitants of such ceded territory, though born under the allegiance of our King, or being under his protection while it appertained to his Crown and authority, become effectually aliens, or liable to the disabilities of alienage, in respect of their future concerns with this country." 1 Bac. Abr., 168

91. Waging War against the King—This, with its various phases of actually waging war, attempting to wage it, abetting the waging of it, or making preparations to wage it, are offences punishable under ss 121 and 122. Concealing the existence of a design to wage war against the King, in order to facilitate such war, is punishable by s. 123, while s. 125 contains provisions similar to those of s. 121 as regards the waging of war against any Asiatic Power in alliance or at peace with the King. In all these sections the only difficulty is as to the meaning to be attached to the words "waging war". The phrase used in the English statute of treasons, 25 Edw III., stat 5, c. 2. is "levying of war", which seems exactly synonymous with the terms of the Penal Code. Did the framers of the Code intend to use an equivalent to the English term, which should be subject to the well-known judicial construction placed upon it, or did they adopt a different wording so as to escape from that construction, and if so, what is the construction they intended?

The Indian Law Commissioners, in their second report, 1847, ss. 9, 10, p. 842, refer with approbation to the language of the English Criminal Law Commissioners in their sixth report. "The crime," they say, "is in plain and unambiguous terms declared by the

statute to consist in a levying of war. There is nothing to indicate that these terms were intended to be used otherwise than according to their literal sense, and, indeed, the context, as well as the history of the times antecedent to the declaratory Act, confirm the position that they were meant to be used in that sense." After much reasoning on the subject they say in conclusion, "Under these impressions we are inclined to recommend that the use of all constructive interpretations of the statute of treasons, both in the article of levying war and of compassing the King's death, should be abolished by the Legislature; and we have accordingly inserted in the Digest provisions which will have the effect of excluding them." In another place the Commissioners say, "The terms of the statute seem naturally to import a levying of war by one who, throwing off the duty of allegiance, arrays himself in open defiance of his Sovereign in like manner and by the like means as a foreign enemy would do, having gained footing within the State. So also we conceive the terms 'waging war against the Government' naturally import a person arraying himself in defiance of the Government in like manner and by like means as a foreign enemy would do, and it seems to us, as we presume it did to the authors of the Code, that any definition of terms so unambiguous would be superfluous."

Recently the Calcutta High Court, however, held that the expression "wages war" must be construed in its ordinary sense, and a conspiracy to wage war or the collection of men, arms and ammunition for that purpose is not waging war. See 37 C. 467 at 505 & 518. But judging from these extracts, given above, it would appear that the Indian Law Commissioners accepted the phrases "levying war" and "waging war" as identical in meaning, and thought that no sensible man could mistake the meaning of either phrase, if he kept in mind that a social and an international war were both alike in their manner and their means. With great respect to both sets of Commissioners, it appears that this is a fallacy. So far from being alike, the two sorts of war have nothing in common except that they are both carried out by violence; they differ in their methods and in their aims. The social war has neither the legal origin nor the organized procedure of international war. It always begins in mere local disturbance. The most successful rebellion of modern days, that which produced the United States, . . . series of riots no way . . . riots of 1780, or the Bristol riots of 1831. (Lecy),

of England, iii. 329.) If it is not checked it matures into rebellion, and culminates in civil war. Again, the object of international war is to subdue the State but to preserve the Government. The object of rebellion is to overthrow the Government, in order to get possession of the State. The former unites society, the latter dissolves it. Every day that a rebellion continues it is strengthened by new recruits, and the power of the Government is weakened. The governor who waits to recognize a rebellion till it looks like a war will probably find that he has waited too long. That which distinguishes a riot, which is the beginning of waging or levying war, from a riot which will end in plunder and broken heads, is the object with which it is started. That is the principle of English law, and although the application of the principle is always difficult, and has often been too severe, it seems that the principle itself is sound, and that there is no country in which it is so necessary to enforce it as in India. Under the Penal Code, though the punishment for abetment, in general, varies according as the offence abetted was committed or not, no such distinction is drawn as regards punishment in the case of abetment of waging war. 34 B. 394=12 Bom. L. R. 105=11 Cr. L. J., 264=5 Ind. Cas. 854.

The material parts of the statute of Edward III, the whole of which is set out in 1 Hale, P. C. 89, are as follows: "Whereas divers opinions have been before this time in what case treason shall be law, and in what not, the King, at the request of the lords and of the commons, hath made a declaration, in the manner as herein followeth: that is to say, when a man doth compass or imagine the death of our lord the King," "or if a man do levy war against our lord the King in his realm, or be adherent to the King's enemies in his realm, giving to them aid and comfort in the realm or elsewhere," "it is to be understood, that in the cases above rehearsed, that ought to be adjudged treason." "And if *per case* any man of this realm ride armed covertly (in the original *discovert*, which, as Sir James Stephen points out, 2 Steph. Crim. L. 269, should be translated 'overtly' or 'openly,' not covertly,) or secretly with men of arms against any other to slay him, or rob him, or take him, or retain him, till he hath made fine or ransom for to have his deliverance, it is not the mind of the King nor of his council, that in such case it shall be judged treason, but shall be judged felony or trespass according to the laws of the land of old time used, and according as the case requireth."

The invariable construction put upon this statute, which was itself declaratory of the common law, has been that no acts, however violent or lawless, even if they took the form of open war between two great nobles, or insurrection by the commonalty (see 1 Hale, P. C 140, 143) amounted to a levying of war against the King, where the object was to procure some private advantage or to redress some private injury. To make out the offence, it was necessary to show that the distinct object aimed at was either directly to overthrow the authority and power of the Sovereign, or to do so indirectly by coercing the Sovereign and his advisers into adopting some different policy, or passing or repealing some law in a matter of general concern. The judges considered that those who, by violence or intimidation, compelled the Sovereign to do that which he would not otherwise have done, overthrew his authority, and possessed themselves of it, exactly as if they had formally deposed him from his throne. Any acts of violence intended to have this effect were held to be a levying of war against the King. 1 Hale, P. C 133—146; Foster, Cr. L. 208—211. The language of Mr. Justice Foster has always been adopted in subsequent cases, and was read out to the jury as an authoritative exposition of the law by Lord Loughborough in cases arising out of the Gordon riots (21 St. Tri., p. 490), and by Tindal, C. J., in *Frost's* case (9 C. & P., p. 161). In India, except what is contained in ss. 121 and 121A 1 P. C., there is no separate Law of Treason or misprision of treason. 7 B. L. R. 63=15 W. R. (Cr.)25.

In earlier times it is probable that this principle was strained to meet cases which would now be charged only as riots and unlawful assemblies. In *Messenger's* case, in 1668, (Kelyng, 70=6 St. Tri., 879,) where a mob pulled down a number of brothels, under colour of reforming them and resisted the troops who were brought out against them, and in *Dammaree's* case, in 1710, where the mob, during the Sacheverell riots in Queen Anne's reign, destroyed numerous meeting-houses, the offenders were held guilty of levying war against the King. In the former case Hale C. B., differing from all the other

judges, thought the offence was a misdemeanour only. Lord Campbell, in his "*Lives of the Chief Justices*" 1 508, heaps ridicule upon the decision, and upon Chief Justice Kelyng, who pronounced it. In the latter case, Parker, C. J., said, in reference, to the case of the brothels: "If it be a particular prejudice to anyone, if he himself should go in an unlawful manner to redress that prejudice, it might be only a riot. But if he will set up to pull them all down in general, he has taken the Queen's right out of her hand. This is a general thing, and affects the whole nation." 15 St. Tri., 522, pp 606—609. The most authoritative cases of modern times are those of Lord George Gordon and of Frost. The Bristol riots of 1831, though they originated in a lawless demonstration of the reforming party against the Tory Recorder, Sir Charles Wetherell, were not aimed at effecting any political object. See *Ann Reg of 1831*, pp 291—294.

The Gordon riots, in 1780, originated in the passing of an Act for the relief of Roman Catholics in England from political disabilities. The proposed extension of this Act to Scotland had led to a series of outrages against the Papists in Edinburgh and other towns, which induced the Government to abandon their intention. Encouraged by this success, a body called the Protestant Association in England was formed for the purpose of repealing the English Act, and Lord George Gordon, who had been active at the head of the malcontents in Scotland, was chosen their president. The first step was the preparation of a petition to Parliament for the repeal of the obnoxious law, which was presented by Lord George Gordon, backed by about ten thousand men, who marched in three organized bodies. When they arrived at Westminster the mob insulted and maltreated the Members of both Houses as they arrived, when they were known to be of the Party who favoured the Catholics, and tried to force them to promise that they would vote for the repeal of the Act. They waited outside the House till the petition was rejected, and then proceeded to demolish some Roman Catholic chapels. For nearly a week the riots continued, the principal object of attack being Catholic chapels and the houses of prominent

Catholics and persons known to be in their favour. The prisoners released. (*Ann.*

Lord George Gordon was indicted for his part in these proceedings, and was charged with levying war against the King. The case against him was that he had instigated the mob who followed him to Westminster to intimidate the Members of both Houses, in order to repeal the Act, and that he had further incited the rioters to commit the subsequent excesses for the same purpose. Erskine, who defended him, did not dispute that such a case, if made out, would have been a levying of war under the statute, but he denied that he had taken part in the riots beyond the lawful act of presenting a petition to Parliament. He was acquitted by the jury. Lord Mansfield, C. J., laid down the law very much in the language of Mr. Justice Foster.

assemble to attain by force any object of a general public nature, that is levying war against the majesty of the King; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government, and by force of arms to restrain the King from reigning according to law." "In the present case, it does not rest upon an implication that they hoped by opposition to a law to get it repealed, but the prosecution proceeds upon the direct ground, that the object was, by force and violence, to compel the Legislature to repeal a law; and, therefore, without any doubt, I tell you the joint opinion of us all (Wilkes, Ashurst and Buller, JJ.) that if this multitude assembled with intent, by acts of force and violence, to compel the Legislature to repeal a law, that is high treason." 21 St. Tr., 485, at p. 613

Frost was a leader of the Chartists, who were associated for the purpose of procuring various constitutional changes. In 1840 he and others concerted a rising in Wales. Three bodies of armed men were to attack the town of Newport, overcome the military, stop the mails, and then signal to Birmingham, where a similar rising was to take place. It was expected that the insurrection would spread over the north of England, and then chartism

was to be proclaimed the law of the land. Nothing was contemplated by chartism beyond six changes in the constitution of Parliament, three of which have already been granted, and no one of which was inconsistent with a reasonable government by King and Parliament. The attempt was made as planned, but failed, and Frost, with two other ringleaders, were indicted for levying war against the Queen. The defence was that the insurrection was only intended for the purpose of releasing some Chartist, who were imprisoned at Westgate, and procuring better treatment for another who was in prison at Monmouth. Tindal, C. J., in summing up the case to the jury, after reading Foster Cr. L., pp. 210 and 211, said

"So that I think the rule of law may be laid down in a few words in this manner. To constitute a high treason by levying war, there must be insurrection, there must be force accompanying that insurrection, and it must be for the accomplishment of an object of a general nature. But if all these circumstances are found to concur in any individual case, that is quite sufficient to constitute a levying of war."

As to the defence that was suggested, he said, that if it were made out, the acts proved would be deficient in the main ingredient of the offence of levying war against the Queen within her realm; it would want the compassing and designing to put down the authority of the Queen. 4 St. Tri. (N. S.), pp. 439—443.*

It will be observed that Chief Justice Tindal speaks of "force accompanying an insurrection," not of an armed or military insurrection. Mr. Justice Foster notices a distinction taken by Hale, (1 Hale, P. C. 131.) "between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours, etc., and those other disorderly, tumultuous assemblies, which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary show and apparatus of war before mentioned." Upon this he says, "I do not think any great stress can

* The case is badly reported in 9 C. & P., 129; the report in 4 St. Tri., (N. S.) 86 is full and accurate.

Catholics and persons known to be in their favour. The gaols were burnt down and the prisoners released. (*Ann. Reg. of 1780, 254—262.*) Lord George Gordon was indicted for his part in these proceedings, and was charged with levying war against the King. The case against him was that he had instigated the mob who followed him to Westminster to intimidate the Members of both Houses, in order to repeal the Act, and that he had further incited the rioters to commit the subsequent excesses for the same purpose. Erskine, who defended him, did not dispute that such a case, if made out, would have been a levying of war under the statute, but he denied that he had taken part in the riots beyond the lawful act of presenting a petition to Parliament. He was acquitted by the jury. Lord Mansfield, C. J., laid down the law very much in the language of Mr. Justice Foster.

He said: "There are two kinds of levying war—one against the person of the King to imprison, to dethrone, or to kill him, or to make him change measures or remove counsellors, the other, which is said to be levied against the majesty of the King, or, in other words, against him in his legal capacity—as when a multitude assemble to attain by force any object of a general public nature; that is levying war against the majesty of the King; and most reasonably so held, because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government, and by force of arms to restrain the King from reigning according to law." "In the present case, it does not rest upon an implication that they hoped by opposition to a law to get it repealed, but the prosecution proceeds upon the direct ground, that the object was, by force and violence, to compel the Legislature to repeal a law; and, therefore, without any doubt, I tell you the joint opinion of us all (Wilkes, Ashurst and Buller, JJ.) that if this multitude assembled with intent, by acts of force and violence, to compel the Legislature to repeal a law, that is high treason." 21 St. Tr., 485, at p. 633

Frost was a leader of the Chartists, who were associated for the purpose of procuring various constitutional changes. In 1840 he and others concerted a rising in Wales. Three bodies of armed men were to attack the town of Newport, overcome the military, stop the mails, and then signal to Birmingham, where a similar rising was to take place. It was expected that the insurrection would spread over the north of England, and then chartism

was to be proclaimed the law of the land. Nothing was contemplated by chartism beyond six changes in the constitution of Parliament, three of which have already been granted, and no one of which was inconsistent with a reasonable government by King and Parliament. The attempt was made as planned, but failed, and Frost, with two other ringleaders, were indicted for levying war against the Queen. The defence was that the insurrection was only intended for the purpose of releasing some Chartist, who were imprisoned at Westgate, and procuring better treatment for another who was in prison at Monmouth. Tindal, C. J., in summing up the case to the jury, after reading Foster Cr L, pp. 210 and 211, said

"So that I think the rule of law may be laid down in a few words in this manner. To constitute a high treason by levying war, there must be insurrection, there must be force accompanying that insurrection, and it must be for the accomplishment of an object of a general nature. But if all these circumstances are found to concur in any individual case, that is quite sufficient to constitute a levying of war."

As to the defence that was suggested, he said, that if it were made out, the acts proved would be deficient in the main ingredient of the offence of levying war against the Queen within her realm, it would want the compassing and designing to put down the authority of the Queen. 4 St. Tri. (N. S.), pp 439—443.*

It will be observed that Chief Justice Tindal speaks of "force accompanying an insurrection," not of an armed or military insurrection. Mr Justice Foster notices a distinction taken by Hale, (1 Hale, P C 131.) "between those insurrections which have carried the appearance of an army formed under leaders, and provided with military weapons, and with drums, colours, etc., and those other disorderly, tumultuous assemblies, which have been drawn together and conducted to purposes manifestly unlawful, but without any of the ordinary show and apparatus of war before mentioned." Upon this he says, "I do not think any great stress can

* The case is badly reported in 9 C. & P., 129; the report in 4 St Tri, (N S) 86 is full and accurate.

Catholics and persons known to be in their favour. The
the prisoners released. (*Ann.*

Lord George Gordon was
these proceedings, and was
charged with levying war against the King. The case
against him was that he had instigated the mob who
followed him to Westminster to intimidate the Mem-
bers of both Houses, in order to repeal the Act, and
that he had further incited the rioters to commit the
subsequent excesses for the same purpose. Erskine, who
defended him, did not dispute that such a case, if made
out, would have been a levying of war under the statute,
but he denied that
the lawful act of
was acquitted by
down the law very much in the language of Mr. Justice
Foster.

words, against him in his legal capacity—as when a multitude
assemble to attain by force any object of a general public nature;
that is levying war against the majesty of the King; and most
reasonably so held, because it tends to dissolve all the bonds of
society, to destroy property, and to overturn Government, and by
force of arms to restrain the King from reigning according to law.”
“In the present case, it does not rest upon an implication that
they hoped by opposition to a law to get it repealed, but the prose-
cution proceeds upon the direct ground, that the object was, by
force and violence, to compel the Legislature to repeal a law; and,
therefore, without any doubt, I tell you the joint opinion of us all
(Willes, Ashurst and Buller, JJ.) that if this multitude assembled
with intent, by acts of force and violence, to compel the Legisla-
ture to repeal a law, that is high treason.” 21 St. Tri., 493, at p. 643

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changes. In 1840 he and others concerted a rising in
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be laid upon that distinction;" and points out the absence of such circumstances in cases which had been held to amount to a levying of war. "The number of the insurgents supplied the want of military weapons; and they were provided with axes, crowes, and other tools of the like nature proper for the mischief they intended to effect—*Furor arma ministrat*. The true criterion therefore in all these cases is, *Quo animo* did the parties assemble?" Foster, Cr. L. 238.

As the specific intention is the essence of the offence of levying war, it must be made out by the prosecution. It may be inferred from the acts proved and from the statements accompanying them, but the Crown is bound to make out a complete case. The prisoner cannot be called on to prove his intentions. *Frost's case* 4 St. Tri., p. 87. But, of course, in this, as in all other cases, if the prosecution has made out a case which is sufficient in itself, if there is other evidence which would refute the presumption so raised, it must be produced by the defence.

Levying war as one of the branches of high treason is defined by the English Commissioners in the following section, which in their Report of 1879, p. 19, they say, "exactly follows the existing law."

Section 75 (f) Levying war against Her Majesty either with intent to depose Her Majesty from the style, honour and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland, or of any other of Her Majesty's dominions or countries; or, in order, by force or constraint, to compel Her Majesty to change her measures or counsels, or in order to intimidate or overawe both Houses, or either House of Parliament.

This agrees substantially with the definition given by Lord Mansfield of levying war against the person of the king in *Lord George Gordon's case*. It must be remembered that in the time of Edward III., and very long after, the King was the Government in a very different and more practical sense than he is now. The real offence consisted in using force for the purpose of taking authority out of the hands in which it was lawfully deposited. The offence is the same, whether that

depository was the King in person, as in the days of the Plantagenets, or the King represented by his ministry in Parliament, as in England at present, or the Government of India, or the various Local Governments, as in India. When the Indian Law Commissioners, in the passage already cited, speak of the term "waging war against the Queen" as an unambiguous term, which is not to be subject to the constructive interpretations of the statute of treason, it is probable they were referring to that levying of war against the majesty of the King, which led to such cases as those of *Messenger* and *Dammaree*. They cannot have meant that no case could amount to a waging of war against the Queen, except an armed and organized rebellion for the purpose of substituting the native for the British Raj, or handing over the Empire of India to the Russians. If a riot arose between Hindus and Mahomedans in consequence of the killing of cows, and if the riot spread, and had to be put down by armed force, resistance to the soldiery would not be a waging of war under s 121. But if an insurrection accompanied by force was got up by leaders with the view of inducing the Hindu community to rise, and by violence or show of violence to coerce the Government of India into prohibiting the killing of cows, that, according to all English decisions, would certainly be a levying of war against the King, within the statute of Edward III, and the Indian courts would hold it to be a waging of war within the definition of the Penal Code. It would be well, however, in all such cases, to add charges under s 121A, and under any of the sections of Chap. VIII appropriate to the case.

92 Offences against the Foreign Enlistment Act.—A very important branch of Criminal Law in respect of offences against the State is not referred to in the Penal Code, but is contained in the Foreign Enlistment Act, 1870 (33 & 34 Vict, c 90), which applies to all parts of His Majesty's dominions, and which came into force in each British possession from the date of a proclamation which the Governor of such possession was directed to make as soon as he received notice of the Act. Its object is to prevent those complications which might arise,

if British subjects were to mix themselves up in hostile acts against a State with which the British Empire was on friendly terms. It renders it penal to enlist in the service of a foreign State, or to leave His Majesty's dominions, with intent to serve a foreign State, or to induce or help others to do so, or to take part in building or equipping ships for the use of a belligerent State or to fit out any naval or military expedition. Many civil cases have arisen out of this statute. *The Gauntlet*, L. R., 4 P. C., 184=3 Adm. & Ecc. 381, *Burton v. Pinkerton*, L. R., 2 Ex., 340. *The International*, L. R., 3 Adm. & Ecc. 321. *The Salvador*, L. R., 3 P. C., 218. The leading criminal case is that of *R. v. Jameson*, which arose out of the well-known raid upon the Transvaal on the 29th December, 1895. For this offence Dr. Jameson and some of his subordinates were tried in London before Lord Russell, C.J., Pollock, B., and Hawkins, J., and, though no further proceedings followed upon the conviction, the very elaborate summing up of the Chief Justice, acquiesced in by his colleagues, gives the most undoubted authority to his rulings. *R. v. Jameson*,* 65 L. J. (M. C.) 218; pp. 227, 228. The indictment was framed under s. 11 of the Act which renders punishable any person who, within the limits of His Majesty's dominions, and without the license of His Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State. There was also a count under s. 12 for aiding and abetting the offence. Lord Russell, C. J., laid down the law as follows:—

"To constitute an offence under s. 11 of the Act it must be proved as the fact that the person charged has intended to proceed—

—that is with the intention that it should proceed—against the dominions of a friendly State. It is not necessary in order to constitute the offence that the expedition shall proceed or shall have proceeded. The cardinal point is the intention. The offence is complete if the person prepares, or assists in or aids, or abets the preparation with that intention."

"Assuming a preparation or fitting out contrary to the Act in any place within the Queen's dominions where the Act of 1870 is

* The case is also reported, but on a minor point, in [1896] 2 Q. B. 425.

in force, two consequences in point of law follow. *First*, a person may commit the offence of engaging in the preparation or fitting out of the expedition, or assisting in it, or abetting, counselling or procuring it, although he himself is not within the Queen's dominions, when he so engages, or assists, or aids, or abets or counsels."

"*Secondly*, this other consequence also follows—that a person may commit the offence of taking employment in the expedition, although he has not engaged, or assisted, or aided in the preparation of the expedition, and although he accepts employment outside the limits of the Queen's dominions."

"An expedition is not the less an expedition against the dominions of a friendly State, though it is not aimed at the overthrow of the Government of that State, or though it is actuated by motives of philanthropy or humanity. If the expedition were designed to enter the Transvaal with the intention either by show of force or by actual force, to interfere with the constituted Government, the laws or administration of the country, or to bring about by such means the reform of those laws or that administration of the country, or to substitute for the protection of any class in that country, by force or show of force, its own protection in the place of the protection of the existing law and its administrators, or if it were intended to join with others, either within or without the dominions of the friendly State in overawing or coercing that Government to obtain a change in that law,—in any of these cases it would be an expedition against a friendly State within the meaning of the Act." 63 L J (M. C.) 218.

See also s 125 for a similar provision in the Penal Code and 3 W.R. (Cr.) 16, which dealt with the Manipur raid.

93. Conspiring against the King.—Section 121A was added to the Penal Code by Act XXVII. of 1870, s 4. It gets rid of the same difficulty which was found in the Treason Act, where levying war against the King was treason, but conspiring to levy war against him was, as a mere conspiracy, only a misdemeanour. This was got over in England by treating a conspiracy, to levy war as an overt act of compassing the King's death, whose life was supposed to be endangered by an invasion, or any other enterprise which might place him in the hands of his enemies "For experience hath shown that between the prisons and the graves of princes, the distance is very small" Foster, Cr. L. 195—197 In 1848, stat. 11 & 12 Vict, c. 12, s 3, expressly enacted that offences similar to those in s. 121 A should be punishable as

felonies, if the Crown chose only to treat them as such. The Act of 1870 was passed by Sir James Stephen when in India, and was intended as the equivalent of the English Treason-Felony Act (3 Steph., Crim. L. 308). The only difficulties that can arise under the latter section are as to what constitutes a conspiracy.

A conspiracy may be defined as a combination by two or more persons to do an unlawful act, or to do a lawful act by unlawful means. See the definition in the new section 120A. In England indictments for conspiracy in every possible sort of case are most frequent. Under the Penal Code, before the enactment of the new Chapter VA, the present section was the only one which rendered punishable a mere conspiracy to do an illegal act, which does not go beyond the conspiracy. In s. 107 and the other sections relating to abetment, it is expressly enacted that a conspiracy only amounts to abetment, "if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing."

In the case in 25 M. 61 = Weir II 271, two persons had been tried on an indictment, the first count of which charged them with having conspired together to commit forty-one acts of bribery extending over three years, all of which were stated to have been committed in pursuance of the conspiracy, and to have constituted an offence under sections 109, 161, and 384. On review by the High Court the Full Bench of six judges was equally divided as to the legality

of the indictment, the majority being of opinion that it was as good as charging a conspiracy since they constituted an offence except under s. 121A, a conspiracy was not an offence under the Penal Code unless it was accompanied by acts or illegal omissions which made it an abetment, and that the count was bad, as charging forty-one acts of abetment of bribery. The point was again raised before the Judicial Committee (25 M., p. 92 = 28 I. A. 257); but no decision was given on the point. The view taken in the text was, however, expressly affirmed by the Calcutta High Court in 28 C. 797; see also 21 W. R. Cr 35 and also by the High Court of Madras in the *Rajah's* murder case, (24 M., 544.) In the latter case Bhaskaram Iyengar, J., said (p. 546) "the Indian Penal Code follows the English law of conspiracy only in a few exceptional cases which are made punishable under sections 311 (Thug), 400 (belonging to a gang of dacoits), 401 (belonging to a gang of thieves), 402 (being a member of an assembly of dacoits) and 121A (conspiring to

wage war)." It may be suggested, however, that the offences, referred to in the sections 311, 400, 401, 402 are purely statutory offences, and have nothing to do with the law of conspiracy, to which no reference is made in the sections themselves. If so, s 121A would remain the only case in which a conspiracy, pure and simple, is punishable under the Penal Code. The gap in the Penal Code has now been filled up by Chapter VA enacted in 1913.

By the Explanation of s 121A, it is declared that "to constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof." This brings a conspiracy under that section into conformity with the English law.

In the case of *Mulcahy v The Queen* (L R., 3 H. L. 306), where a Fenian was convicted under the Treason-Felony Act, and appealed to the House of Lords, Willes, J, in delivering the opinion of the judges, laid down the law as to conspiracy as follows:

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contrarius actum* capable of being enforced, if lawful, punishable, if for a criminal object or for the use of criminal means. And so far as proof goes, conspiracy, as Grose, J, said in *R v. Bristol*, 4 East. 163 at 171, is generally 'matter of inference deduced from certain criminal' acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them. The number and the compact give weight and cause danger, and this more especially in a conspiracy like those charged in this indictment." L R., 3 H. L. at 313, and per Lord Brampton in *Quinn v Leatham* [1901], A. C. p. 527 37 C. 467. Where people take part however slightly in a conspiracy of this nature the fact they were foolish or ignorant does not mitigate the offence. 2 Bur. L. T. 26.

Treasonable correspondence, either by inciting a friendly State to hostility, or by furnishing valuable information to an enemy, used in England to be charged either as an overt act of compassing the King's death, or as adhering to his enemies. *R v Hensey*, 1 Burr. 643 = 19 St. Tri. 1341. Foster, Ct L 196. Under the Code it would clearly be punishable as a conspiracy under s. 121A. In such a case, Lord Kenyon, C J, said "The criminality did not rest on an invitation to the French to

invade the country. If, according to Lord Mansfield, in *R. v. Hensey*, the communication was likely to be of use to the French to enable them to annoy us, defend themselves, or shape their attacks, sending such a paper with a view of its going to the enemy was undoubtedly high treason " *R. v. Stone*, 6 T. R. 527. And it makes no difference that the letters, etc., were interrupted, and never reached the enemy, for the crime consists in the attempt to injure, not in the injury done. *R. v. De La Motte*, 21 St. Tri. 637—*per* Buller, J., at p. 837.

94. Nature of evidence required to make out a charge of Conspiracy.—As to the evidence of such a conspiracy, "loose words spoken without relation to any act or design are not treason, or an overt act; but arguments, and words of persuasion to engage in such design or resolution, and directing or purposing the best way for effecting it, are overt acts of high treason; likewise consulting together for such a purpose." *Per* Holt, C.J., *R. v. Charnock*, 12 St. Tri. 1377, at p. 1451. But words may be evidence of treason, either as explaining an act which might otherwise be innocent, or when accompanied by an act in furtherance of the intention expressed by them. For instance, in an old case it was held that threatening to kill the King, provided the person afterwards comes to England for that purpose, was an overt act of treason. *Croghan's case*, *Cro. Car.* 332. So letters and papers, whether published or unpublished, which "were written in prosecution of certain determinate purposes, which were all treasonable, and then in contemplation of the offenders, and were plainly connected with them. But papers not capable of such connection, while they remain in the hands of the author unpublished, will not make a man a traitor." *Foster*, Cr. L. 198. The most important rule of evidence, however in cases of conspiracy, is that which makes the acts, writings, and words of any one member of the conspiracy, in reference to their common intention, admissible against every other member (2nd Ev. Act, s 10). An early example of this rule is to be found in the trial of Lord Preston, 12 St. Tri. 645, in 1691 for high treason, before Chief Justice

Holt, where the defendant with pathetic persistence continually interrupted the judge in his summing up to point out that such an act was not done in his presence; while the judge, with unfailing patience and perfect courtesy, stopped to explain to him that when he had once got into the meshes of a conspiracy he was answerable for anything done by his associates. So in *Stone's* case, 6 T. R. 527, where he was charged with conspiring with Jackson to send treasonable information to France, a letter by Jackson, which had been intercepted in England, was held admissible against him. Similarly in the case of *R v Hunt*, 5 B. & A. 566=9 C. & P. 94n=1 St. Tri.(N.S.)171, where Hunt and others were indicated for unlawfully meeting together for the purpose of exciting disaffection, it was held that resolutions proposed at a former meeting at which he had presided, were admissible as showing the intention of those who assembled at the second meeting, both having avowedly the same object. The meeting in question was attended by large bodies of men who came from a distance, marching in regular military order, and it was held to be admissible evidence of the character and intention of the meeting, to show, that, within two days of the same, considerable numbers of men were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting, and that on their discovering the persons who saw them they ill-treated them, and forced one of them to swear never to be a King's man again. Also, that it was admissible evidence for the same purpose to show, that another body of men in their progress to the meeting, in passing the house of the person who had been so ill-treated, exhibited their disapprobation of his conduct by hissing. And inscriptions, and devices on banners and flags, displayed at a meeting, were held to be admissible evidence for the same purpose.

Evidence of the acts of one person can only be used against another, "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, or an actionable wrong." Ind. Evi. Act, s 10. As it has been laid down in England, "before you give in evidence the acts of one

conspirator against another, you must prove the existence of the conspiracy, that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design." Archb. 1106. Of course if this rule were to be taken literally, it would be impossible ever to prove a conspiracy. The evidence would be inadmissible till the proof was complete. Practically the difficulty is got over in this way. Counsel for the Crown states the case he expects to prove, and the general evidence by which he hopes to make it out. When evidence is offered which strictly only affects one defendant, it is received provisionally against the others, subject to the undertaking that sufficient connection will be established between them as the case goes on. When the evidence is completed, it is the duty of the judge to decide whether, upon the whole facts, supposing them to be proved, sufficient connection is shown between the parties to make the acts of one evidence against the other. It is for the judge to say, as a matter of law, whether particular evidence can be submitted to the jury. It is for the jury to say, as a matter of fact, whether they believe the evidence. They are told by the judge that if they disbelieve the connecting evidence, they must disregard the evidence which assumes the connection. Where the judge tries a case without a jury, of course he performs all these mental operations himself. *Crim. P. C.*, ss. 298, 299, 30 C. 983. See also the elaborate judgments in the *Ashe murder case* for further exposition of the law as laid down by s. 121A and evidence that may be pressed into service to substantiate a charge under that section, 35 M. 247=22 M. L. J. 490=[1912] 1 M. W. N. 207=13 Cr. L. J. 305=14 Ind. Cas. 849; also 13 Cr. L. J. 609=15 C. L. J. 519=16 Ind. Cas. 257. It is not every member of a revolutionary society that would be liable under s. 121A. Those that are not admitted to its secrets cannot be convicted though they be members. So also a letter by a stranger to a conspirator which is not shown to have been received or replied to or otherwise acted upon by the latter is not sufficient to establish the worker's connection with the conspiracy so as to make his acts done in pursuance thereof, 16 C. W. N. 1105.

95. **Seditious Language.**—Section 124A passed in 1870 reproduces s. 113 of the Code as originally drafted by Macaulay. By some curious omission it seems to have dropped out of the Code, as finally passed in 1860; see 19 C. 35 at p. 42. It was adopted with some verbal alteration by Sir James Stephen, and added to the Code by Act XXVII of 1870, s. 5, "as substantially representing the law of England of the present day, though much more compressed, and more distinctly expressed" *Per Ranade, J*, 22 B. 160. As to the English law, see *per Fitzgerald, J*, in charging the grand jury in 1868, *R. v. Sullivan and Pigott*, 11 Cox, p. 45. The language used by him was quoted and relied on by Cave, J., in the case of *R. v. Burns*, 16 Cox, 365. It condenses the remarks addressed to the jury at the trial by Fitzgerald, J., in *Sullivan's* case, 11 Cox, p. 53, and by Deasy, B., in *Pigott's* case, 11 Cox, p. 60. It is also in accordance with the general language used by the English judges in directing juries in similar cases. See *per Lord Ellenborough, R. v. Lambert*, 2 Camp, 400 = 31 St. Tri. 335; *per Best, J*, *R. v. Burdett*, 4 B. & A., pp 120, 131; *per Littledale, J*, *R. v. Collins*, 9 C. & P., 456, at 461; *R. v. Lovett*, 9 C. & P. 462, at 466; see, too, *per Tindal, C J.*, *O'Connell v The Queen*, 11 Cl. & F., at 236 = 5 St. Tri. (N. S.) 1.

The Crim. P. C , s 108, enables security to be taken from persons who disseminate seditious matter

The meaning to be attached to section 124A was so much discussed in several cases in 1897 that a new section was substituted for it in 1898. The present state of the law will be best shown by presenting in parallel columns the original and amended sections 124A, with some reference to the decisions on the section of 1870.

1870.	1899.
124A. Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites, or attempts to	124A Whoever by words either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt,

excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment * for a term which may extend to three years, to which fine may be added, or with fine.

Explanation.—Such a dis-

lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause

or excites or attempts to excite disaffection towards Her Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1.—The expression 'disaffection' includes disloyalty and all feelings of enmity.

Explanation 2—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection do not constitute an offence under this section.

The first case which arose under the earlier section was that against the *Bangobasi* newspaper, which was tried by a jury before Petheram, C.J., in Calcutta. In reply to the contention that disaffection meant nothing more than disapprobation, which was itself protected by the explanation, he said "Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him." "If a person uses either spoken or written words, calculated to create in the minds of the

* By the General Clauses Act X of 1897, s. 3 (26), "imprisonment of either description as defined in the Indian Penal Code."

persons addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of his
 1 by
 ion,
 that the words used are calculated to excite feelings of ill-will against the Government, and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling." 19 C. 35, at 44. The fact the attempt did not succeed will not lessen the guilt, though it might affect the sentence. 8 Bom. L. R. 421 at 439=4 Cr. L. J. 1; 10 Bom. L. R. 848=8 Cr. L. J. 281; 2 Bom. L. R. 286; *R. v. Burns*, 16 Cox, 365.

It was held, however, the offence is wholly independent of intention in the sense a man must be taken to have intended, whether he actually did or no, all the natural, and reasonable consequences of his act. The question of intention is one of fact; 12 Bom. L. R. 21; the view the Registered proprietor of a Newspaper cannot excuse liability even if he proves temporary absence and entire ignorance of the seditious matter, was expressed in 1905 Cr. No. 1=1905 P. L. R. 69=2 Cr. L. J. 31; 8 Bom. L. R. 421=4 Cr. L. J. 1. But this view does not seem to be sound Law. See 12 Bom. L. R. 675. But if the printer of a paper, absents himself with full knowledge of what is to happen in his absence he will not be allowed to shirk his liability, 35 C. 945; also an absent editor may control the paper during his absence; 32 M. 338=5 M. L. T. 415=9 Cr. L. J. 506=2 Ind. Cas. 193. An editor is certainly liable for the seditious writings of his correspondents, if he gives publicity to them; 35 C. 141 at 153=2 M. L. T. 500=7 Cr. L. J. 10=7 C. L. J. 49. Also republication of seditious matter from another paper cannot be justified.

The next and most important case was that of *R. v. Bal Gangadhar Tilak*, which was tried by a Bombay

jury before Strachey, J. The contention on the part of the prisoner appears to have been that disaffection was much the same as disapprobation, and that no attempt to excite disapprobation was criminal unless it aimed at bringing about mutiny, rebellion, or at the lowest some actual disturbance, great or small.

In his summing up, Strachey, J., said that he agreed with Sir C. Petheram as to the meaning of disaffection: (By some

J. Petheram as say-

whereas the phrase

contrary to affection,

means hatred, enmity,

dislike, hostility, contempt, and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite; he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or

trial except per-

if a man excites

or small, he is

absolutely im-

not by the publication in question." The offence consists in

in others certain bad feelings

not the exciting or attempting to

sort of actual disturbance, great

or small.

The learned Judge then proceeded to deal with the explanation, of which he said, "Its object is to protect from the condemnation pronounced by the first clause certain acts which it distinguishes from the disloyal attempts with which the first clause deals. The next and most important point for you to bear in mind is that the thing protected by the section is the making of comments on a certain intention. defined and limited scope. observe that it has no application whatever unless you come to the conclusion that the writings in question can fairly and reasonably be construed as 'the making of comments on the measures of the Government.' It does not apply to any sort of writing except that. It does not apply to any writing which consists not merely of comments upon Government measures, but of attacks upon the Government itself. It would apply to any criticisms of legislative enactments, such as the *Epidemic Diseases Act*, or any particular tax, or of administrative measures, such as the steps taken by the Government for the suppression of plague

and famine. But if you come to the conclusion that these writings are an attack, not merely upon such measures as these, but upon the Government itself, its existence, its essential characteristics, its motives, or its feelings towards the people, then you must put aside the explanation altogether, and apply the first clause of the section."

He then went on to point out that the nature of the comments themselves was subject to a double limitation; first that they must only aim at producing disapprobation of the measures of Government. "Disapprobation means simply disapproval, and it is quite possible to like or be loyal to any one, whether an individual or a Government, and at the same time to disapprove strongly of his or its measures. This distinction is the essence of the section. It shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably, perversely, and unfairly. So long as he confines himself to that he will be protected by the explanation. But if he goes beyond, and whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers, as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people—then he is guilty under the section, and the explanation will not save him." The second limitation is as to the quality of the disapprobation itself. It must be "compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against

comments upon Government measures which were not merely severe, unreasonable or unfair but so violent or bitter, or accompanied by such appeals to political or religious fanaticism, or addressed to ignorant people at a time of great public excitement, that persons reading those comments would carry their feelings of hostility beyond the Government measures to their author, the Government, and would become indisposed to obey and support

An application was made to the Full Court for leave to appeal to the Privy Council against the conviction which followed upon this summing up, and leave was refused. **22 B. 146.** An application was then made to the Privy Council for special leave to appeal to Her Majesty in Council, and this also was refused. The Lord Chancellor, in delivering the judgment of the judicial committee, said :

" Their Lordships are of opinion, taking a view of the whole of the summing up, which is of very great length, that there is nothing in that summing up which calls upon them to indicate any dissent from it, nor any necessity to correct what is therein contained, looking at the summing up as a whole, and looking at each part of what was said by the light of what else was said " **25 I. A. 1=22 B. 528.**

Substantially the same views; as those laid down by Mr Justice Strachey in his summing up were also stated by Full Benches of the Bombay and Allahabad High Courts on appeal from convictions under s 124A. **22 B. 152 ; 20 A. 55.**

The amended section was passed with reference to all these decisions, and seems to have been framed with a view to maintain the construction which had been put on the earlier section, by introducing words in accordance with that construction, and excluding all ambiguous phrases. The changes in the wording of the principal section and Explanation 1 make clear what was meant by disaffection. Explanations 2 and 3 make equally clear what is the subject-matter against which political disapprobation may be aroused, and what are the limitations within which such disapprobation must be confined. The highly metaphysical description of a disapprobation, which is consistent with a disposition to support the Government in doing the things which you disapprove, is wisely left out. But all attempts, whether open or disguised to make the people hate their rulers (**22 B. 112 at 137-38**) and to impair the confidence imposed by the public in the Government (**8 Bom. L. R. 421=4 Cr. L. J. 1**) is sought to be brought within the section. While fair and moderate criticism of Governmental measures is

protected, it is held to be the duty of every citizen to support the Government established by Law. 35 C. 141=2 M. L. T. 500=7 Cr. L. J. 10=7 C. L. J. 49; 35 C. 945. The state is as anxious to preserve its corporate existence, as an individual is to protect his own life by all legitimate means. It has been held that, to urge an audience to secure *Swaraj*, i.e., home-rule under the British Government, more or less on the colonial or projected Irish basis is not an offence under this section. 34 C. 991=11 C.W.N. 1050=6 C. L.J. 699=6 Cr. L. J. 297. In 8 Bom. L. R. 421 at 437-38, Batty, J., thus summarises what is meant by *disaffection* :—

"Disaffection is a feeling and not the want of a feeling. It is not the absence of affection. It is not indifference, but a positive emotion not necessarily prompting the action, but with a tendency to influence conduct just as all our feelings do. It is not necessarily limited to '*feelings of enmity*'. It is intended to express a feeling which can only exist between the ruler and the ruled. Feelings of personal affection in such a connection are not demanded, but only such feelings as the relation of the subject to the Government necessarily implies. This relation implies the recognition on the part of the ruled of the Government as a Government. The ruler must be accepted as a ruler, and disaffection which is the opposite of that feeling is the repudiation of that spirit of acceptance of a particular Government as a ruler." The learned judge proceeding further, says at p. 441. "Government does not mean the person or persons for the time being. It means the person or persons, collectively, in succession, who are authorised to administer Government for the time being. One particular set of persons may be open to objection, and to assail them and to attack them and excite hatred against them is not necessarily exciting hatred against the Government, because they are only individuals and are not representatives of that abstract conception which is Government."

In 38 C. 214=12 Cr. L. J. 348=10 Ind. Cas. 948, an article imputing wholesale bribery to the ministerial officers of courts of justice and to lower officers of the police force and expressing grave doubts whether Government really cares to inquire into the alleged abuses by these public servants was held to have exceeded limits of fair comment when published at a time when sedition was rife and the minds of the people excited, quite irrespective of the truth or falsity of this allegation. It will be observed that both in the explanation of

s. 124A, and in the language quoted above, the essence of the crime consists in the intention with which the language is used. But this intention must be judged primarily by the language itself. Intention for this purpose is really no more than *meaning*. When a man is charged in respect of anything he has written or said, the meaning of what he said or wrote must be taken to be his meaning, and that meaning is what his language would be understood to mean by the people to whom it is addressed. The mode of putting this part of the case to the jury is admirably stated by Best, J., in *R. v. Burdett*. 1 St. Tri. (N. S.) 1=4 B. & A., at p. 120. "With respect to whether this was a libel, I told the jury that the question, whether it was published with the intention alleged in the information, was peculiarly for their consideration; but I added, that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added, that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce." See to the same effect, *Haire v. Wilson*, 9 B. & C. 643; *per Petheram, C.J.*, in 19 C., pp. 45, 46; *per Strachey, J.*, in 22 B., pp. 139, 142. The meaning is to be collected from the whole document, and not merely from isolated passages *R v Stockdale*, 22 St. Tri., at p. 292. In judging articles which are charged as seditious, due allowance should be made to oriental modes of thought and for high-flown or classical language. 10 Bom. L. R. 848=8 Cr. L. J 281. External evidence may be offered either to prove or to rebut the meaning ascribed to the language by the prosecution. For instance, where the libel consisted in asserting that the King's troops had inhumanly murdered their American fellow-subjects at Lexington, and the indictment asserted that the libel was concerning His Majesty's Government and the employment of his troops, and the defendant produced an officer who had been present at Lexington; Lord Mansfield held that he was a proper witness, not to show that the troops had behaved inhumanly, but that they had been employed on behalf of the King as his troops. *R. v. Horne*,

2 Cowper, 672=20 St. Tri. 651. So where a person is libelled anonymously, it is every day's experience that witnesses are called to say to whom they understood the libel to refer. But, however, different may be the constructions suggested, the final question to be decided is, not what was the meaning of the writer, but what was the meaning of the language he used. *Foster v Clement*, **10 B. & C. 472.** As Chief Justice, De Grey, said in *Horne's case*, **2 Cowper, p 687.** "As the crime of a libel consists in conveying and impressing injurious reflections upon the minds of the subjects, if the writing is so understood by all who read it, the injury is done by the publication of these injurious reflections, before the matter comes to the jury and the court. The true rule to go by is laid down by Lord King, in the case of *R v Matthews*, **15 St. Tri., at 1391**, that the court and jury must understand the record as the rest of mankind do." And a man must be taken to intend the natural and reasonable consequences of his act—*per Jenkins, C J*, in **2 Bom. L. R. 286.**

In *Tilak's case* **22 B. pp 119—121**, articles and extracts from *The Kesari*, the newspaper specially charged, and from another newspaper *The Mahatta*, of which the accused was also the publisher and proprietor, were admitted to show *animus* on the part of the accused, while other articles drawn from the same sources were tendered on behalf of the accused to show that he was not actuated by any intention to excite feelings of disaffection to the Government. See also **8 Bom L. R. 421 at 441, 442=4 Cr. L. J., 1; 32 M. 384=5 M. L. T. 393=9 Cr. L. J. 456=2 Ind. Cas. 33 & 1907 P. W. R. (Cr.) 37.** In **20 A. 69** it was said: "The intention of a speaker, writer or publisher may be inferred from the particular speech, article, or letter, or it may be proved from that speech, article, or letter considered in conjunction with what such speaker, writer, or publisher has said, written, or published on other occasions." So in illustration (c) to s. 14 of the Indian Evidence Act it is stated that "The fact of previous publications by *A* respecting *B*, showing ill-will on the part of *A* towards *B* is relevant, as proving *A's* intention to harm *B's*

reputation by the particular publication in question." It is submitted, however, that such evidence can only be used for the purpose of throwing light on the meaning of the writing or words, etc., on which the specific charge is based, and of showing the effect which they were intended to produce on the persons to whom they were addressed. Again the writer of an article may be guilty of attempting to excite disaffection, no matter how guardedly he may employ words to conceal the real object; but the printer and publisher cannot be made liable if the concealed object is not established by evidence. **8 Ind. Cas. 531.** Language which does not in itself exceed the limits laid down in Explanations 2 and 3 cannot be made criminal by proving that the defendant entertained sentiments of a very different character which he has not expressed in the document on which he is charged. On the other hand, in estimating the natural consequences which will flow from particular language, all the surrounding circumstances of the case are material, the excited state of public feeling, the ignorant or hostile character of the persons addressed, the critical condition of affairs, and the influence of the speaker.

96. Truth of the language alleged to be seditious is irrelevant to the charge.—The truth of language charged under s 124A as being seditious, can neither be pleaded nor proved. It is quite immaterial. This might be expected as a matter of common sense. The statements are generally true enough as matters of fact. The existence of a grievance, real or supposed, is no answer to a charge of seditions. **2 Bom. L. R. 364.** When, for instance, the *Bangobasi* complained, (19 C., pp. 36, 37), that "we suffer from the ravages of famine, from inundations, from the oppressive delays of law courts, from accidents on steamers and railways:" no one could deny the facts; and as to the law courts and the railway accidents, it was equally true that those misfortunes had become more prevalent with the extension of English rule in India. The offence consists in making use of statements whether true or false, whether the facts are or are not grievances, as a means of exciting subjects against

their rulers. As Lord Mansfield said in *R v. Horne*, 2 Cowper, at p. 679=20 St. Tri. 651. "It may vary the degree of mischief, malice or guilt, but it is totally immaterial as to the constitution of the crime upon the record, whether the words refer to something that has existed, and misrepresent such existent facts, or are an entire fiction." As a matter of authority it is equally clear. Even as regards libels upon private individuals, it was the well-established rule, "that in an indictment or criminal prosecution for libel, the party cannot justify that the contents thereof are true, or that the person upon whom it is made has a bad reputation." 5 Bac. Abr., 203. As regards seditious libels, the rule was equally clear, and in *Burdett's* case it was laid down as beyond doubt; and although the objection was made that the facts asserted by the defendant were true, it was not even attempted to be supported by argument at the trial. 4 B. & A., pp 145, 146, 181; *per curiam*, 20 A., p. 96. By Lord Campbell's Act (6 & 7 Vict., c. 96, s. 6), the law was altered to this extent, that on the trial of any indictment or information for a defamatory libel, the defendant was entitled to plead that the facts alleged were true, and that it was for the public benefit that they should be published. This act, however, does not apply to seditious libels, as to which the law remains unaltered. In the case of *Charles Garan Duff*, 9 Ir. L. R. 329=6 St. Tri. (N. S.) 303, who was indicted in Ireland for seditious libel in 1847, a plea framed under Lord Campbell's Act was held to be bad in law. Blackburn, C J., said: "It requires very little consideration to see that a provision of this sort would not apply to libels, seditious or blasphemous." In a more recent case, where the same point was raised, the above decision was affirmed. Lawson, J., said: "The Court is gravely asked to give a *mandamus* requiring the magistrate to receive evidence, for the purpose of proving that it was with untruly and contempt, and of exciting hostility." *Ex parte O'Brien*, 12 Ir. L. R. 29=15 Cox. 180.

97. Liability of Printer or Publisher of Seditious Language.—In the case of the *Bangobasi* newspaper, it was contended for the defence that only the actual speaker or writer of the seditious language was liable. This plea was of course set aside at once. 19 C., p. 41. A much more substantial question, however, arises, whether evidence of mere publication of such language, in the literal sense, without further complicity, is sufficient to warrant a conviction under the section. Under the old law in England it certainly was. In one of the prosecutions arising out of the celebrated letter by Junius to the King in 1769, Almon, a book-seller, was indicted for the publication of the libel. He had done nothing but sell the letter in the ordinary way of business. At the trial a juror put to Lord Mansfield this carefully prepared question, "Whether the bare proof of the sale in Mr Almon's shop, without any proof of privity, knowledge, consent, approbation, or *malus animus*, in Mr. Almon himself, was sufficient in law to convict him criminally of publishing a libel." Lord Mansfield answered that it was conclusive evidence, upon which the defendant was convicted. Upon the subsequent discussion of the case, Lord Mansfield explained his answer as meaning, "If it is believed, and remains unanswered, it becomes conclusive." He went on to say, "It is liable to be contradicted where the fact will bear it, by contrary evidence tending to exculpate the master, and to show that he was not privy, nor assenting to it, nor encouraging it." What evidence would make out this defence he did not suggest. Probably nothing short of proving that the paper had gone into his shop without his knowledge or against his orders. In this and later cases the judges put it on the simple principle, that a person who makes a profit by the sale of an article in his shop, is responsible for the act of his servant in selling it. *R. v. Almon*, 5 Burr., 2686. Upon a similar indictment against the proprietor of a newspaper, he proved that he lived in the country, that the whole management of the paper was entrusted to an editor, and that he knew nothing of what it was to contain, or of what it did contain, till he read it next day. This, again, was held to be no defence. *Mr. v. Walter*, 3 Esp. 21. In this respect

also the law was altered by s. 7 of Lord Campbell's Act, which authorized the defendant 'to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.' In a case upon this section, it was pointed out by the judges that the mode in which the above cases had been decided "was in direct contravention of the fundamental principle, that to constitute guilt there must be a *mens rea*, an intention to violate the law." "A person who employs another to do a lawful act is to be taken to authorize him to do it in a lawful, and not in an unlawful, manner. This is the principle which is applied to other cases of acts done by servants, when it is sought to fix criminal liability on the employer. If the paper was a calumnious paper, its general character would negative the ordinary presumption of innocent intention, and fairly lead to the inference that the proprietor authorized the insertion of slanderous articles." "Where a general authority is given to an editor to publish libellous matter at his discretion, it will avail a proprietor nothing to show that he had not authorized the publication of the libel complained of. It is equally clear that though, in the authority originally given to the editor, no license to publish libellous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor, and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred." *R. v. Holbrook*, 4 Q. B. D., 42, at pp. 50, 58, 61. Of course Lord Campbell's Act is not law in India, but the rules laid down in the last case appear to be in accordance with s. 124-A. 2 Cr. L. J. 31, 8 Bom. L. R. 421=4 Cr. L. J. 1; 35 C., 945 at 953. The offence constituted by it requires an act coupled with a distinct intention. The man who intentionally gives circulation to seditious language is even more criminal than the man who used it to a limited audience. But it must be proved, by direct evidence, or necessary inference, that it was circulated with his knowledge or

by his authority. As Petheram, C. J., said (19 C., p. 41): "The offence is attempting to excite disaffection by words intended to be read, and I think that, whoever the composer or the writer might be, the person who used them for that purpose, within the opinion of the jury, was guilty of an offence under s. 124-A."

The same point arose in two Bombay cases. In *Tilak's case*, 22 B. 112 at 131, the second defendant was the acting manager and printer of the papers in which the incriminated matter appeared. Strachey, J., said:

"You have to find whether he authorised the insertion of these articles or their distribution. It is a pure question of fact. If you are not satisfied that the prisoner was cognisant of the particular articles or that he directed or authorised the insertion or distribution of them, then I will advise you to find him not guilty, because you must have regard to the section which requires distinct proof by the Crown against him. You must be satisfied that for printing or using the words that were published he was responsible, and that he used those words for the purpose of exciting disaffection."

The jury acquitted the prisoner. In the other case, 22 B. 152, the second defendant was the manager. He was convicted, and, on appeal, Farran, C. J., said:

"I think it is established that the accused No. 2 now leaves the general management of the *Pratod* to the first accused, but I am not satisfied that he is not from day to day cognisant of the more important matters which appear in it. This being so I am not prepared to upset the conviction in his case. His offence appears, however, to me to have consisted rather in passively acquiescing in and negligently allowing the publication of the libel in question, than in actively directing it."

Under the *Dramatic Performances Act*, XIX of 1876, Government have wide powers of prohibition (s. 8) and prosecution (s. 6). But a conviction under that Act will not bar a prosecution under s. 124-A, I. P. C. (s. 9)

The mere writing of seditious words which are not intended for publication and are kept by the author in his own possession, would not be punishable under the above section. *Foster, Cr. L.* 189. But if a person writes seditious words, intending them to be published,

and they are afterwards published, though in a different way, and to a greater extent than he had contemplated, this completes his offence. It is also to be remembered that the act of publication is complete as soon as the contents of the writing have been communicated to any person, or even if the writing itself has been parted with by the author with a view to a subsequent publication, though the person who receives it is unable to read it, and even though the document is intercepted, so that it never reaches the public for whom it is intended, **12 Bom. L. R. 21**. Sending a seditious matter by post, addressed not to a private individual, but to the representative of a large number of men (*e g. Captain of a School*) amounts to publication, if it is opened by anybody, and, would afford sufficient indication as to the intentions of the sender, **39 C. 606=16 C. W. N. 812=13 Cr. L. J. 289=14 Ind. Cas. 753**. But if it is intercepted by the police on the way so as never to reach the addressee the offence would only be an attempt which is also included in s 124-A, **39 C. 522=13 Cr. L. J. 679=16 Ind. Cas. 327**. In this case it was also held following *R. v. Lovett*, **9 C. & P. 462**, that if the manuscript be in the handwriting of the accused and if there be proof that it was printed and published, these facts would be enough to support a finding that it was published by the accused although there is no evidence adduced to show that the printing and publication was by direction of the accused. As a matter of jurisdiction the offence is complete either in the district where the author hands over the document, for the purpose of being communicated to the public, *R. v. Burdett*, **4 B. & A., 95**, at pp 126, 135-137, 143, 144, 153, 158—160, or in any other district to which it is sent, and in which it is published by the authority or with the assent of the defendant, **22 B. 112 at 129**. To distribute among native Troops copies of a letter published in a newspaper urging native soldiers to give up their allegiance to the British Throne is clearly an attempt within the section, **2 P. W. R. Cr. 97=6 Cr. L. J. 411**. But to constitute an offence, the hatred, contempt or disaffection sought to be excited must be against the King-Emperor or his Government. Inciting

workmen to "*strike*" or the boycott of foreign goods by starting a *swadesi* agitation is not sedition; 32 M. 3=5 M. L. T. 1=9 Cr. L. J. 108=1 Ind. Cas. 22.

OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

These offences as defined by the Code, come under the general heads of unlawful assembly, rioting, turbulent assembly, and affray, numerous variations arising, according to the mode, or the circumstances of aggravation, which accompany the special offence.

98. Unlawful Assembly.—This is defined in s. 141, I. P. C

An assembly becomes unlawful by virtue of the unlawful purpose for which it is constituted, or by which it is actuated, although no actual offence is committed by anyone in pursuance of such purpose. Sometimes an assembly may be perfectly lawful in its inception, but may become suddenly unlawful without previous concert among its members, 6 C. W. N. 507, but illegal acts of one or two members not acquiesced in by the others, would not change the character of the assembly, 9 W. R. (Cr.) 19. If it was originally brought together for an unlawful object, it is illegal from the very first. If it was originally an innocent assembly, as where a number of persons unite for lawful discussion, or to form a religious or caste procession, it will become illegal as soon as, from any cause, the purpose of the assembly changes into an unlawful purpose or by subsequent unlawful acts of its members, 1 W. R. (Cr.) 19, 18 W. R. (Cr.) 2, Weir I. 66, 2 Bom. L. R. 1129, and sometimes even without previous concert among the members, 6 C. W. N. 507; but illegal acts of a few not acquiesced in by the others would not change the character of the assembly. Further, if a number of persons meet together for a lawful purpose and in the course of their discussions a sudden quarrel ensues, the members do not commit a riot, 24 W. R. (Cr.) 26. Similarly if two of the members of an unlawful assembly suddenly fight with each other, it would not make the assembly as a whole responsible for a riot, 5 N. W. P. H.

C. R. 208. One who is innocently mixed up with, or is a spectator of such an unlawful assembly, is not said to be a member of it, unless he has intentionally joined it or continued in it after he became aware of the facts which render it unlawful (s. 142). On the other hand, no one who intentionally joins or continues in an assembly which is or has become illegal, is allowed to say that he was merely a harmless spectator. If any person encourages, or promotes, or takes part in riots, whether by words, signs or gestures or by wearing the badge or sign of the rioters, he is himself a rioter. Active participation in actual violence is not necessary, **Ratanlal 99**. The danger of such an assembly arises from the mutual encouragement given by its numbers to those who form it, and the intimidation to those who are affected by the assembly. *R v. Graham*, **16 Cox C. C. 420; 16 C. 206; 1870 P. R. Cr. No. 1**. A person who, having innocently got into a crowd, is unable by the mere weight and pressure of numbers to escape from it, could not be said to continue intentionally in it. Such a case, however, would have to be made out by the person who alleged it. **Weir I. 66**. The knowledge possessed by each member of an assembly need not be the same. It must necessarily vary according to the information at his command or according to the extent to which he shares in the common object. **22 C. 306**. This would have material bearing upon his constructive liability under s. 149. **6 C. W. N. 98; 8 C. L. J. 561=9 Cr. L. J. 32**. It should hardly have required a decision of the High Court to show that a person does not join an unlawful assembly, which he has gone out to oppose, merely by getting physically mixed up in it. **19 W. R. (Cr.) 66**.

The essence of the offence defined by s. 141 is the common object of the persons forming the assembly, **15 C. 388n; 9 W. R. (Cr.) 19**; therefore in a charge under that section, or for rioting, it is necessary to state distinctly in the charge what is alleged to have been the common object, and this object must be proved and found by the jury or court. **24 M., 124; 8 M. L. T. 222=11 Cr. L. J. 533=7 Ind. Cas. 855**. It is not open to an appellate court while disbelieving the common object

found by the first court to find a different common object regarding which the accused was never called upon to plead. 27 C. 990=5 C. W. N. 31. It is essential the charge should state the common object. 4 W. R. (Cr. Let.) 9 & 10; 26 C. 630; 22 C. 276; 4 C. W. N. 599; 1907 P. R. N. 38; 13 C. W. N. 801=10 Cr. L. J. 471=3 Ind. Cas. 19; 11 C. 106. In a case in which the judge in his charge had referred to two possible common objects, one of which only had been alleged, and there was nothing in the verdict to show which of these views had been accepted by the jury, it was held that there must be a new trial, as the prisoner might have been convicted of assembling with some object of which he had not been accused, and which he had not an opportunity of meeting. 22 C., 276.

The leading case on the subject is 33 C. 295=2 C. L. J. 516=3 Cr. L. J. 153 where it was distinctly laid down that the common object of an unlawful assembly must be distinctly found and not merely left for conjecture or inference from other facts found in the judgment. See 3 C. W. N. 605. The common object must be one of the five specified in s. 141, 1863 P. R. No. 34, 20 W. R. (Cr.) 76, 22 W. R. (Cr.) 17, 1893 A. W. N. 169, and must have animated at least five of the accused. Where of five prisoners convicted, two were found not to have shared the common object, all of them had to be acquitted. 5 M. L. T. 285=11 Cr. L. J. 197=4 Ind. Cas. 1142; see 6 M. L. T. 17=11 Cr. L. J. 30=4 Ind. Cas. 700. The common object should be stated in the charge. 21 C. 827; 26 C. 630=3 C. W. N. 605, but when it is obvious from the evidence on record a mere omission to state may not necessarily vitiate the trial on charges under s. 143 or s. 147. 9 C. W. N. 599=2 Cr. L. J. 275; 1907 P. W. R. (Cr.) 38; 12 C. W. N. 944=8 Cr. L. J. 129; 36 C. 158, 9 Cr. L. J. 531, 8 Cr. L. J. 41=18 K. L. R. 81, 12 C. W. N. 579=7 Cr. L. J. 374. But it is otherwise with a charge under s. 149 where the common object is the essence of the case and must be specified in clear and unambiguous language in the charge to which the accused is required to plead, 39 C. 781=13 Cr. L. J. 218=14 Ind. Cas. 314.

When a person is charged with an offence constructively under s. 149, and it is found there was no unlawful assembly, a conviction could not be sustained as regards the offence so charged by implication, because the charge when coupled with s. 149 is information to the accused, they did not themselves physically commit the offence; hence when the offence fails, all the offences charged coupled with s. 149 will

13 Cr. L. J. 502=15 Ind. Cas. 646; 1896 A. W. N. 190. Where the common object alleged by the prosecution is found against, a conviction ought not to be based upon a hypothetical state of facts never suggested to the accused as the case they had to meet, 11 C. L. J. 270=11 Cr. L. J. 245=5 Ind. Cas. 771; 36 C. 865. But where the charge alleged the common object to be to get possession of two plots of land and evidence substantiated the alleged common object only as to one plot, it was held the conviction was not bad 14 C. W. N. 422. It would also seem, a charge is not bad if it alleges alternative common objects provided there is a definite finding as to one or other of the alternatives or even both. 35 C. 718=8 Cr. L. J. 203. When an appellate court finds one of several common objects charged in the alternative, it must be clearly supported by evidence. 12 C. W. N. 944=8 C. L. J. 69=8 Cr. L. J. 129.

The objects of an assembly, alleged to be unlawful, would be established by its acts, by the placards and advertisements convening it, and by the language and conduct of its individual members, and still more of its leaders and instigators. See per *Alderson, B.*, in *Vincent* 9 C. & P. 91=3 St. Tr. (N.S.) 1037; Ind. Ev. Act, s. 10, *Common object* denotes the means whereby the purpose of the assembly is to be effected *Field v. The Recorder of Metropolitan Police*, L. R. [1907], 2 K. B. 853.

To make a valid order that an assembly should disperse, there must be sufficient indication of a likelihood of a breach of the peace by its continuance. A mere opinion of a Magistrate may not be sufficient 1887 P. R. (Cr.) No. 22

99. The five classes of common object. *Clause First.*—The mere assemblage of large masses of persons for the purpose of hearing political addresses, or even of demonstrating by their numbers the weight of public opinion which is arrayed on either side of any question of the day, is not illegal, as an attempt to overawe the Government or its officers. To bring it within this clause it would be necessary to show, that the object of the meeting was not a *bona fide* desire to exhibit and to influence public opinion, but a menace of the physical force which the promoters of the meeting could bring to bear in support of their views. It was on this ground that the Government put a stop to the series of monster meetings which O'Connell had organized in Ireland, in 1843, in support of the Repeal of the Union. On his trial next year, *Pennefather, C. J.*, in charging the jury pointed out that it was not necessary to show that any breach of the peace had taken place, or was intended to take place at such meetings. It was sufficient if "the persons who had collected that mass and multitude together, did so for the purpose of making a demonstration of immense physical force and power, guided and actuated by the will and command of the person who had caused that meeting to assemble;" and if "his object was to overawe the Legislature, who are likely to have to consider certain political subjects in which he was interested, and for the purpose of deterring the Legislature and the Government of the country from a free, cool, and deliberate judgment on the subject." *Ann. Reg. of 1844, 333=5 St. Tri. N. S., p. 608.* And so it would be if crowds were to assemble to hoot a Government official, who had made himself obnoxious in the discharge of his public duties, or who was supposed to favour some measure which was opposed to the popular wish.

Clause Second—The circumstances under which the execution of legal process may lawfully be resisted, have already been considered (*ante*, Chap. III, § 73, pp. 205—215). But it by no means follows that persons other than the party aggrieved may join him in such resistance, and still less that they may get up an opposition on their

own account. The view of the English authorities appears to be, that when the illegal act of a public official creates a breach of the peace, the bystanders may interpose to prevent the peace being broken, and that if they use excessive violence, the provocation will be an extenuation of their offence (*ante* Chap. III, § 80, pp. 234—236). I know of no case in which it has been held lawful to collect a number of persons to resist the execution of legal process. Hawkins says that “an assembly of a man’s friends in his own house, for the defence of the possession thereof, against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is indulged by law, for a man’s house is looked on as his castle.” Here he is evidently referring to threats of pure violence, and in the same section he states that no assembly of a man’s friends in public, to

authorities. 1 Hawk, P. C. 516. The case of *R. v Allen* (*ante* § 80, p. 235) seems also to negative the legality of any premeditated resistance to legal process, though in itself irregular. But if the object of the assembly is a legal one, then it can never be within this clause. 29 C. 244. In 7 N. W. P. H. C. R. 209 an assembly resisting an unwarranted house-search by officers was held to be not an unlawful assembly. See also *Weir* 1. 64; 31 C. 424; 25 M. 729; 24 C. 324; 1 Bur. 152; 24 C. 320=1 C. W. N. 154, 6 C. L. J. 753=6 Cr. L. J. 439.

Clause Third.—The object under this clause must be to commit mischief, criminal trespass, or some other offence. Where a criminal intention is a necessary ingredient in the offence, as it is in those specifically mentioned, the clause will not be satisfied, if it can be shown that the defendant had a right, or honestly believed that he had a right, to do the act complained of. In this respect it differs from cl. (4). *A* and *B* were joint owners of a piece of land. *A* erected an edifice on it without the consent of *B*, who obtained a decree of the Civil Court directing its removal, and removed it accordingly. Subsequently

the servants of *B* found the servants of *A* putting up the erection again; they protested against its erection, pulled down the part already put up, and thrust aside the servants of *A*. They were convicted of rioting. This conviction was set aside by the High Court. It was clear that the defendants were not committing mischief, so as to bring the case under cl. (3) since they were doing on behalf of their master what he was legally authorized to do; nor criminal trespass, as they were on their master's land. Nor did the case come under cl. (4) as they were doing what they were entitled to do in defence of their possession of the common property. There was no violence or breach of the peace, and the police were standing by and looking on while the acts complained of took place. 3 C., 573, at 584—587. In *Weir* l. 53, an assembly for the purpose of gambling was held not to be within the section. Persons by simply passing close to the village of their enemies do not bring themselves within s. 143 as the intention to insult—an offence under s. 504—cannot be inferred from this fact alone. 1912 P. W. R. (Cr.) 7=1912 P. L. R. 67=13 Cr. L. J. 476=15 Ind. Cas. 316. See 1886 A. W. N. 254. But where the accused finding their fields flooded, gathered in numbers and cut a drainage channel through a railway, it was held their ultimate motive to drain their fields would not make their act none the less a mischief to the railway line and their conviction under s. 143 was proper. 16 C. W. N. 263=13 Cr. L. J. 138=13 Ind. Cas. 826.

Clause Fourth—Under this clause it is immaterial whether the possession or enjoyment sought to be recovered was claimed under colour of title, or without it, and whether the right which is asserted is a valid or invalid one. The only distinction the clause makes is one between an admitted claim and an ascertained right on the one hand and a disputed claim on the other. 11 Bom. L. R. 849=10 Cr. L. J. 427=3 Ind. Cas. 958. The question as to who was in actual occupation is of paramount importance but not a mere right to possession or even constructive possession. 35 C. 103=7 Cr. L. J. 123; 14 M. 126 at 130—132; 10 Cr. L. J. 116=5 M. L. T. 85=2 Ind. Cas. 613 & 35 C. 368=12 C. W. N. 384=

7 Cr. L. J. 256. The object of the clause is to prevent breaches of the peace, by compelling every one who desires to enforce a disputed right, to do so under the authority of the law **21 C. 392.** When a riot is premeditated by both sides, no questions of *bona fide* claim of right or of private defence could possibly arise. **20 A. 459; 35 C. 368=12 C. W. N. 384=7 Cr. L. J. 256, 35 C. 384=12 C. W. N. 579=7 Cr. L. J. 374, 35 C. 443=8 Cr. L. J. 54; 11 C. W. N. 176=5 Cr. L. J. 19.** Where both parties are armed and prepared for a fight, it is immaterial who strikes the first blow. **1 C. L.R. 521.** Though a magistrate's order to the police to take charge of paddy, pending proceedings under s 145, Cr P C., may not be legal, yet resistance accompanied by armed violence to the police in executing the order would bring the resisters within s 147 **9 C. W. N. 125.** The principle is the same as that under which the magistrate is authorized in cases where a breach of the peace is apprehended, to maintain the party in possession until suit brought, or to restore to possession one who has been dispossessed by criminal force Cr P. C., ss. 145, 522; **6 M. 245, 1903 P. L. R. 47, 16 C. 206, 26C. 574; 23 W. R. (Cr.) 25.** It is in accordance with the old stat. 5 Rich. II., c 7 "And also the King defendeth, that none from henceforth make any entry into any lands and tenements, but in case where entry is given by law, and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner" This corresponds with the Code, which only creates an offence where the persons who are attempting to enforce a real or supposed right, do so by criminal force, or show of criminal force; that is (s 350) intending to cause injury, fear, or annoyance to those who might wish to resist them And so Hawkins says, "It is to be observed that wherever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly indicates a design to back his pretensions by force, or by

actually threatening to kill, maim or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall use any resistance." 1 Hawk P. C. 501; *Milner v. Maclean*, 2 C. & P., 17. And, "if an entry be made peaceably, and if before actual and complete possession has been obtained, violence be used towards the person who is in possession, that is criminal within the statute of Richard II." *Per Fry, J., Edwick v. Hawkes*, 18 Ch. D., 199. Where there is a dispute as to the right to possession, neither party being in undisturbed possession, whichever party forcibly attempts to secure the right which he claims is punishable under this section. 9 C. 639=13 C. L. R. 80, 29 C. 417.

This provision is one of those rare instances in which an act, which, in the view of the civil law, is legal, and gives no right of action to the person affected by it, is punishable criminally on account of its injurious consequences to the public peace. Where a tenant holds over after his tenancy has come to an end, the landlord may enter upon the land or house, and dispossess him. If he does so in a tumultuous and forcible manner, the landlord is liable to be indicted; but the tenant cannot bring any action against him for trespass. *Taunton v. Costar*, 7 T. R., 431. Whether the tenant can sue for personal violence used in the necessary process of turning him out is a question which appears still to be undecided. See *Newton v. Harland*, 1 M. & G., 644; and *per Parke, B., Harvey v. Bridges*, 14 M. & W., p. 442. And so "if the like number (in India five or more persons) in a violent and tumultuous manner join together in removing a nuisance, which may lawfully be done in a peaceful manner, they are as properly rioters as if the act intended to be done by them were never so unlawful; for the law will not suffer persons to seek redress of their private grievances by such dangerous disturbance of the public peace" 1 Hawk., P. C. 516. And violent resistance to processions, whether legal or otherwise, on the plea that the procession was a nuisance, is illegal under s. 141, cl. 4. 5 M.H.C.R., App. vi; 7 M. H. C. R. App. xxxv; 14 M. 126; 26 M., 249; 9 Cr. L.J

321. Such an indictment cannot, however, be supported by evidence of a mere trespass, or of an entry which had no other force than such as is implied by the law in every trespass. There must be proof of such force, or, at least, of such show of force, as is calculated to prevent any resistance. 1 Hawk, P. C. 500 *per* Lord Tenterden, C.J. *R v. Smyth*, 5 C. & P., 201, at p. 204=1 M. & Rob. 155. Further, if the legal owner of property, entitled to immediate possession, can obtain complete and peaceful possession, where there is no one present to resist, and no breach of the peace can possibly take place, he may do so, and any attempt forcibly to turn him out of possession will be illegal. A house was mortgaged to *Loews* in fee. He left the mortgagor in possession, and the latter let the premises to *Telford*. *Loews* went to the house early in the morning with a carpenter and another man, there being no one inside, took the lock off the door and entered into actual possession. Subsequently *Telford* and another got in at a side window and ejected *Loews*. It was held by the House of Lords that *Loews* had done nothing which was illegal, that he had acquired a legal possession of the house, and that the forcible entry by *Telford* was an indictable offence. *Loews v. Telford*, 1 App. Ca., 414=45 L. J. Exch. 613 (see *per* Lord Selborne, at p. 426.) It must be remembered that under the English statute a forcible entry may be committed by a single person as well as by twenty. (1 Hawk, P. C. 502.) Where, however, the property is land, of which it is impossible to obtain complete and exclusive physical possession by mere occupation of part, it would be unsafe, and probably illegal to attempt such a proceeding. 6 M., 245.

It has been frequently held that the mere assemblage of numbers, with a view to repel illegal aggression upon property which is in the peaceful possession of another, is not an unlawful assembly, and that actual resistance, within the limits allowed by law, is not rioting. 3 W. R. (Cr.) 41; 7 W. R. (Cr.) 112; 2 B. L. R. (A. Cr.) 16=10 W. R. (Cr.) 64; 10 C. L. R. 278; 6 B. L. R., Appx. 9=14 W. R. (Cr.) 69; 19 W. R. (Cr.) 66; 23 W. R. (Cr.) 25; 3 C. 573 at 584; 24 C. 686; 29 C. 244;

'5 C. W. N. 368; 1870 P. R. No. 13; 1877 P. R. No. 5; 1889 P. R. No. 4. See, too, 4 M. H. C. R. Appx. lxx, which, however, may be doubted. In 8 M. H. C. R. App. XI, obstruction to illegal distraint by a landholder was held not to constitute the obstructors an unlawful assembly. See 25 M. 624; 33 C. 295 at 305.

A good deal of discredit, however, was thrown upon this view by the Calcutta High Court, in 16 C. 203 at 213—221, where the following facts appeared. A watercourse issued from a river, and after passing on for about two miles, irrigated the lands of Fazilpore. The point of junction of the river and the watercourse, and the lands between this point and Fazilpore, belonged to a person who was known as the Mohashoy. Fazilpore belonged to the Thakurs. The Thakurs asserted that they had a right to erect a bund at the point of junction, so as to secure the irrigation of Fazilpore. This right was denied by the Mohashoy; but it was found, as a fact, by the courts below that it had been the practice to erect such an embankment. On the occasion in dispute, the Thakurs went to the spot, either to renew a bund which had been entirely washed away, or to renew a bund which had been partially washed away. They went peacefully, at 10 A.M., in such numbers as were necessary for the purpose, and without arms or any show of force. While they were working, about twelve hundred of the Mohashoy's people, many of them armed with *litties*, and headed by the petitioners, assembled together, and proceeded to the bund. Then twenty five or thirty men detached themselves, and attacked the Thakurs' party, the most of whom had already fled, wounded five, and left three senseless on the ground. The petitioners were acquitted on the charges of wounding, which, with regard to the provisions of s. 149, was a matter for some congratulation. They were convicted of rioting under s. 147, which raised the question whether, before the use of actual violence, they were members of an unlawful assembly. The High Court affirmed the sentence, and there can be no doubt was perfectly right. Even if the Thakurs were trespassers, which they probably were not, the case was specially one which the authorities should have been called on to settle, and the amount of violence, prepared for and used, was, under any circumstances, indefensible. [The case was followed in 26 C., 574, which, upon its facts, was equally clear. See also 28 C. 411; 20 A. 459, 24 A. 143.]

The Court, however, proceeded substantially to lay down the general rule, that no force could be used against trespassers, unless their trespass amounted to a crime. They seemed to think that this was undoubtedly the law of England. It has already been pointed out (*ante* Chap. III, § 76, at p. 222) that the law of England does

not permit the owner of property to attack a trespasser ; but it does permit him gently to press the trespasser away, and, if resisted, to continue the pressure while protecting his own person against any violence that may be offered. This principle appears to have been followed in India in the cases cited above. Some of them were distinguished by the High Court, on the ground that the acts resisted were crimes, and came within s 101, but it did not appear to have been so in 3 W. R. (Cr.) 41, and the Court accordingly *overruled* the same. It seems strange to assert that if half-a-dozen men came and sat down in your house, or took possession of your garden, they could not be interfered with, except by applying to a magistrate who might be twenty miles off. In support of this view, the Court said (p 219) "The section refers to 'right or supposed right.' This would seem to make a division into (1st) rights in actual enjoyment when interfered with, (2nd) rights claimed, though not in actual enjoyment when interfered with. And this would again indicate that the section, in some cases at any rate, makes unlawful an assembly which by force, etc., defends the right by restoring the *status quo ante*, and with it the actual enjoyment." It seems, with great deference, that the words are meant to show that, in cases to which the section applies, tumultuous force is illegal, whether the person has or has not the right which he claims. Does the section apply only to cases in which a claimant, being out of possession, seeks to oust the person in possession by force, or does it also extend to cases in which a person in peaceful possession uses the necessary force to prevent being dispossessed? Take one of the illustrations given by the Court. If my neighbour refuses to allow me to draw water at his well, I cannot use numbers and force to assert my right, though it may be a perfectly good one. But if I find half-a-dozen men standing round my own well, am I to do without water till I can get a magistrate to help me? It is clear that a previous peaceful possession is not displaced by a mere act of illegal violence. "If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of the two is

in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser" *Per* Maule, J., in *Jones v. Chapman*, 2 Exch., p. 821, cited and approved by Lord Selborne in *Lows v. Telford*, 1 App. Ca., 414 at p. 426. On the other hand, where a right is exercised over the land of another, such as a right of way, a right of common, a right of water, no one is in possession of it, except during the actual moment when he is peacefully exercising his right. 1 Hawk, P. C. 502. Any attempt to vindicate such a right by force must necessarily be an attempt to enforce a right, or supposed right, within the meaning of s. 141, cl. (4) and not an act done to maintain an existing and peaceful possession, within the meaning of the cases previously cited. The ruling in 14 B., 441, is, perhaps, the extreme limit to which the courts in this country have proceeded. Here the first accused received information one evening that the complainants intended to go on his land on the following day and uproot the *juvari* seed sown on it. About 3 a.m. next morning he was informed the complainants had entered upon the land and were ploughing up the crop. Thereupon he at once proceeded to the spot with his friends and remonstrated with the trespassers, and a fight ensued, both sides receiving injuries, and the leader of the complainants' party was killed. In spite of the facts that when they received the information the accused were not actually on the land but were in the village some distance away and that they did not seek the aid of the police, the accused were acquitted. There is a cardinal distinction between enforcing a right and maintaining a right, one is in possession of. 36 C. 865=13 C. W. N. 801=10 Cr. L. J. 471=3 Ind. Cas. 19; 25 M., 624; 24 C. 686; 19 W. R. (Cr.) 66; 23 W. R. (Cr.) 25; 16 K. L. R. 46=3 Cr. L. J. 443; 15 C. L. J. 80=13 Cr. L. J. 188=13 Ind. Cas. 1004. In 3 N. L. R. 177=7 Cr. L. J. 49, the complainant harvested the crop on accused's land and had it stacked on the village thrashing-floor. The accused collected 60 men and removed the crops to his own house. This was held not to constitute the members an unlawful assembly as the entry to deprive the thief of the crops would not constitute the offence of criminal trespass. See also 36 C. 296=13 C.

W. N. 677=1 Ind. Cas. 973=9 Cr. L. J. 443 which was distinguished in 36 C. 82=13 C. W. N. 827=10 Cr. L. J. 245. Abatement of a nuisance by pulling down a structure put up contrary to the decree of a Civil Court was held not to constitute an offence under s. 143 2 C. L. R. 62. Once an attack is made on persons in the lawful exercise of their right of property, they are entitled to defend themselves and maintain their possession by using appropriate force; people thus exercising their lawful rights cannot be held to be members of an unlawful assembly, nor can their assembly become unlawful by reason of their repelling the attack made on them by persons who had no right to obstruct them, nor by reason of their having exceeded the right of private defence. Any person who acts in excess of the right of private defence will be liable for his own acts but cannot make his associates liable unless these latter constitute themselves an unlawful assembly by encouraging the former to act in excess of their rights 13 Cr. L. J. 481=15 Ind. Cas. 481; 14 Cr. L. J. 295=19 Ind. Cas. 951, 14 Cr. L. J. 380=20 Ind. Cas. 140.

Clause Fifth.—An assembly will also be unlawful, where its object is, by criminal force or show of force, to compel a person to do what he was not legally bound to do, or to omit to do what he was legally entitled to do. This clause differs from cl (4) in the omission of any reference to a supposed right. A gathering of ryots to prevent a distress for land revenue or rent, or to prevent a purchaser at an auction sale from taking possession of the property sold to him, would come within the section, if the proceedings taken were legal. See 4 M. H. C. R. Appx. lxxv.; 13 M. 148; 5 P. L. R. 47=1 Cr. L. J. 94. But the mere use of criminal force or show of criminal force by an assembly with a view to take possession of any property would not bring the case under clause (5) unless some criminal intent is proved against the person so using force or show of force 12 C. W. N. 96=6 Cr. L. J. 393. Assemblages to resist religious or caste processions would be illegal under this clause, if the procession was itself one which the persons forming it had a right to carry out. Even if its legality was doubtful, resistance

might still be unlawful under cl. (4). So would all violence be if used to compel workmen to join in a strike, or to refrain from continuing in their employment. Where a number of people united in making disturbances at Covent Garden Theatre, and prevented the performances going on, in order to show their disapprobation of a change in the prices of admission, Sir J. Mansfield, C.J., said: "If people endeavour to effect an object by tumult and disorder, they are guilty of a riot. It is not necessary, to constitute this crime, that personal violence should have been committed, or that a house should have been pulled down." *Clifford v. Brandon*, 2 Campb., 358.

100. Rioting.—As already observed, the mere fact of joining an unlawful assembly is itself an offence, and is punishable under s. 143. Where there has been no breach of the peace and the members of the assembly are in the right as to their claims, these circumstances may be urged in mitigation of sentence. 11 C.W.N. 176= 5 Cr. L. J. 19. If any force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting by s. 146, and is punishable under s. 147; or if the offender was armed with a deadly weapon, under s. 148. [As to the term "deadly weapon," see 15 A. 19. The person so armed only can be convicted under s. 148; 22. C. 276; 1899 A.W.N. 77.] Further, by s. 149, if any specific offence was committed by any member of the unlawful assembly, every person who, at the time of committing it, was a member of the same assembly, is guilty of that offence, provided it was committed, or was an offence which the members knew was likely to be committed, in prosecution of the common object of that assembly. 9 A. 645. This subject has already been discussed with reference to s. 34, and the kindred sections (see Ch IV., § 82.) Section 149 takes the act of the member of the unlawful assembly who does not commit an offence with his own hand out of the provisions for abetment and makes him responsible as the principal solely on the ground he is a member of the assembly.

6 A. 121 at 123. The expression *common object* in this section referring, as it does, to one of the five objects specified in s. 141, has not the same significance as the expression *common intention* in s. 34. Whether the unlawful act was committed in prosecution of the common object, so as to bring the case within ss. 146 or 149, is a question of fact on all the circumstances of the case. **Weir I. 68 ; 7 W. R. (Cr.) 58 ; 24 W. R. (Cr.) 5 ; 4 W. R. (Cr.) 26 ; 3 C. L. R. 49 ; 13 W. R. (Cr.) 33 ; 21 C. 392 ; 22 C. 306 ; 9 A. 645 ; 27 C. 566.** It is the use of force or violence that converts an unlawful assembly into a riot. The word force is used in s. 146 in the sense defined in s. 349. Violence is force used to any object other than a human being, *e.g.*, smashing windows or throwing stones. **1889 P. R. No. 4 ; 13 Cr. L. J. 821=17 Ind. Cas. 565.** Force or violence, however slight or inconsiderable, is sufficient to complete rioting. **26 W. R. (Cr.) 6 ; 1868 P. R. No. 34 ; 1864 W. R. (Cr.) 12.** But where the members of an assembly when attacked by an opposite party took to flight, they cannot be convicted of rioting. **1904 A. L. J. 602=1 Cr. L. J. 1057.** Again where the common object of the assembly is not illegal, employment of force by any member would not constitute rioting. **1 C. W. N. 233 ; 4 C. W. N. 345.** Where several Hindus forcibly took possession of an ox and two cows from a Muhammedan with a view to prevent their slaughter, it was held their act amounted not to dacoity because there was no dishonest intention but only to rioting. **15 A. 22.** But see **15 A. 299.**

Though in a case of rioting under s. 147 the common object may be left to obvious inference, if a person is sought to be made liable for the act of another under s. 149 the common object cannot be left to be inferred but must be expressly set forth in the charge. **11 C. 106 ; 34 C. 325 ; 1907 P. W. R. Cr. 106=6 Cr. L. J. 446.** Where the object of the assembly was to drive off some herdsmen, and after this object had been accomplished, the defendant got into a merely personal altercation with one of the opposite party, and wounded him with a spear, it was held that the other members of the party were not liable in respect of this act under s. 149. **24 W.**

R. (Cr.) 66. Similarly, it was held that a man who had retired wounded from a fight, had ceased to be a member of the assembly so as to be liable for what happened afterwards. **3 B. L. R. (A. Cr.) 1; 15 O. C. 183=13 Cr. L. J. 556=15 Ind. Cas. 972.** And even where the party was engaged in the common object of ejecting the opposite party from land, the title to which was disputed, and one of the aggressors, who was armed with a gun, fired it in the heat of the struggle, and killed his opponent, a Full Bench of the High Court of Calcutta exonerated the other members of the same party from the charge of murder, holding that the act was sudden and unpremeditated on the part of the man who fired, and that no homicidal intention had been entertained by any of the others in entering upon the contest. **11 B. L. R., 347=20 W. R. (Cr.) 5; Ratanlal 44; 1 W. R. Cr. 20; 1882 A. W. N. 179; 5 Bom. L. R. 1023; 19 M. 483; 29 A. 282; 9 Bom. L. R. 153=5 Cr. L. J. 163; 16 K. L. R. 177=4 Cr. L. J. 271.** Persons who, under similar circumstances, wish to avoid a similar risk, would do well not to allow men armed with deadly weapons to join their enterprise. Where a prisoner is constructively guilty of murder, under s. 34, Field, J., doubted in **8 C 739 at 751=12 C. L. R. 233**, if he can be said to have committed the murder within s. 149 so as to make his associates in the riot also guilty of murder by a double construction.

As regards the second division of the offence under s. 149 where a number of persons armed with deadly weapons go out to commit violence, knowledge may be imputed to all that murder was likely to be committed. The presumption, however, is one of fact depending on the circumstances of each case. **13 C. W. N. 827; 3 Ind. Jur. 416; 24 W. R. (Cr.) 66.**

It must be remembered that where a person is guilty of rioting, and at the same time commits a distinct offence independent of the rioting, he may be charged and punished separately for each offence. **7 W. R. (Cr.) 60; 9 A 645; see Part I., note to s. 71. at pp. 34—41.** Thus when the force essential to convert an unlawful

assembly into a riot causes hurt or grievous hurt the accused may be given a separate sentence under ss. 323 or 325 in addition to the sentence under s. 147. 2 A. 139; 7 A. 29; 16 C. 725; 7 A. 414 (F.B.), 9 A. 645; 1895 P. R. No. 8; 1901 P. R. No. 4 (F.B.) *Contra* 12 Cr. L. J. 236=10 Ind. Cas. 278; 14 Cr. L. J. 66=18 Ind. Cas. 402; 8 C. L. R. 390. But separate sentences cannot be given for offences under ss. 353 and 147, because the use of the force with no further consequences would complete both offences. 3 C. W. N. 174; 4 C. W. N. 245. Similarly when trespass is the common object of the rioters. 8 C. W. N. 305=1 Cr. L. J. 139. In 3 C. W. N. 761, it was held following 16 C. 442 (F. B.) separate sentences should not be passed for rioting and theft when it was not shown that any of the rioters individually committed theft. See 1907 P. W. R. No. 38; 1894 P. R. No. 31; 8 C. W. N. 483=1 Cr. L. J. 365; 1 Cr. L. J. 199. In 17 B. 260 and 6 C. 718 it was held that on a conviction under s. 147 and ss. 323 and 149, two sentences may be passed provided the total does not exceed the maximum prescribed for either. See also 8 C. W. N. 344. But see *contra* 16 C. 442; 7 A. 757. A conviction under s. 147 cannot be altered to one under s. 323 as it cannot be said that the latter offence is minor to and therefore included in s. 147, 12 Cr. L. J. 82=9 Ind. Cas. 455. Again under no reasonable construction of ss. 236—238, C. P. C. can causing grievous hurt (s. 325) be regarded as minor to or included in a charge under s. 325 read with s. 149, 34 C. 698=11 C. W. N. 666=5 Cr. L. J. 427. Where death is caused by some member of an assembly and it is not proved by whom, and the assembly could not be found an unlawful assembly none of the accused could be convicted of any offence. 1885 A. W. N. 96.

101 Turbulent Assembly.—An assembly of five or more persons likely to cause a disturbance of the public peace is of itself illegal under English law, but is only punishable criminally under the Code after such assembly has been lawfully commanded to disperse (s. 151). Such a disobedience to summons where the assembly is unlawful is punishable additionally by s. 145.

See Ch. IX. of the Code of Cr. Procedure for provisions as to dispersal of unlawful assemblies. See also *ante* Ch. III, § 38, pp. 96-100.

The Penal Code contains no definition of an assembly likely to cause a disturbance of the public peace. In *Vincent*, 9 C. & P. 91, Alderson, B., stated the law as follows :

"Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them; and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness."

An assembly is not unlawful as likely to cause a disturbance of the public peace, unless the disturbance is likely to follow from its own acts. This was so held in the case of the *Salvation Army*. They assembled with others for a strictly lawful purpose, *viz.*, the promotion of religious feelings according to their own special procedure, and with no intention of carrying it out in an unlawful manner, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it. It was held that this did not constitute their meeting an unlawful assembly. *Beatty v Gillbanks*, 9 Q. B. D. 308; see 6. M. 203. The same rule would govern cases of processions, and meetings, public or private, which, though in themselves lawful, might be at the time obnoxious to popular feeling. In 7 B. 42 it was found the object of three persons was to draw a crowd and their action was calculated to and did draw a crowd of fifty or sixty likely to be turbulent. On the refusal of the assembly to disperse when lawfully commanded, the members were held liable under s. 151. I. P. C. See also 1887 P. R. No. 22. But where an

assembly met for an innocent purpose and the meeting suddenly quarrelled with an intruder, it would not thereby make itself an unlawful assembly. 24 W. R. (Cr.) 26; 5 N.-W. P. H. C. R. 208.

102. Affray.—The essence of an affray (s. 159) consists in the publicity of the place, and the disturbance of the public peace. "It is said that the word 'affray' is derived from the French word *effraier*, to terrify, and that, in a legal sense, it is taken for a public offence to the terror of the people. From this definition it seems clearly to follow, that there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any except the parties concerned, in which case it cannot be said to be to the terror of the people." 1 Hawk, P. C. 487. Or if the disturbance of the public peace is by mere exchange of abusive words, not amounting to *fighting*, Weir l. 71. There is a distinction between doing an act in public, that is, in a place where it can be seen by the public, and doing it in a public place, that is, in a place to which the public have lawful access by right, permission, usage, or otherwise. In the latter case, an affray is an infringement on the lawful right of access enjoyed by the public. It is not so in the former case. Hence it was held that no offence was committed under s. 159 by a fighting which took place on a *chabutra*, which was private property adjoining a public road, although the public could see what was taking place. 17 A. 166; [see also Part I, note to s. 294.] A railway station and platform at a time when only a goods train was due was held to be not a public place, 1883 A. W. N. 197, though the goods yard would be a public place. 26 B. 609=4 Bom. L. R. 290. If, on the other hand, a fight takes place on private property used for example as a show-ground open to the public, it is within the section. Wellard, 14 Q. B. D. 63, at 66, 67.

To constitute an affray, it is not necessary to prove a particular individual beat another particular individual. Evidence of general fight is sufficient, if the accused be present at it. 21 C. 392, Weir l. 71. If the evidence be

specific that A assaulted B, causing hurt to him, it is improper to try both of them for the minor offence of affray. 4 L. B. R. 237=7 Cr. L. J. 498. Though the fight involves necessarily two sets of men with divergent objects, they may all be tried together as they are all equally disturbers of the public peace. Thus, where a quarrel arose at a temple gate between four persons stationed there to collect fees and three others who attempted to enter the temple, the offence committed was requisite numeric under s. 159 and all the seven might be tried together though if each party had been more than five in number, they are entitled to be tried separately when charged for rioting Weir I. 68.

103. Promoting Class Enmity.—An offence similar in its nature to that of sedition, but differing in its objects, has for the first time been created by s. 153A, which makes it punishable by words, spoken or written or by signs or visible representations, to promote feelings of enmity or hatred between different classes of His Majesty's subjects. The pointing out without malicious intention and with an honest view to their removal matters which are producing or are likely to produce such feelings is not an offence. To bring a case within the section, there need not be a finding that the conscious intention of the accused was to promote the feelings between classes condemned by the section. 10 Bom. L. R. 848=8 Cr. L.J. 281; 1907 P.R. No. 10=1907 P. W. R. Cr. 27=5 Cr. L.J. 439. The truth of the statements is no defence and the liability seems to be a statutory liability independent of *mens rea* unless the facts are covered by the explanation. This section is no more auxiliary to s. 153 than s. 124A is to s. 124.

By s. 108 of the Criminal Procedure Code special means are provided for preventing the dissemination of matters which are punishable under ss. 124A or 153A.

CHAPTER VI.

**CONTEMPT OF THE LAWFUL AUTHORITY
OF PUBLIC SERVANTS.**

Chapter X of the Penal Code contains various sections which are grouped under the general head of Contempts of the Lawful Authority of Public Servants. Few of these require any detailed examination, beyond the short notes which are appended to the sections in Part I. Sections 181 and 182 are examined in Chapter VII. In this chapter some remarks will be offered upon s. 174 dealing with non-attendance in obedience to processes of Court or to orders of public servants and on s. 188 relating to Disobedience to an order of a Public Servant [As to who are public servants, see 18 C. 518; 29 C. 236, and notes to s. 21, I P.C., Part I, pp. 7—11]

104 The officer issuing process must be legally competent to issue the summons, etc.—To sustain a conviction under ss. 172, 173 or 174 it has to be remembered the offence depends upon the legal competence of the authority issuing the summons, etc. 5 B. H. C. R. (Cr. Ca.) 33; 8 B. H. C. R. (Cr. Ca.) 19. If a village headman summons a person in respect of an offence which he has no jurisdiction to try, disobedience to such a summons would not constitute an offence under s. 174. Weir I. 87. See Ratanlal 70; 1883 A. W. N. 222; 1904 A. W. N. 122; 1907 P. R. (Cr.) 4=1907 P. L. R. 37=1907 P. W. R. 25=6 Cr. L. J. 107. Where certain persons were required by a Tahsildar to serve as coolies and for their failure to attend they were summoned under s. 68, Cr. P. C., as accused persons to answer a charge of non-attendance as coolies, and they failed to obey the latter summons and for such failure they were convicted under s. 174, the conviction was quashed by *Knor and Akman, JJ.*, on the ground the Tahsildar was not competent to summon them either as coolies or as accused persons. No officer can be held competent to

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summon a person to answer for an offence unknown to law 1 A. L. J. 263=1 Cr. L. J. 497. See also Weir l. 86, 93, 97; 7 C. W. N. 797; 1871 P. R. No. 2; 1875 P. R. No. 18; 1887 P. R. No. 14; 1885 A. W. N. 43; 1889 A. W. N. 1; 3 C. W. N. CCLXXI. In several rulings prior to 1869 the Madras High Court held that disobedience to a summons issued by a Tahsildar in his revenue capacity was not punishable. As a result of these rulings, Madras Act III of 1869 was passed empowering Revenue Officers to summon persons to attend at their *cutcherris* for the settlement of matters connected with revenue administration, 6 M. H. C. R., Appx. X & XLIV, but the scope of this enactment is limited. Thus, in 2 M. 297 a petition to sue in *forma pauperis* was pending in a District Court and under the directions of the Collector, a Tahsildar summoned the defendant to give evidence on the question of the alleged pauperism of the petitioner and for his non-attendance the defendant was convicted under s. 174, but the conviction was quashed on the ground the Tahsildar was not competent to summon the defendant as the enquiry was not within the scope of the Act, the question of pauperism not being one of the matters connected with revenue administration (See 6 M. H. C. R., Appx. XIV and 7 M. H. C. R., Appx. X & XI.) Madras Act III of 1869 confers but very limited powers. It does not contemplate a subordinate officer such as a village headman being summoned for the purpose of carrying out a sale of land for arrears of land revenue 5 M.H.C. R., Appx. XXVII. But a Full Bench of the High Court in 7 M. 197 held over ruling 5 M. 377 that the Act must receive a liberal construction (see Weir l. 93; 11 Cr. L. J. 566=8 Ind. Cas. 133). The power has to be exercised however with due discretion and not on every occasion when a superior officer merely desires information easily obtainable otherwise by means of correspondence in the usual course. Weir l. 94 & 95. The power is limited to formal proceedings conducted to ascertain facts by investigation, Weir l. 95, and to enquiries relating to matters of revenue administration. Thus the non-attendance in obedience to summons of a village headman at an enquiry held by a Tahsildar relating to vaccination of children was held to be outside the

scope of the Act. **Weir I. 95 & 96.** But to sustain a conviction it is not necessary that an enquiry should be actually pending. It is enough if the Revenue Officer considers the evidence of the person summoned necessary for investigating a matter regarding which he is competent to conduct an enquiry. **Weir I. 96.** But a summons to take away a bundle of pattas for being distributed to ryots has been held not to be a summons duly issued under the Act. **Weir I. 97.** There are similar Acts in other provinces also authorising *public* officers to issue process. Thus a citation issued under s. 147 of the North-Western Provinces and Oudh Land Revenue Act III of 1901 is within s. 174, I.P.C., **6 A. L. J. 114n. followed in 13 O. C. 55=11 Cr. L. J. 250=5 Ind. Cas. 805.** Section 160, Cr P C., does not authorize a Police Officer to require the attendance of the accused at the police investigation and disobedience to such a notice is not covered by s. 174, I.P.C., **4 Bom. L. R. 644.**

105. The process issued must be one legally binding on the person whose attendance is desired.—A Statutory power to command the attendance of a person should not ordinarily be construed so broadly as to jeopardise the liberty of subject. Thus a Tahsildar empowered to summon by Madras Act, III of 1869, was held to have no power to summon a person to appear before an officer not so empowered. **Weir I. 97.** A receiver under s. 56 of the Bengal Land Registration Act, has no authority to demand the attendance of persons before the Collector with collection papers and receipts **29 C. 236=6 C. W. N. 141.** No witness is bound to appear if the summons directs his appearance at a place outside British India. **16 M. 463=Weir I. 87.** But Magistrates have jurisdiction to issue summons to witnesses residing beyond their own local limits. **3 M. H. C. R., Appx. V.** Section 174 deals only with persons *legally bound* to attend. **10 W. R. (Cr.) 33; Weir I. 81; 1901 P. L. R. No. 37.** The question may well arise whether a witness under protracted examination from day to day in one Court could be punished for non-attendance in another Court. But s. 195, Cr. P C., would be a sufficient safeguard against a

summon a person to answer for an offence unknown to law. 1 A. L. J. 263=1 Cr. L. J. 497. See also Weir I. 86, 93, 97; 7 C. W. N. 797; 1871 P. R. No. 2; 1875 P. R. No. 18; 1887 P. R. No. 14; 1885 A. W. N. 43; 1889 A. W. N. 1; 3 C. W. N. CCLXXI. In several rulings prior to 1869 the Madras High Court held that disobedience to a summons issued by a Tahsildar in his revenue capacity was not punishable. As a result of these rulings, Madras Act III of 1869 was passed empowering Revenue Officers to summon persons to attend at their *cutcherris* for the settlement of matters connected with revenue administration, 6 M. H. C. R., Appx. X & XLIV, but the scope of this enactment is limited. Thus, in 2 M. 297 a petition to sue in *forma pauperis* was pending in a District Court and under the directions of the Collector, a Tahsildar summoned the defendant to give evidence on the question of the alleged pauperism of the petitioner and for his non-attendance the defendant was convicted under s. 174; but the conviction was quashed on the ground the Tahsildar was not competent to summon the defendant as the enquiry was not within the scope of the Act, the question of pauperism not being one of the matters connected with revenue administration (See 6 M. H. C. R., Appx. XIV and 7 M. H. C. R., Appx. X & XI.) Madras Act III of 1869 confers but very limited powers. It does not contemplate a subordinate officer such as a village headman being summoned for the purpose of carrying out a sale of land for arrears of land revenue 5 M.H.C. R., Appx. XXVII. But a Full Bench of the High Court in 7 M. 197 held *over ruling* 5 M. 377 that the Act must receive a liberal construction (see Weir I. 93; 11 Cr. L. J. 566=8 Ind. Cas. 133). The power has to be exercised however with due discretion and not on every occasion when a superior officer merely desires information easily obtainable otherwise by means of correspondence in the usual course. Weir I. 94 & 95. The power is limited to formal proceedings conducted to ascertain facts by investigation, Weir I. 95, and to enquiries relating to matters of revenue administration. Thus the non-attendance in obedience to summons of a village headman at an enquiry held by a Tahsildar relating to vaccination of children was held to be outside the

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vexatious prosecution in such cases. In 14 W. R. (Cr.) 20, it was ruled that a witness who attended in obedience to a summons was not bound to wait all day in Court, and if he went away after waiting a reasonable time he would not be liable under s. 174. *Weir* I. 99; but having regard to the unpunctual habits of the mofussil magistracy who have also numerous extra judicial duties to discharge, it is unsafe for a witness to depart so long as there was reason to believe the case might be taken up and his evidence required 10 B. 93 is an instance in point. There a man summoned to appear at 10 A.M. appeared punctually and waited for two or three minutes and departed leaving a notice to the Magistrate scribbled on the walls of the court-house. He was not available for being examined on the arrival of the Magistrate at 11 A.M. The conviction under s. 174 was upheld. The purpose of attendance to answer a criminal charge is not fulfilled until the charge is answered. *Weir* I. 99. 20 M. 31 is, however, an extreme case—there the accused never attended on the day fixed but to his good luck it was also established the Magistrate was absent from the station the whole day. The Court held as the object of the summons was a meeting on the particular day at a specified place between the person summoned and the Magistrate, the non-attendance at a time when no such meeting could have taken place was not an offence. This ruling, if correct, would require that in the case of judicial proceedings proof must be adduced that as a matter of fact the particular case was taken up on the date fixed 3 Sind L. R. 155=10 Cr. L. J. 576=4 Ind. Cas. 410. Section 17 of the *Coroners Act*, IV of 1871, empowers a Coroner to issue summons and non-attendance would be punishable under ss. 174 or 176. Where a proclamation under s. 87, Cr. P.C., is not duly made and published, a conviction for disobedience of the proclamation cannot be sustained under s. 174, and s. 537, Cr. P.C., cannot be invoked to cure the irregularity in the proclamation 19 M. 3.

106. To establish liability, strict proof of service is essential.—No person could be said to be legally bound to attend unless service of the summons or notice has

been served upon him in the manner contemplated by law. Thus in the case of processes of Civil Court the rules laid down for personal service must be complied with. 7 W. R. (Cr.) 58; 10 W. R. (Cr.) 33; 11 M. 137; 1870 P. R. No. 6; 5 B. H. C. R. (Cr. Ca.) 20; Ou. S. C. 99. In 11 M. L.T. 405=13 Cr. L.J. 245=14 Ind. Cas. 597, on a refusal to accept service the process-server did not leave a copy of the summons with the accused. It was held that the mere tender and refusal would not constitute personal service and the accused was not liable under s. 174 unless the process-server had taken care to throw down the duplicate in the presence of the accused so as to enable him to avail himself of it afterwards if he so chose. Where a summons was not served personally on the defendant, but only affixed to the door of his house and he failed to attend, such failure was held not to amount to an offence under s. 174. 6 M. H. C. R., Appx. XXIX=Weir I. 84. But where there was a tender and failure to accept a conviction was upheld in Weir I. 81. A mere verbal order given at any stage of a trial to a person already in attendance directing him to return on a specified day to which the hearing is adjourned was held sufficient in 5 M. H. C. R. XV; 7 M. H. C. R., Appx. III; Weir I. 87; and Ratanlal 75. But it would be otherwise if the order was a general one to appear again when required, no particular day being named, 6 M. H. C. R., Appx. X; 5 A. 7; 1883 A. W. N. 109; Weir I. 81 & 100. A summons to appear *within* a certain number of days from the date of service is not a legal process, Weir I. 82; and an adjournment of a trial to a date which would be notified by public proclamation is equally objectionable. Special notification should be given to all parties concerned of the date of the adjourned hearing. 6 M. H. C. R., Appx. XXIX. The summons must also specify the place at which attendance is demanded, otherwise conviction under s. 174 would not be legal. 7 M. H. C. R., Appx. XIV & XLIII; 17 W. R. (Cr.) 38; Weir I., 81, 89 & 100. There is no objection to a summons being made returnable on a Sunday. 4 M. H. C. R., Appx. LXII. Weir I. 86.

If a witness does not receive or hear of the summons till after the date named therein for his appearance, non-attendance would not be an offence. 1 N.-W. P. H. C. R. 303. He could not have appeared at the date fixed and no useful purpose would be served by his appearing later in the absence of a fresh summons. Section 174 dealing with *intentional* non-attendance or *wilful* departure assumes knowledge on the part of the accused. 14 W. R. (Cr.) 20; 1908 P. W. R. (Cr.) 85=7 Cr. L. J. 226; Weir I. 83, 84 & 85. In a summons case where the accused appears by pleader and applies under s. 205, Cr P. C., for his personal attendance being dispensed with, he is not liable for non-attendance. 27 C. 985; 8 A. L. J. 537=12 Cr. L. J. 432=11 Ind. Cas. 616 is rather an extreme case. On a reference under the Land Acquisition Act, the District Judge summoned the defendant in person and warned him that on his failure to do so the reference would be disposed of *ex parte*. The party appeared at first by pleader but on his personal attendance being insisted on, appeared in person a few hours later on the same day and explained that as the notice was in Arabic characters, he did not know his personal attendance was required. In spite of this explanation, the Judge sanctioned his prosecution under s. 174, which on appeal was set aside by the High Court. In 1880 P. R. No. 22 it was held that if the person summoned explains to the process-server his inability to attend, he is not liable unless it is proved that non-attendance was in the nature of a wilful disobedience. 1 N.-W. P. H. C. R. 303; 1882 A. W. N. 52; 10 W. R. (Cr.) 33. Before convicting a person the Court is bound to decide whether there was an intentional disobedience and accused must have every opportunity of explaining his absence 1907 P. W. R. (Cr.) 27.

In the absence of an order in writing as required by s. 160, Cr P. C., a person asked orally to appear as a witness before a Police Officer does not render himself liable under s. 171 by non-attendance. Weir I. 86. In criminal cases service of a notice upon the pleader of a party is not sufficient (6 C. W. N. 927), nor is mere

affixture sufficient. It must be brought to the notice of the accused that he was required to attend **6 M. H. C. R., Appx. XXIX, Weir I. 84 & 85.** The mere fact there was postal communication between the place where the notice was affixed and the place where the accused was temporarily residing is not sufficient to raise a presumption of knowledge of the contents of the notice in the accused. Further, a mere production of the original of the summons with an endorsement of service is no proof of the service unless the evidence of the serving officer that he did actually serve the accused is also forthcoming. **Weir I. 85.** The section applies to the case of an accused who had given bail for appearance and has also entered into his own recognizance. It is no answer for a prosecution under s 174 that the surety has already been made to pay for the accused's non-attendance and that he himself was liable to have his own recognizance forfeited under s 514, Cr P C **1 B. L. R. (A. Cr.), 1=10 W. R. (Cr.), 4** (which was *over-ruled* by **5 B. L. R., 100**, but not on this point). Similarly the fact a Civil Court has dealt with a witness under O XVI r 12, C P C., and fined him for disobedience of summons does not preclude a further prosecution under s 174, I P C.

Section 174 does not apply to a warrant issued for the arrest of a person. The process is addressed to an officer of Court and not to the person to be arrested **1881 P. R. No. 8.** The section is equally inapplicable to an escape from custody when arrested on a warrant **1 B. H. C. R., 38; 7 M. H. C. R., Appx. XLIII; 1873, P. R. No. 72; 1871 P. R. No. 1; 1890 P. R. No. 28; 1870 P. R. No. 27; U. B. R. (1897—1901), I. 61**

107. Disobedience to an order promulgated by a Public Servant.—In order to constitute the offence created by s 188, it is necessary to show *first*, a lawful order promulgated by a public servant, *second*, knowledge of the order and disobedience to it, and, *thirdly*, a special class of results likely to follow from such disobedience.

Some of the most important cases of orders by public servants are those provided for by Chapters X, XI,

and XII. of the Crim. P.C. Again, under the various Police Acts, for example secs. 30, 30A, of the *General Police Act*, V. of 1861 as amended by secs. 10 & 11 of Act VIII. of 1895, by sec. 49 of the *Madras Police Act XXIV.* of 1859 or by corresponding provisions of other various Police Acts governing different local areas, officers of Police are given authority to direct processions and to regulate the use of music in streets. In 20 M. 1, the difference between an order to do a thing and a notice that if it is not done by the party himself, it will be done at his expense, is pointed out. A permit to cut and remove timber, issued under the provisions of the Forest Act, is not an order within the meaning of sec. 188. *Weir I. 140.* A person who trespasses on land with respect to which an order has been made under sec. 146, Cr. P. C., would be guilty of no offence under sec. 188, because the order is one addressed to the attaching officer though he may be guilty under sec. 447, I. P. C., 8 M. L. J. 253. But an order under section 237 of the Indian Succession Act, X. of 1865, would be an order under this section. Another fruitful source of prosecutions under this section is furnished by sec. 3 of the *Epidemic Disease Act III of 1897*. When a plague regulation has been made by the Local Government acting under this Act, but the regulation is re-published by a public servant, no sanction would be required under sec. 195, Cr. P. C. 24 M. 70

It is not every order promulgated by a public servant the violation of which could be dealt with under s. 188. The order must contain a direction either to abstain from a certain act or to take certain order with certain property in his possession or under his management. An order which merely declares that as between the parties to a contention, certain land is not public, cannot be made the basis of a prosecution under sec. 188, 24 W. R. (Cr.) 20. In *Oudh S. C. 65*, a notice that tenants will not be liable to pay a Patwari cess was held not to be an order directing landholders to abstain from a certain act, viz: the collection of the cess. Even where an order is a proceeding to which the accused was a party, it would be a sufficient answer if the property concerned was not in fact in the possession of the

accused. Thus where the proprietor of a theatre had leased it to another, he was, in **Ratanlal 527**, adjudged not guilty of having disobeyed an order passed against him with respect to the management of the theatre.

Where a public officer has passed an order which he is competent to make in a matter over which he has jurisdiction, it is no defence to a charge for disobedience under s. 188 that the order was one which, from some error in law or in fact, he ought not to have made. So long as the order exists it cannot be questioned by anyone, who would otherwise be bound by it, on the ground that it ought not to have been passed. **12 M. 475**, but in **6 C. 88** a contrary view was held that when a prosecution is started under s. 188 the propriety of the order disobeyed may be called in question. This is all the more so when a prosecution is started while the original order is under appeal. The magistrate is bound to stay the trial on the charge under s. 188 pending the final orders of the appellate court, **2 B. H. C. R. 384**. Though an order may be questioned, by standing a prosecution for its disobedience, it cannot be set aside by a Civil Court, whose function is to determine rights, whereas the powers in question are given to the magistrate to prevent injurious consequences to the public arising from the exercise of rights. Where, however, a magisterial order is improperly obtained a suit may be instituted though not for the cancellation of the order, for a declaration of plaintiff's right which would otherwise be under a cloud by reason of the improper order. To maintain such an action no proof of special damage is required, **32 M. 478**. Again, where an order is passed in utter disregard of the provisions of law, *e g*, an order under s. 145, Cr. P. C., without a preliminary order under sub-section (1) or notice under (3) or enquiry under (4), a conviction based upon such an order would not be sustained, **1913 P. W. R. (Cr.) 16=14 Cr. L. J. 63=18 Ind. Ca. 351**. As regards Chapter X, Cr. P. C., it was decided by a Full Bench in **4 B. L. R. 24**, that a suit to cancel a magisterial order would not lie, and s. 133 of the present Code

expressly provides that "no order duly made by a magistrate under this section shall be called in question in any Civil Court." As to orders under s. 144, it was decided on the corresponding sections of the Codes of 1861 and 1872, that the procedure, being a summary one intended to meet cases of emergency, was not a judicial proceeding, and was not subject to revision by the High Court, 6 B. L. R. 74 (F.B.), 6 M. 203 p. 222, and could not be interfered with under s. 15 of the Charter Act, 2 C. 293. Orders made under Chapter XII are on their face provisional, and only remain in force till the question of right is decided by a Civil Court; till such a decision has been given, the High Court has no power to review the finding of the magistrate as to possession, 15 W. R. (Cr.), 86, and disobedience to the order is punishable under s. 188, I. P. C., 13 C. 175. As soon as, from any cause, an order has lapsed, or where it is from its nature temporary, it is no offence to act as if it had never existed, 10 A. 115.

It is not a punishable offence to disobey an order which it is not competent for the magistrate or other public authority to make, 10 C. L. R. 193; 13 A. 577; 5 C. W. N. 329. Thus, an order made under s. 144, Cr. P. C., directing the removal of an embankment, on the ground that the adjacent lands were in danger of being flooded, 5 M. H. C. R. Appx. xix.; 25 C. 852; 19 M. 464; Weir I. 143 & 141; a similar order, by way of a municipal bye-law, announcing that owners of cattle would be punished if the cattle did mischief by straying, 6 B. L. R. 78n=12 W. R. (Cr.) 36; 9 B. L. R. App. 36=18 W. R. (Cr.) 21; 3 B. L. R. 111. In *Reg. v. J. J. J.*, directing a landowner to hold a court leet on the first Monday of the week, 1 Cr. L. J. 111. In *Reg. v. J. J. J.*, directing the accused to keep his gateway open, so as to give effect to a right of way through it claimed by another person, 5 B. H. C. R. (Cr. Ca.) 21 being *ultra vires*, could not be made the basis of a prosecution. The magistrate is only competent to make a prohibitory order, not a mandatory one. So orders issued by the district magistrate of Broach, and by the municipality of

Ahmedabad, forbidding the giving of caste dinners, at a time when an outbreak of cholera was apprehended, however sensible as matters of advice, were held to be absolutely invalid, and convictions under s 188 for disobedience to them were set aside. 14 B., 165 & 180. See Ratanlal 433; 20 A. 501; 1873 P.R. No. 8; U.B. R. (1892-96) 178.

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an order which is

directing the owner of land to cut down a large quantity of trees. 13 W. R. (Cr.) 72. See as to orders relating to temples or mosques, 24 M. 45 & 262.

108. The Act prohibited need not necessarily be an illegal Act.—The validity of a magistrate's order under Chapters X, XI, XII, depends not on the illegality of the act forbidden, but on the injurious consequences to the public health, safety, or peace, which may arise from its being permitted. Where there are no such special consequences, or where the order is not calculated to attain the purpose, the special jurisdiction created by the sections falls to the ground, 28 C. 446; 14 C. W. N. 234=11 Cr. L. J. 49=5 Ind. Cas. 154, and where the special circumstances which justify the order cease to exist it may be cancelled. 30 C. 112. In some cases the existence of such consequences is itself sufficient to make the act illegal. As for instance, where a trade, which is a perfectly lawful occupation, and carried on in a lawful manner, is a public nuisance from the noxious fumes or smells which it produces (see *post*, Ch. VIII, §130) In some cases the act is absolutely lawful, but in certain conditions of popular feeling, is likely to lead to a breach of the peace, which justifies a suspension of its exercise for the sake of the public. For instance, where a landholder has established a new *hāt* or market, near an old-established *hāt* belonging to a neighbourhood, and public disturbances were apprehended, it was held that the magistrate was justified in forbidding the holding of the new *hāt* on the same days as were usual for the old one. 10 B. L. R., 434=18 W. R. (Cr.) 47. In a similar case, where

the magistrate had issued an order absolutely forbidding the holding of a *hit* on Tuesdays and Fridays, it was ruled in 5 C. 7, under s. 518 of the 1872 Code, that the order was illegal. The magistrate "might have prohibited the holding of the *hit* on any particular occasion or occasions; but he had no right to deprive the plaintiff for ever of a right, to which by law he was entitled." This difficulty is got over by the clause in s. 144, Cr. P. C., which provides that, as a general rule, no order under that section shall remain in force for more than two months. On the other hand, where the magistrate directed the hereditary priests and managers of a temple to widen and heighten the doorway, so as to supply better ventilation, and safer means of ingress and egress for the crowds of pilgrims who resorted to it in certain times of the year, the order was held valid, and disobedience to it punishable under s. 188. 6 B. H. C. R. (Cr. Ca.) 36. Similarly in regard to an order prohibiting a person from plying a boat in the vicinity of a public ferry, 1 A. 527. If such an order were made under s. 144, it would probably be held that the clause limiting the duration of the order had no application to cases where the order directed a single act, and was exhausted when that act was executed. Where, however, a magistrate was asked to issue an injunction under s. 62, the 1861 Code (s. 144) forbidding a man from building a house, whose drippings when finished would fall on the petitioner's premises, and the magistrate bound the opposite party over under s. 282 of the same Code (s. 107 of the Code of 1898) on the ground that a breach of the peace would be likely to ensue if the contemplated building was carried out, the whole proceeding was held to be illegal. It is obvious that the case was not one which, on the petitioner's own showing, would have warranted an order under s. 144, the ground of complaint being some future evil which might never happen, and could be adequately remedied by a civil suit. As to s. 107, the magistrate has no right to bind over *A* not to do a perfectly lawful act, merely because *B* said that he might be injured by *A* if he did it. 10 B. L.

R. 441=19 W. R. (Cr.) 47. See 10 W. R. (Cr.) 36. The following orders were held invalid, when their disobedience was sought to be brought within s. 188. An order directing a landowner to discover a theft within fifteen days, 3 A. 201; an order declaring that certain land did not belong to the public 24 W. R. (Cr.) 20; an order prohibiting use of public roads between 9 P.M. and sunrise, 12 C. L. R. 231; an order prohibiting the collection of rents from tenants, 9 C. W. N. 392=2 Cr. L. J. 166; an order forbidding the slaughter of cattle or sale of meat within three miles of a licensed slaughterhouse, U. B. R. (1892-1896) 179; an order by a Receiver forbidding persons to pay rent to any other person, 29 C. 236=6 C. W. N. 141. An order by a magistrate calling upon householders to keep themselves well-supplied with pots filled with water upon their roofs and with hooked sticks for use in beating out fires, L. B. R. (1872-1892) 363; an order that a Mukhtar should not assist a vakil in the defence of an accused without the permission of the magistrate, 1881 A. W. N. 20. An order by a "tee houseowner 1881 A. W. N. 52. An order that persons should not leave the village. 1 Bom. L. R. 51. (See also 1 Bom. L. R. 223.) An order that a man should not leave his home without informing the village *Lambardar* or the Police, 1863 P. R. Cr. 12, 1867 P. R. Cr. 45. An order by a Deputy Commissioner forbidding carters to drive their carts on a public road for six months, U. B. R. (1897-1901) 1. 263. An order that fishing-nets should have meshes not smaller than 1½" sq or 6" all round, 1873 P. R. Cr. 11. An order calling upon a landholder to attend upon and assist a *Tahsildar* in the measurement of land, 1867 P. R. No. 32.

A very common instance in which these questions have been discussed is in regard to the right to go with processions or insignia on the public highways. *Prima facie* every individual has a right to pass along the public highways in any manner, and with any number of attendants, he chooses, provided he does no injury to

anyone else. And the fact that he has never done so before is no reason why he should not do so now. Accordingly, the Madras Sudder Court ruled that a priest had a right to pass with a palanquin in procession through the high street of Salem, accompanied by his disciples, bands of music, banners, etc., and laid it down that "such right is inherent in every subject of the State, not requiring to be created by sunnud or patent, and it lies upon those who would restrain him in its exercise, to show some law, or custom having the force of law, depriving him of the privilege." 1. M. H. C. R. 50; 26 M. 376; 30 M. 185; 32 M. 478. On the other hand, the persons who exercise this right must not interfere with the ordinary use of the streets by the public, and must submit to such directions as the magistrates may lawfully give to prevent obstructions of the thoroughfare, or breaches of the public peace, or to maintain the corresponding rights of other religious sects. For instance, an order forbidding the use of music by a procession while passing a place of public worship, when worship is actually going on, would be legal, though it would be illegal to direct that music should always cease when a procession passed a place of worship where no ceremonies were taking place at the time. 2 M. 140; 5 M. 304; 6 M. 203.

The principles just stated were very much discussed in 26 M. 554. There the *Tengalais* in a certain district had been declared by a Civil Court decree to be entitled to hold certain offices in a temple, and as such office-holders it was their duty to recite certain hymns in a procession. The *Vadagalais* were ordered not to interfere with the *Tengalais* in the recital of the hymns otherwise than as ordinary worshippers. In pursuance of this decree the *Tengalais* conducted a religious procession along a highway, chanting their hymns. The *Vadagalais* followed chanting their own hymns. It appeared that those who chanted in front could not hear the words which were chanted behind, but they could hear that a *Vadagalai* chant was going on, to which some of the *Tengalais* objected ineffectually. The *Vadagalais*

were charged with committing an offence under s. 296, I. P. C. Practically the charge broke down in its merits, but Subrahmaniam Aiyar and Bhashyam Aiyengar, JJ., expressed their opinion in very elaborate judgments, that the Tenggais were not "an assembly lawfully engaged in the performance of religious worship or religious ceremonies" within the meaning of s. 296. Subrahmaniam Aiyar, J., based his judgment (pp. 570—572) on the ground "that no assembly can be lawfully engaged in the performance of religious worship or ceremonies on a highway, unless it be established or can be presumed that the dedication of the highway was subject to such restriction or

J., took the view that as a procession may, in consequence of its being inconsistent with the paramount right of passage, be of such a character as to render the user by the processionists otherwise than lawful, and as carrying on worship on a highway is of that character, it cannot be assumed that the Tenggais on the occasion in question constituted an assembly lawfully engaged in worship within the meaning of s. 296. White, C. J., and Benson, J. (pp. 560—585) were of the contrary opinion. It would seem that the former Judges failed to distinguish between two sorts of lawful acts; one, which a man has a *prima facie* right to do, and another, which he has an absolute right to do. Every public highway is dedicated to all users which can be made of a highway as such and which do not amount to a nuisance. It cannot be used at all for a cricket match or as a firing range. Whether its use by an organised body of men passing along it amounts to a nuisance or not depends on the special circumstances of each case. That which will be a nuisance in the crowded streets of a city will be no nuisance in a country village. Further, there are special occasions on which a proceeding which is strictly speaking a nuisance, is so in accordance with the feeling or usages of society as to be readily submitted to. The Duke of Wellington's funeral, and the Coronation processions were in law, nuisances of the first magnitude, as they involved the exclusion of all traffic for many hours

from the leading thoroughfares. In the instance under discussion, in order to ascertain whether the particular procession was lawful, it was the duty of the Court to consider, *first*, whether it was in itself, when and where it took place, something "which must necessarily cause injury, obstruction, danger or annoyance to persons" passing along the highway (s 268). *Secondly*, whether, if so, it was the sort of temporary inconvenience which, in the give and take of ordinary life, people tolerated and perhaps enjoyed. Village life in India would not be grateful to any purist who put down religious and festive processions.

109. The principle of maintaining tranquillity at the sacrifice of liberty examined.—A very important question may arise as to whether a magistrate should invariably prohibit certain acts, merely upon the ground that they may endanger public tranquillity. There may be cases in which religious or political bigotry will render it certain that a disturbance will ensue upon the exercise of certain rights, and yet it may be the duty of the magistrate to support the parties who claim that exercise in the face of all opposition. For instance, the establishment of a Christian place of worship in a Brahmin village, and the attendance of native converts at Divine worship, might be certain to produce a breach of the peace; and yet it would, I conceive, be the duty of the magistrate to call out an armed force, if necessary, rather than to allow unoffending persons to be intimidated out of their lawful privileges. Accordingly, the right of the members of any religious sect to build places of worship upon their own property, however near to other places of worship of rival sects, and to perform their worship, provided they do not cause material annoyance to their neighbours, have been recently recognized in the most unqualified manner by the Indian courts. 2 M. 143; 7 C. 694; 5 M. 304. The true rule would seem to be that where the exercise of a right is a mere luxury, the temporary denial of which would not practically interfere with a man's general rights as a subject, he may fairly be forbidden to enforce his rights at the risk of public disturb-

ance. But where the right is one of a substantial nature, which enters into the daily usages of life, there the magistrate is bound to support the subject against illegal opposition. Tranquillity ought not to be maintained by a sacrifice of liberty. For instance, the magistrate ought, at all hazard, to support every sect in the practice of their religious rites in such places as are set apart for them. This is a substantial right; but if they wish to parade about the streets with the symbols of their faith, this is a mere luxury, and may fitly be refused if it is likely to be attended with a disturbance. This was the ground of decision in the case of the *Salvation Army* in 7 B. 42. In a case before the Sudder Court of Madras, by their admitt-

In a similar case from the same district, the magistrate made an order, under the Code of 1872, corresponding to s 147 of the present Criminal Procedure Code, by which he prohibited the weavers from carrying corpses through a public street inhabited by Mohammedans, who had offered a violent resistance on a previous occasion. The order was set aside as illegal. The Court said that except where danger to public health was occasioned, the conveyance of corpses along a highway is not an unlawful use of a highway. When the conveyance of corpses by a particular highway is unnecessary and repugnant to the feelings of the inhabitants, a magistrate may properly exercise his influence to induce the persons concerned to abandon that route. 7 M. 49. The Court did not suggest that if they insisted upon their right they should be compelled to give it up, in order to avert an illegal riot. It is evident that in all these cases half the opposition would die away when it was known that Government was not enlisted in its favour. Nothing fosters caste prejudice like magisterial countenance.

110. The essential elements of the offence under s. 188, I. P. C.—In order to establish disobedience to an order, it is essential to prove the existence of the order, and this fact can neither be assumed nor inferred. If

legal evidence of it is wanting, the charge must fail. 18 W. R. (Cr.) 30. Where an order in writing is required by law, the written order must be produced and proved. 17 W. R. (Cr.) 52. The public servant must be lawfully empowered to promulgate the order. 5 B. H. C. R. (Cr. Ca.) 21; 3 B. H. C. R. (Cr. Ca.) 53; Ratanlal 50 & 81, 1904 A. W. N. 233=1 Cr. L. J. 916; 1 A. L. J. 615 =1 Cr. L. J. 987; 3 B. L. R. (A. Cr.) 45; 8 C. L. R. 231; 3 A 201; 23 W. R. (Cr.) 57; 1901 P. L. R. 12; 10 C. L. R. 146. In 1910 M. W. N. 616=11 Cr. L. J. 621=8 Ind. Ca. 302, the question arose whether damming up an *Odoi* contrary to the directions issued by a P. W. D. overseer was punishable under s. 188 and was decided in the negative as the overseer had no power to make acts unlawful which were lawful before the promulgation of his order. In 35 A. 136=11 A. L. J. 92=14 Cr. L. J. 122=18 Ind. Ca. 682, certain *pandas* begging alms from passengers in a railway carriage were convicted under s. 188 for violation of an order forbidding persons to enter the Railway station at *Bindhachal* except for *bona fide* purposes of travelling, and the conviction had to be quashed as the order was an illegal order the public having a right to go to the Railway station for many purposes other than travelling. Further, the order must be such as the accused ought to have felt himself bound to obey.

"The order ought to contain a clear statement of the facts, which the magistrate, in the exercise of his judicial discretion, considers to constitute the material facts of the case, and upon the footing of which he has made the order. It is only fair to the party against whom the order is passed, that he should be made to know distinctly the grounds upon which the magistrate has acted, in order that he may be better guided to a conclusion as to whether the order is one which he is bound to obey, or whether he can safely resist it either under the Penal Procedure, which is laid down by s. 188, I. P. C., or by showing cause under the provisions of s. 135, Cr. P. C. But whether an order would be bad or not, when it did not contain a statement of the material facts in the way I have indicated, I still think that at least the record which is sent up to this court, when the validity of the magistrate's order is put in question, should disclose all the facts upon which the magistrate acted, and upon which he relied for the justification of his order . . . I think we ought not

to maintain orders of this kind in force, unless we see that the facts of the case as exhibited in the record justify them in law." *Per* Phear, J., 1 B.L.R. (A. Cr.) 23 = 10 W.R. (Cr.) 53; see 19 W.R. (Cr.) 10; 6 C. 835; 7 C. 46; 27 C. 981; 25 A. 537, *Weir* I. 139; 12 W. R. (Cr.) 49; 4 C. W. N. 226, *followed* in 1 Cr. L. J. 778.

Further, the order must show on its face that it applies to the accused, either as an individual or as a member of the class to which it is addressed 7 C. L. R. 291; 3 B. L. R. (A. Cr.) 13; 12 C. L. R. 231; Ratanlal 30, 342 & 527; 1905 P. R. No. 36. It is not enough to show that a general proclamation was made in the town by beat of tom-tom. It must further be shown that the accused knew of it. There can be no offence if the accused did not knowingly contravene any particular order. 9 Cr. L. J. 550. Sub-section (3) of sec 144, Cr. P. C., enables a prohibitory order under that section to be issued either to a particular individual or to the public generally. Hence a general order if known to the accused will bind him though he was not a party to the proceedings; see 4 C. 650; 13 C. 175; 16 C. 9. In a case where one *Gobinda Chander Sahu* had established a new *hāt* on his land in the neighbourhood of an old one, from which public disturbance was apprehended, the magistrate issued an order which, after reciting the facts, ended as follows: "It is hereby ordered that the said *Gobinda Chander Sahu* and all other persons abstain from holding such *hāt*, or any *hāt* whatever, near or within the *hāt* at *Krishnagange* on any Tuesday or Saturday." The accused was a trader who came to a *hāt* which was held in violation of the order to sell his wares. He was convicted under s. 188. The Court held that the conviction was bad. They said of the order, "It is almost impossible to read the words as including the conduct of people who do not hold the *hāt* as owners and managers, but who frequent it as buyers or sellers. But if we are wrong in this interpretation of the words, at any rate it is clear that the order, looking at it in the most favourable light for the prosecution, is ambiguous, and does not clearly and unmistakably prohibit traders from buying and selling

legal evidence of it is wanting, the charge must fail. 18 W. R. (Cr.) 30. Where an order in writing is required by law, the written order must be produced and proved 17 W. R. (Cr.) 52. The public servant must be lawfully empowered to promulgate the order. 5 B. H. C. R. (Cr. Ca.) 21; 3 B. H. C. R. (Cr. Ca.) 53; Ratanlal 50 & 81, 1904 A. W. N. 233=1 Cr. L. J. 916; 1 A. L. J. 615 =1 Cr. L. J. 987; 3 B. L. R. (A. Cr.) 45; 8 C. L. R. 231; 3 A 201; 23 W. R. (Cr.) 57; 1901 P. L. R. 12; 10 C. L. R. 146. In 1910 M. W. N. 616=11 Cr. L. J. 621=8 Ind. Ca. 302, the question arose whether damming up an *Odai* contrary to the directions issued by a P. W. D. overseer was punishable under s. 188 and was decided in the negative as the overseer had no power to make acts unlawful which were lawful before the promulgation of his order. In 35 A. 136=11 A. L. J. 92=14 Cr. L. J. 122=18 Ind. Ca. 682, certain *pandas* begging alms from passengers in a railway carriage were convicted under s. 188 for violation of an order forbidding persons to enter the Railway station at *Bindhachal* except for *bona fide* purposes of travelling, and the conviction had to be quashed as the order was an illegal order the public having a right to go to the Railway station for many purposes other than travelling. Further, the order must be such as the accused ought to have felt himself bound to obey.

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at the *hât*." 16 C. 9. Lastly, it must be established that the order came to the knowledge of the accused before he did the act complained of. 3 B. L. R. Appx. 149; 1 Bom. L. R. 524; 15 W. R. (Cr.) 50. In case of orders made under ss. 133 or 144, Cr. P. C., a particular mode of service or proclamation is provided by s. 134. A conviction under s. 188 was, however, held to be valid, although the directions of s. 134, Cr. P. C., had not been observed. Wilson, J., said :

"I think we may fairly say that the terms of s. 134 and the notification in the Gazette are directory, and ought to be followed, and that it is an irregularity when they are not; but it does not follow that the order is a nullity in consequence, and I think that when the order has been duly made and promulgated, although not strictly in accordance with the terms of the law, and has been brought to the actual knowledge of the person sought to be affected by it, that is sufficient to bring the case under s. 188 of the Indian Penal Code." 16 C. 9 at 12; see 1903 P.R. (Cr.) 36=2 Cr. L.J. 719; 5 W. R. (Cr.) 4; 25 A. 337.

Disobedience to a lawful order is not an offence under s. 188, unless such disobedience causes, or tends to cause, some of the specific consequences stated in that section 1 Bom. L. R. 524; 4 C. W. N. 226; 15 W. R. (Cr.) 22; 3 L. B. R. 214=4 Cr. L. J. 479. Disobedience of an order under s. 144, Cr. P. C., is not punishable unless the evidence shows that the disobedience was likely to lead to a breach of the peace. 31 C. 993=8 C. W. N. 781; 32 C. 793=2 Cr. L. J. 760. But if the act of disobedience has tended to cause annoyance, that would bring a case under this section provided the other elements are made out, 10 Bom. L. R. 1047=8 Cr. L. J. 431=4 M.L.T. 363; 10 E. H. C. R. 424. Sec. 18; applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party. The proper remedy for disobedience is an injunction of the court is committal for contempt of court. 6 C. 445; Ratanlal 864; 8 Bom. L.R. 638 & 639n, *contra* 5 B.H.C.R. (Cr. Ca.) 46. See 2 W. R. (Cr.) 32; 14 C.P.L. R. 174; 15 K.L.R. 302=3 Cr. L.J. 151; 7 C.L.R. 350; U.E.R. (1907-1909) I.P.C. 23=11 Cr.L.J. 56=4 Ind. Ca. 824. The omission from O.X. r. 21 of the C.P.C. of 1905

of all reference to s. 188, thus differing from s. 136 of the 1882 Code would indicate that disobedience of an order for the production or inspection of documents can be punished only in the manner prescribed by that rule but not under s. 188, I P. C. ; 1910 P. R. Cr. 15=1910 P. W. R. Cr. 15=11 Cr. L. J. 386=6 Ind. Ca. 623 ; 1930 P. R. 2=1930 P. L. R. 24. When the accused was merely given the custody of a girl, the right to arrange for her marriage being given to another, it was held in 1878 P. R. (Cr.) 3, that he could not be convicted under s. 188 for giving away the girl in marriage. Similarly, convictions under s. 188 were set aside in 4 M. H. C. R. Appx. vi., where the accused disobeyed an order issued by a Collector, forbidding him to cultivate land in the bed of a tank, because there was nothing to indicate the disobedience caused or tended to cause *obstruction, annoyance or injury or risk of obstruction*, etc., as essentially required by the latter part of the section. See also *Weir* l. 138 & 139. In 1886 A. W. N. 251, a magistrate directed an inn-keeper to repair the gates and walls of the inn so that the property of guests may be safe. *Held*, conviction for disobedience was unsustainable as the obstruction, annoyance or injury contemplated by the section is not what the court had found, *viz.*, thefts of the property of travellers being facilitated by the gates and walls of the inn continuing in a dilapidated condition. The injurious consequences are confined to those that might ordinarily result on account of any act or omission of the accused. The law does not contemplate that a gate or wall is necessary to restrain persons from committing theft. But where shouting against drink near liquor shops being prohibited, a person shouted from a private verandah adjoining a public road using language to the effect "if you drink, you will be drinking the blood of your children," his disobedience was held to constitute an *offence under s. 188 without any proof as to the consequence of such disobedience* ; 10 Bom. L. R. 1047=4 M. L. T. 363=8 Cr. L. J. 431=1882 A. W. N. 232. Where a magistrate issued an order directing persons in possession of arms to take out licences under s. 26 of

Act XXXI. of 1860, a conviction under s. 188 for being found in possession of arms without a licence was quashed. What the defendants were carrying arms for was the lawful purpose of destroying game, and there was not the slightest indication to show that, in so doing, they would cause, or were in the least likely to cause, injury or annoyance to any person. 3 B. L. R. Appx. 149. Where, however, the statutory consequences have followed, or might have followed, from the disobedience, it is no answer that the defendant neither intended nor contemplated them (s. 188, Explanation). The offence consists in disobedience. The element of intention is immaterial.

Where increased punishment is inflicted under the last clause of s. 188, the finding must state facts to show that the case contains elements of aggravation which would warrant the punishment. 3 B.H.C.R. (Cr. Ca.) 32.

CHAPTER VII.

OFFENCES AGAINST PUBLIC JUSTICE.

I FALSE EVIDENCE.

111. False Evidence.—In order to constitute the offence of giving false evidence, it is necessary (1) that the statement should have been made under circumstances which raise it from a mere assertion or a promise, into what can be described as evidence. Under the Code, differing in this respect from English Law, the offence of perjury may be committed even in the course of proceedings which are not judicial. Only the punishment prescribed would vary according as the offence is committed in the course of a judicial proceeding or otherwise. See per *Jenkins, C. J.*, 28 B. 479=6 Bom. L. R. 324 at 326=1 Cr. L. J. 305; (2) that it should be false; and (3) that its falsity should be known to the person making it

No promise or undertaking, however formal, or however important it may be as evidence, in the ordinary acceptation of the word, comes within the meaning of the term as used in s. 191. It must be a statement made in reference to some matter as to which the defendant is legally bound on oath, or by some express provision of law to state the truth, 14 W. R. (Cr.) 24, 27 C. 455; or it must be a declaration which he is bound by law to make (s. 191); or it must be contained in a legal certificate (s. 197), or in a declaration which is by law receivable as evidence (s. 199). Since the Law has expressly prohibited an oath being administered to an accused person [s. 342 (4), Cr. P. C., and s. 5 of the Indian Oaths Act X of 1873] under any circumstances, an accused person can never be made liable under s. 193, I P. C., for anything that he might say at any stage, before the original or appellate or revisional tribunal 1906 A. W. N. 191=4 Cr. L. J. 66. But there are several proceedings held by Criminal Courts the parties to which cannot

be called accused persons, *e.g.*, proceedings under s. 133 or s. 483, Cr. P. C. A false statement made by a party in proceedings of this description will render him liable under s. 193, 1 P. C., 9 C. W. N. 983=2 C. L. J. 149=2 Cr. L. J. 575.

112. *Perjury*.—The first head includes all testimony given by a witness in court. As to this, the only questions that can arise are, whether the testimony was given on oath, and whether the witness was legally bound by the oath. An oath is defined by the Code (s. 51; see also *Indian Oaths Act* X. of 1873, s. 15) as including "a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant, or to be used for the purpose of proof, whether in a court of justice or not." By Act X. of 1873, it is provided—

That where the witness is a Hindu or Mohammedan, or has an objection to taking an oath, he shall, instead of making an oath, make an affirmation. In every other case he shall make an oath (s. 6) "No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth." (s. 13). "Every person giving evidence on any subject before any person hereby authorized to administer oaths and affirmations, shall be bound to state the truth on such subject." (s. 14.)

By the *Indian Evidence Act*, s. 114, cl. (e), the Court may presume that judicial and official acts have been regularly performed. The result of these provisions is, that the legal obligation to tell the truth attaches to a witness, by the mere fact that he gives testimony as such in a Court where he could legally be put on oath, whether in fact he has been sworn or not, and whether the oath has been administered in a binding form or not. Accordingly, in 19 C. 355 where the defendant was charged under s. 193, and no evidence was forthcoming that he had been actually affirmed before giving evidence, the

Court, independently of the presumption that he had been affirmed, said: "It seems clear that the offence of giving false evidence may be committed, although the person giving evidence has been neither sworn nor affirmed" 2 W. R. (Cr. Let.) 9; 16 M. 105 & 421, 2 L. B. R. 272. The ruling in 4 M. H. C. R. 185 that a Native Christian cannot be convicted unless he has been examined under the sanction of an oath on the Holy Gospel is no longer law. The ruling in 19 C. 355 has been applied to cases where the omission to administer an oath or affirmation was intentional and not merely accidental. For instance, the evidence of a child has been held admissible where the judge considered that, although it was incapable of understanding the nature of an oath or solemn affirmation, it was capable of understanding the questions put, and returning rational answers to them, and therefore recorded and acted on its statement, without oath or affirmation. See *Evi. Act*, s 118, 14 B. L. R. 295n=22 W. R. (Cr.) 1; 14 B. L. R. 54=22 W. R. (Cr.) 14; 14 B. L. R. 294=23 W. R. (Cr.) 12; *folld. in* 16 B. 359; 23 A. 90; 27 C. 423 at 440; *contra per* Mahmood, J., 10 A. 207, which decision was approved in 11 A. 183, to the extent of holding that a judge who considers a witness competent to depose has no option but to administer to him either an oath or affirmation. The point was again raised in 18 C. W. N. 147, but Mookerjee, J., in view of conflict of authority on the subject refrained from making any definite pronouncement, holding that the case could be decided on other grounds. Beachcroft, J., in the same case is of opinion that the question whether a witness understands the nature and obligations of an oath or affirmation is foreign to the question of competency to testify, intellectual capacity being the only test, and under the Oaths Act, the judge was bound to affirm the witnesses, however tender their age.

It has also been held a hearsay statement when recorded by a magistrate cannot be made the subject of a prosecution for perjury, 7 A. L. J. 618. In all such cases, of course, it is assumed that the statements made

are offered as evidence by the person who makes them, and are accepted as such by the tribunal which records them. For instance, if a judge, wishing to inform his mind upon any point, were to call upon someone who was present in court, and to put questions to him, without oath or affirmation, it would be fairly open to such a person, if he were indicted under s. 193, to say that he never considered that he was a witness at all, or that his answers were to be treated as evidence in the cause. Supposing this to be made out that it would be a sufficient defence. In short, under s. 13 of Act X. of 1873, the administering or omission to administer an oath or affirmation may be very material as showing that certain answers were or were not treated as evidence, but would be immaterial as rendering what really was intended to be evidence inadmissible, or as diminishing the responsibility of the person who gave it. On this and several other points the statutory law in this country differs materially from the common law in England and the points of divergence should be well borne in mind before English cases are resorted to to elucidate the language of the Indian code.

113. There is no perjury where the court or authority is not competent to record statement on Oath.—A witness must not only be bound, but he must be legally bound by an oath; that is, he must have made his statement before an authority legally competent to record a statement on oath. Hawkins says:

"It seemeth clear that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority for their doing so, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force but are altogether idle" I. P. C. 431.

Accordingly, where an appeal was made under s. 72 of the Registration Act III. of 1877 against the refusal of

the sub-registrar to register a document, and the registrar directed the deputy magistrate to make an inquiry into the case, and the accused made a statement before him on oath which was alleged to be false, it was held in 20 C. 719 & 24 C. 755 that the deputy magistrate had no jurisdiction to make the inquiry, and that no conviction could be supported, either under s 82 of the Registration Act, or under s 193 of the I P C.

Other instances of unauthorized inquiries, in which oaths were administered without jurisdiction, and held insufficient to support convictions for false evidence, will be found in 11 B. H. C. R. 11; 6 A. 103; 14 C. 653; 23 M. 223; 27 C. 455; 20 C. 724; 5 A. 17; 1899 A. W. N. 87; Ratanlal 25; 1864 W. R. 15; 1894 P. R. No. 15; 5 M. H. C. R. 326; 12 B. H. C. R. 1; 1870 P. R. No. 24 & 11; 1879 P. R. No. 32; Weir I. 151; 1 B. 610 at 617; 5 Sind L. R. 102. Nor is a person punishable for making a false statement on oath, where the court had power to make an inquiry, but had no power to put the person upon oath. 6 M. 252; 12 M. 451; 19 A. 200; 28 A. 331. As, for instance, where a pardon was illegally tendered to an offender, who was then examined upon oath 10 B. 190. Where a judge, without any authority, altered the title of a cause, so as to change it into another cause, which had never been legally instituted, and after such change the prisoner was sworn and gave false evidence, it was held in *R v Pearce*, 32 L. J. (M. C.) 75=3 B. & S. 531=9 Cox 258, that the conviction was bad. Cockburn, C J., said "I think that the alleged perjury was committed on the hearing of a cause which had no existence, and in which the judge had no jurisdiction." An oath taken in the trial of a cause which the court had no jurisdiction to hear—as, for instance, in a Small Cause Court, for the possession of land—is not criminally punishable. *Burton v Gouch*, 3 Salk, 269. The test of jurisdiction is whether or not the court had power to enter upon the inquiry, *R v Bolton*, 1 Q. B. 66; 11 B. 702 (F. B.), followed in 14 Bom. L. R. 753=13 Cr. L. J. 709=16 Ind. Ca. 517; 4 C. W. N. 351; 32 A. 30=6 A. L. J. 963=10 Cr. L. J. 424=3 Ind. Ca. 952; 1890 A. W. N. 100. Where

a suit had been dismissed *ex parte* against a defendant but all the same the defendant applied under O. IX. r. 13, C. P. C., and obtained a rule for re-hearing, false evidence given at such re-hearing was held not to amount to perjury as O. IX r. 13, C. P. C., empowered the Munsiff to set aside only *ex parte* decrees against a defendant and not *ex parte* decrees dismissing plaintiff's suit, 8 A. L. J. 674=12 Cr. L. J. 373=11 Ind. Ca. 141. See also 8 Bom. L. R. 587=4 Cr. L. J. 165; 1899 A. W. N. 87. It must, however, be remembered that, where jurisdiction depends upon the existence of certain facts, such as value, or situation of property, that a ship is of a particular class, or that a man is of a particular nation, and where the charge, on its face, brings itself within the jurisdiction, the court is bound to commence the inquiry, and in doing so acts within its jurisdiction. If it comes to the conclusion that the facts necessary to give it jurisdiction do not exist, it will dismiss the suit or the charge, but the proceedings will not be null and void *ab initio*. If it comes to a wrong conclusion, its decision, if appealable, may be set aside, and the Appellate Court will pronounce the decision which it ought to have pronounced. If a court has jurisdiction to commence a case, it has jurisdiction to go wrong in it. Thus Lord Denman, C.J., said in *R v. Bolton*, 1 Q. B. 66, pp. 73, 74. "The question of jurisdiction does not depend on the truth or falsehood of the charge (or allegations in the plaint), but upon its nature; it is determinable at the commencement, not at the conclusion of the inquiry." So in 19 M. 375 evidence falsely given on a trial which proved abortive, and had to be recommenced, because one of the jury turned out to be incompetent, was held still punishable. See 10 C. 634; 14 A. 25. Nor is it any objection to the jurisdiction of a criminal court that the warrant has been illegally issued. In *R v. Hughes*, 4 Q. B. D. 614, p. 622, it was argued that a witness could not be convicted of perjury. Lopes, J., said

"Whether S was summoned, brought by warrant, came voluntarily, was brought by force, or under an illegal warrant, was immaterial. Being before the justices, however brought there,

the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge, and being so competent, a false oath wilfully taken would be perjury."

114. The Evidence must be false.—The statement must, as a matter of fact, be false, 27 C. 820=2 Cr. L. J. 227; 10 C. W. N. 1099. It is not sufficient to show that the probabilities are that the statement was false, *Weir* l. 165; what the witness or declarant says about it, as facts observed by him, must be false. For instance, nothing is more common than to produce half-a-dozen witnesses to prove that a particular document was signed, or a particular payment was made, in their presence. Very often the document was really signed, or the payment was really made, but they were not there, and knew nothing about it. This is false evidence in spite of the fact the document is genuine or payment was made because what the witness states is that he saw the executant sign or the payment being made, which statements are untrue. 2 W. R. (Cr.) 47; *Mawbey*, 6 T. R. 619 at 637; 11 W. R. (Cr.) 25; 6 M. H. C. R. 342. When a judgment-creditor presented an application for execution, which by O. XXI r. 11 C. P. C. he was bound to verify, and in which he alleged as due to him the whole amount of the judgment debt, without stating, as he was bound to do, the terms of an adjustment made with the judgment-debtor, and a payment received under that adjustment, it was held that he had given false evidence in a stage of a judicial proceeding, and was punishable under s. 193. 10 B. 288 at 298; 2 M. 216; 14 Cr. L. J. 456=20 Ind. Ca. 616=7 Sind. L. R. 25.

Another point that is often raised is whether the evidence should be material to the adjudication of the matter under enquiry. *Macpherson, J.*, in 16 W. R. (Cr.) 37, said the words of s. 191 are very general and do not contain any limitation that the statement made shall have any bearing upon the matter in issue. It is sufficient to bring a case within the section if the false evidence is intentionally given with the intention of deceiving the court and of leading it to be supposed that that which he

states is true. If the statement is absolutely irrelevant it is difficult to imagine the accused intended to mislead the court on a point to which no judicial attention would ever be paid. But if the evidence is proved to be false

W. P. H. C. R. 133, 11 C. W. N. 911=6 Cr. L. J. 397=6 B. & M. L. R. 379; 2 C. L. J. 101=2 Cr. L. J. 455; 13 W. R. (Cr.) 56; 13 C. W. N. 422=9 Cr. L. J. 282=1 Ind. Cas. 287; 10 Cr. L. J. 7=2 Ind. Cas. 431.

115. Guilty Knowledge.—The statement must not only be false, but in addition to this essential prerequisite, it must be false to the knowledge of the person making it 9 W. R. (Cr.) 54. That is, he must either know or believe it to be false, or he must not believe it to be true. As regards the material facts of the case, there can generally be little doubt that if the evidence is false, the witness must have known it to be so. The gist of the offence under s. 133 is the giving or fabrication of false evidence is intentional, 11 C. W. N. 911=6 Cr. L. J. 162; 13 C. W. N. 422=9 Cr. L. J. 282=1 Ind. Cas. 287. Where knowledge of falsity is proved, intention is readily presumed. 3 N.-W. P. H. C. R. 133; 26 A. 5(9 at 511; 2 W. R. (Cr.) 63 but where a man makes contradictory statements and he is tried on an alternative charge this would no doubt relieve the prosecution from the duty of proving the particular statement was false and false to the knowledge of the deponent. But the intention required by s. 193 has to be established from surrounding circumstances. No man can be convicted merely because he has made contradictory statements. It must further be proved that the contradiction is not the result of either mistake or confusion but was intentional, 3 C. W. N. 81. A man who deposes to the fact of an adoption or marriage which never took place, must intend to tell a lie. On the other, where a man swears that he saw A B commit a burglary, he may be deliberately imputing to A B a crime which was, to his knowledge, committed by X or an unknown person.

or he may have honestly mistaken A B for the criminal. Again, there are subjects on which a statement can only amount to an expression of opinion. A man who swears that a horse was sound when it was sold, that a man was not suffering from consumption when he effected a life insurance, that a testator was capable of making a will at the time of its execution, is expressing a belief founded on a variety of circumstances present to his mind at the time he formed the belief. The circumstances may still be present to his mind, or they may have vanished, leaving merely the strong recollection that they had led him to a state of belief, which he has no doubt was well founded at the time. Provided he states his belief honestly, his evidence is true, although he cannot state the grounds for it, or although his reasons were erroneous, or his conclusion unsound (s. 191, Explanation 2) **14 K.L.R. 15=1 Cr. L. J. 486.** Where a statement involves a mixed question of law and fact, a man who is honestly mistaken in the law, and answers accordingly, is not criminally liable, on the principle that ignorance of law is no excuse. For instance, a man who honestly states that there is no legal impediment to a proposed marriage, has not given false evidence because he is about to marry his deceased wife's sister, and such a marriage is forbidden by law, if he is not aware that it is forbidden **16 A. 212.**

A very common instance of evidence which is false, merely because it is not believed to be true, arises from the inveterate habit among Indian witnesses of always answering with the greatest minuteness to details, which they probably never observed, and would certainly have forgotten. Statements of this sort are constantly made by witnesses, whose evidence in the main is truthful, to show the accuracy of their memory, or to strengthen the belief that they are talking of things which they really saw. It is a common mistake to disbelieve an Indian witness because he embellishes his facts with a fringe of fiction. A European witness who did the same would probably be absolutely unworthy of credit. It is an equally common mistake to attribute weight to discrepancies

in testimony. They generally amount to little more than this, that witnesses who agree in what they really saw, vary in what it occurs to them to invent under the pressure of cross-examination.

Though an accused person is under no obligation in defending himself to speak the truth so as to be liable under s. 193 if he made false statements (28 A. 705, 19 A. 200, 1906 A. W. N. 42,) yet if he instigates a witness to suppress certain facts he would be guilty of abetment of perjury, 2 M. H. C. R. 438, see also 8 W. R. (Cr.) 5, 20 W. R. (Cr.) 41 & Ratanlal 632. Again a witness may very often find himself in the position where if he spoke the truth, he would be incriminating himself while if he tried to exculpate himself he would be guilty of perjury. See s. 132, Ind. Ev. Act. 3 M. H. C. R. Appx. XXIX. In 2 C. L. R. 181, a person found guilty of perjury (under these circumstances) was held entitled to only light punishment, see 3 C. W. N. 35, where the prosecution of a boy of eleven for perjury was held inexpedient, see 7 W. R. (Cr.) 37 as to quantum of punishment in different cases. Similarly some allowance ought to be made to a witness seeking to evade some matter relating to his past history, 2 A. L. J. 836; 1905 P. R. (Cr.) 8=2 Cr. L. J. 45.

116. Contradictory Depositions—The necessity of proving that any particular statement which was charged as being false evidence, was false and false to the knowledge of the party making it, raised a considerable difficulty, where a defendant had made two statements so contradictory that one or other of them must be false. It might be difficult or impossible to prove which of the two was false; and if the prosecution selected one of the two as being false, the tribunal which tried the case might think it was true, and acquit the prisoner. In Madras Reg. III. of 1826 authorized the prosecution to prove the two contradictory statements, which was sufficient to secure a conviction, if the judge was of opinion that in one or other of them the defendant must have been telling a wilful untruth. A similar practice,

founded apparently upon a *futuah* delivered in 1831, sprang up in Bengal (*Per Duthoit, J.*, 7 A. 44, p. 52). The original draft of the Penal Code contained nothing bearing upon the subject, but the Indian Law Commissioners, in their second Report of 1847 (s. 154, p. 387) expressed a strong opinion that the mere fact that a person had in any stage of a judicial proceeding given a statement on oath which directly and positively contradicted another statement similarly given, should render him liable to punishment. The Penal Code and the Crim. P. C. of 1861, which came into force on the same day, contained provisions which were apparently intended to carry out this view. (Penal Code, s. 72, Crim P. C. Act XXV of 1861, ss. 242, 381, 382.) At first it was assumed that, even in the case of contradictory statements, it was necessary to prove which was false, and many conflicting decisions were recorded, even after a contrary ruling had been given. Finally, it was agreed by all the High Courts, that where the two statements were so irreconcilable, that one or other must necessarily be false, it was unnecessary to offer any evidence to negative either assertion. This was so decided upon the Crim. P. C. of 1861 by a Full Bench of the Calcutta High Court, in 6 W. R. (Cr.) 65=B. L. R. Sup. Vol. 521, and by the Madras High Court in 4 M. H. C. R. 51; upon the Crim. P. C. of 1872 by a Full Bench of the Calcutta High Court, in 13 B. L. R. 324=21 W. R. (Cr.) 72; upon the Crim. P. C. of 1882 by the High Court of Allahabad, 7 A. 44, and by the Bombay High Court, 10 B. 124. The reason is thus stated in 6 M. H. C. R. 342, that the law makes no distinction between the testimony of a person directly falsifying the alleged false statement and the contradictory statement of the accused himself, such a contradictory statement being an admission inconsistent with his innocence. See also 1883 P. R. No. 20, 1888 P. R. No. 32, 1904 P. L. R. 261, 1893 P. R. No. 27, 1899 P. R. No. 3, 1903 P. R. No. 21; 8 M. L. T. 86=1910 M. W. N. 397. But where the prosecution undertakes to prove a particular statement to be false and a charge is drawn upon those terms, a conviction cannot be had by merely putting in a contradictory statement made by the

accused some time previously, 5 Sind. L. R. 136=13 Cr. L. J. 28=13 Ind. Ca. 220, because the accused himself is not a witness, his previous statement is only secondary evidence and secondary evidence of a person suspected to be a liar. 4 B. L. R. (A. C.) 4=12 W. R. (Cr.) 66. But where a contradictory charge is properly framed, the prosecution avoids the responsibility of having to prove either statement to be untrue.

It is hardly necessary to remark, that the mere circumstance that the same man, at different times, made contradictory statements upon the same point, is by no means conclusive proof of guilt. Either statement may have been made under the influence of forgetfulness, or misapprehension: or he may, when he made the second statement, have discovered the falsity of what he had believed to be true when he made the first statement. Still less would it be safe to convict, when each statement merely conveys an expression of opinion: for instance, as to the identification of property, or the similarity of handwriting. The law does not punish a man because he has changed his opinion. Consistency is not necessarily a virtue, 3 C. W. N. 35. The statements must relate to matters so necessarily within the knowledge of the party on both occasions, that one or other statement must have been known to be false when it was made. For instance, if a man were at one time to swear that he had been beaten and robbed, and at another time were to swear he had neither been beaten nor robbed, either assertion may be true, but he must have known one or other to be untrue. In charges founded upon supposed contradictory statements, every presumption in favour of the possible reconciliation of the statements must be made. 13 E. L. R. 325n.; 4 B. L. R. (A. Cr.) 9 at 12=12 W. R. (Cr.) 69; 7 A. 44; 10 C. 435 & 937; 10 B. 124. See as to contradictory statements in the same deposition; 26 M. 55. The Madras High Court in *Weir* l. 164 laid down that convictions should not be had by reason of the mere fact there was a contradiction. This would however be a matter for the consideration of the court in granting sanction under

s. 195, Cr. P. C. Every facility ought to be afforded for genuine repentance 1864 W. R. (Cr.) 10; 1901 P. R. No. 21; 1899 P. R. No. 3; 12 Cr. L. J. 405=11 Ind. Ca. 589; 1911 P. W. R. 34=1911 P. L. R. 230; 16 O. C. 81; 14 Cr. L. J. 280=19 Ind. Cas. 712, *contra*, 13 Cr. L. J. 752=17 Ind. Ca. 64. Nothing is more dangerous to the administration of justice than that a man should be allowed to adhere to a lie uttered under pressure to which witnesses are often subjected from various quarters. The practice of dispensing with evidence in the trial of alternative charges based on contradictory statements was condemned by the Madras High Court in *Weir* I. 165. To estimate the gravity of the offence, the court should have some evidence as to what bearing the alleged contradictory statement had upon the case under enquiry. As observed by Scotland, C.J., in 1 M. H. C. R. 38, this will have great weight in deciding whether the contradiction was intentional or due only to inadvertence, indifference or carelessness on the part of the accused. See 14 C. W. N. 767; 28 B. 533=6 Bom. L. R. 379=1 Cr. L. J. 390; 12 W. R. (Cr.) 11; 16 W. R. (Cr.) 37; 19 W. R. (Cr.) 69; *Ratanlal* 502; 5 P. L. R. 261=1 Cr. L. J. 517, 5 Sind. L. R. 129=13 Cr. L. J. 23=13 Ind. Ca. 215, 4 Bur. L. T. 262=13 Cr. L. J. 56=13 Ind. Ca. 392. A witness should be given every opportunity of explaining an apparently contradictory statement, 1906 P. W. R. (Cr.) 35=7 Cr. L. J. 460; 11 Cr. L. J. 353=6 Ind. Ca. 409; 1911 P. W. R. (Cr.) 14, 1911 P. L. R. 72=12 Cr. L. J. 265=10 Ind. Ca. 840. An affidavit filed by a witness with a view to get his evidence as recorded corrected cannot be made the basis of a prosecution for having made contradictory statements, 17 K. L. R. 229=7 Cr. L. J. 65.

It will be observed that the form of charge given for such cases, (C. P. C. Sch. v, Form XVIII (a), 4) though it comes under the list of charges with two or more heads, differs from all the other forms in the same list in this respect. they charge the same transaction as possibly constituting one or other of different offences. It charges two transactions, either of which may be

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innocent, as establishing that by means of one or other of them, it is immaterial which, he has committed the single offence charged. As stated by Morris, J., in 13 B. L. R., at p. 335=21 W. R. (Cr.) 72, at p. 75. "The course allowed by the law was adopted of framing a charge containing two contradictory statements of such a nature that the two, when taken in combination, disclosed the specific offence of intentionally giving false evidence." Accordingly, it has been held in Bombay that each of the statements relied on must be sufficient to constitute the offence charged. A charge alleged a false statement made to a public officer, and a contradictory statement on oath made to a magistrate, and alleged that by virtue of such statements he had committed an offence punishable under s. 182 or s. 193. It was held that if it was intended to charge two offences in the alternative, the charge was bad as not being framed in accordance with s. 233 of the Crim. P. C. But if the charge was to be taken as framed under Sch. v., xxviii. (ii.), 4, then there could be no conviction, as a false statement under s. 182 could not constitute an offence under s. 193, or vice versa. Wedderburn, J., said: "He cannot successfully be charged under s. 193 of the Indian Penal Code, because he only gave one deposition in which there are no discrepancies; and, similarly, he cannot be charged under s. 182, for he only once gave information to a public servant." 10 B. 124, at 129; 11 B. 702. Nor can separate charges be framed for each offence, for unless there is evidence as to the falsity of either statement, both must fail. 18 B. 377 (F. B.) The question has been raised when a person makes one statement in the course of a judicial proceeding and a contradictory statement in a proceeding not judicial so that the two statements are not under the same part of s. 193, I. P. C., whether a charge in the alternative for having made two contradictory statements could be sustained. The question was answered in the affirmative in 22 A. 115, 5 M. L. T. 355 at 356 & 1908 A. W. N. 73=7 Cr. L. J. 302. See *contra* Ratanlal 401, 18 E. 377 & 28 B. 533 at 560=1 Cr. L. J. 390. The point will be found discussed at length in 15 K. L. R. 148=2 Cr. L. J. 590. See also

1899 A. W. N. 39. It certainly seems to me that this mode of charging two contradictory statements, made at different times, as making out a single offence, does not come within the terms of s. 72, I P. C. It would be impossible under that section to charge two different acts of housebreaking on different nights, and to conclude that by means of one or other of them the accused committed an offence under s. 456. The whole procedure seems to rest on the fact, that the particular form which authorizes such a mode of charge is contained in the schedule to the Crim P. C., and is sanctioned by s. 554.

Where it is intended to support a charge of false evidence, by proving contradictory depositions given before different tribunals, the proper sanction must be obtained for a prosecution on each branch of the alternative **11 B. H. C. R. 34.** And similarly, there must be a sufficient committal to justify an independent trial for each false statement. It was so held with reference to Act XXV of 1861, s. 172. See Crim P. C. 1882, ss. 477, 478; **3 B. L. R. (A. Cr.) 36=12 W. R. (Cr.) 31;** **4 B. L. R. (A. Cr.) 9=12 W. R. (Cr.) 69.**

117. Fabrication of False Evidence.—The offence of fabricating false evidence under s. 192 involves three elements: (1) the causing the existence of any circumstance, or making any false entry, or any document containing a false statement, (2) with the intention that it may appear in evidence in a judicial proceeding, or a proceeding taken by law before a public servant as such, or before an arbitrator, (3) in order to cause any person whose duty it is in such proceeding to form an opinion upon the evidence, to arrive at an erroneous opinion on any point material to the result of such proceeding. Where a person's name to a petition was written by his son but not with any fraudulent intention and the father if he had not authorised did not object to the son having made the signature, it was held in **4 L. B. R. 45=6 Cr. L. J. 283** that the act was not an offence as defined in s. 192. It has to be remembered that s. 192 differs from s. 191 in that the fabrication must be on a paper

material to the proceeding, *Ratanlal* 2, 1903 A. W. N. 68. It is therefore no offence if the fabricated matter is altogether inadmissible in evidence, 5 M. H. C. R. 373, 10 C. L. R. 433, 6 A. 42, 21 A. 159, 5 Sind L. R. 102=12 Cr. L. J. 563=12 Ind. Ca. 651. Also suggesting a false inference would not amount to fabrication. In 1910 P. L. R. 80=11 Cr. L. J. 601=8 Ind. Ca. 243, the original of a mortgage deed contained endorsements of payment which the accused desired to hide. He therefore produced a genuine copy of the original deed without the endorsements so that the officer before whom it is produced might infer no payments had been made. This was held not to amount to fabrication.

A person who put stolen goods in a man's house, with a view to bringing a false charge of theft against him; 3 W. R. (Cr) 59; 4 N. W. P. H. C. R. 133; 1905 A. W. N. 52=2 Cr. L. J. 100 or who altered the position of a Government boundary stone, with a view to proceedings affecting the limits of his land; or who changed the contents of a bag of samples, which was to be produced in a suit on a warranty, *Q v. Verones*, (1891), 1 Q. B., 360, would be causing a circumstance to exist within the meaning of s. 192. The insertion in an account-book, which is admissible evidence under s. 34 of the Evidence Act, that money had been received or paid; or the entry in a revenue record that a particular person was in possession of land, or had paid revenue in respect of it, would be similarly punishable. Anything is a false statement which embodies a fact capable of being used in evidence, 10 C. W. N. 220=3 Cr. L. J. 196. Thus a pleader's clerk who alters the date in the copy of a decree in order to hide his own fault in not having filed the execution petition in time, would be guilty of an offence under s. 193. *Weir* 1. 551; under s. 29 anything is a document upon which such matter is capable of being visibly expressed. A claimant in a pedigree case, who substituted for a genuine tombstone a false one, which contained an untrue statement as to a marriage, a birth, the date of a death or the like, would also be making a document containing a false statement. Where a person

at the instigation of the defendant applied to a stamp vendor for a stamp, giving his name as Chatter Singh, and thereby procured the usual endorsement to be made on the stamp, showing a sale to Chatter Singh, in order to use it in subsequent proceedings against him, it was held in 2 A. 105 that the defendant had thereby fabricated false evidence. 25 A. 75; 4 N. W. P. H. C. R. 46. The fact that the judicial proceeding has not yet been commenced is perfectly immaterial. A mere fabrication is punishable under s. 192 and the use of the fabricated article under s. 196. A person who tries to foist stolen property on an innocent person may be made liable both under s. 192 and s. 414, I. P. C., 1 A. 379. Similarly a false return of service of summons, 8 W. R. (Cr.) 27; 2 M. H. C. R. 43 and a false return to a warrant of sale, Weir I. 155 would be covered by s. 191, so also, signing and verifying a Dalkhast

L. R. 886=1 Cr. L. 197

false balance sheet

offence under s. 418, not under s. 193, I. P. C., 16 A. 88. A clerk who, to cover his own negligence, substitutes spurious papers in the room of genuine ones he has lost, would be within this section 5 A. 553. The section defines fabrication apart from the ideas of injury, dishonesty or fraud as defined in the code, (see also 6 C. 482) and leaves the accused no *locus penitentiæ*. 8 A. 304, 15 A. 173.

The intention must be that the thing so fabricated should be used as evidence, and this intention must have existed at the time of the fabrication. 7 M., at p. 290. It must therefore be something capable of being so used. If an accused person fabricates a document for the purpose of making it appear to be what it is not and causes it to be produced in his defence, he may be guilty of an offence under s. 193. (1890) A. W. N. 96; (1880) P. R. (Cr.) 10. False statements contained in mere applications to a court or public officer, which are not in themselves evidence of the facts they assert, do not come within this section. 9 W. R. (Cr.) 58; 2 B. L. R. (A. Cr.) 1=10 W. R. (Cr.) 31. A police officer suppressed certain reports,

and then made an entry in his diary that he had forwarded them, no doubt with the intention of producing the entry as evidence in his own behalf if any charge was brought against him. It was held that this was not an offence within s. 192, as the entry, though admissible against him, could not have been used for him. **6 A. 42 followed in 21 A. 159.** The entry might have been very much in his favour in the event of a merely departmental inquiry, but this would not come within the section as "a proceeding taken by law before a public servant." It is not, however, by any means clear that the defendant could not have managed to get the Court to look at the entry as corroborative evidence, or as showing the course of proceedings in his office, and, if received, it would have been very material. A witness may be indicted for giving evidence that is false, though, as a matter of law, it ought not to have been admitted. *R. v. Gibbons*, **31 L. J. (M. C.), 98=L. & C., 109.**

Where it is not the intention of the accused to use the fabricated evidence in a judicial proceeding, the nature of which is discussed hereafter (§ 118), or before an arbitrator, it must be intended to be used in a proceeding taken by law before a public servant as such. Thus in **7 C. L. R. 356**, the accused in order to save an estate from forfeiture made a false entry as to receipt of rent in a book maintained in the collector's office, the collector being empowered by law to take proceedings in respect of arrears of rent. Though the false entry was not made with the intention of using it in a judicial proceeding, the act of the accused was held to be within s. 192. But in **17 A. 436**, an *amin* made a false report of his having been obstructed in delivering possession of property under a civil court decree, this was held not to constitute an offence under s. 192. But where the lessee of a forest presented false accounts to a forest office in order to defraud the Government, it was held that he had not committed an offence within the meaning of s. 192. The Court said :

"It does not appear that the forest officer was empowered by law to hold an investigation and take evidence in any matter at-

all. His functions seem to be purely ministerial, and no proceedings, by way of investigation, being provided for and regulated by law, the statement laid before him, though false, would not be false evidence fabricated so as to expose the fabricator to the penalties of s 193." 11 B. H. C. R. 1, at p. 6.

Finally, the object of the fabrication must be to cause any person—whether judge, juryman, or assessor—who had in the proceeding to form an opinion upon the evidence, to entertain an erroneous opinion upon some point material to its result. 1903 A. W. N. 68. Not, be it observed, upon the ultimate result, but upon some point material to the result. For instance, suppose the issue to be decided was, whether the defendant had paid a particular debt, which he had in fact paid, and that, to strengthen his case, he inserted in his books a false entry of the payment. The result would be to induce the judge to come to a perfectly sound view on the issue itself, viz., whether the payment had in fact been made. But he would have been led to an erroneous opinion as to a point material to the result, viz., whether the defendant's books contained such an entry as might naturally be looked for under the circumstances. Where a person who wished to register a document altered its date, so that it might appear to be presented in proper time, this was held to be an offence within the section, as the object was to induce a public servant to act differently from the way in which he ought to act, in a proceeding taken before him by law. 6 C. 482. On the other hand, where a Vakil filed in a civil suit a *Vakalatnamah*, which contained a statement that it was signed in the presence of the *Adighari* of the *Amshom*, and purported to be signed by him, and it appeared that the *Vakalatnamah* was really given by the client, but that the attestation was falsely added by the Vakil, to make the *Vakalatnamah* admissible according to the rules of practice, it was held that a conviction under s 192 could

affect his decision of the case. 5 M. H. C. R. 373; see 21 A. 159, which relates to false entry in a special diary of an investigating police officer not admissible in

evidence. See also 2 C. L. J. 46. The mere fact that the entry might be useful to refresh the memory of the police officer deposing would not make it material evidence or indeed any evidence of any date, fact or statement therein contained. 19 A. 390 (F. B.), 9 C. P. L. R. 5 is an extreme case. There, for the information of the court, a witness misread a document. This was held not to amount to fabrication or causing a circumstance to exist, probably on the ground the document was there for the Magistrate to get it properly read if he so chose. But in 29 A. 351=4 A. L. J. 237=5 Cr. L. J. 265, the brother of an accused desired the court to get the prosecution witnesses to identify the accused and produced ten or twelve men none of whom could the witnesses identify as the accused. When asked by the court where the accused really was, the brother pointed out a man other than the accused as the accused, and this was held to amount to fabrication of false evidence. But where there being disputes between brothers regarding articles in a box, the one who scooped out a hole in the wall and secretly removed some of the articles with a view to make it appear there was a theft was held not guilty of any offence as he had no intention of charging anyone with having committed theft. 10 C. L. R. 187. Unless the intention of the accused is clear that the fabrication was with a view to be used in one of the proceedings contemplated by s. 192, it is not an offence. 1905 A. W. N. 52. Thus, when a *patwari* made entries in his book out of documents he knew to be forged, 1890 P. R. No. 26, and where a *kabuliyat* was made and signed by the lessees with the intention of causing it to be believed that a false recital contained therein that there was a lease by the landowner, 1894 P. R. No. 10, these facts were held not to constitute an offence.

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1. The following facts appeared in a case decided in 1866:—A purchaser of land obtained a registered title in which the property was rightly described as 10 bighas, but its revenue number was wrongly entered as 272 instead of 27. Subsequent to registration, the purchaser altered the number from 10 to 272, and produced so altered as evidence in a suit in which

evidence. See also **2 C. L. J. 46**. The mere fact that the entry might be useful to refresh the memory of the police officer deposing would not make it material evidence or indeed any evidence of any date, fact or statement therein contained. **19 A. 390 (F. B.). 9 C. P. L. R. 5** is an extreme case. There, for the information of the court, a witness misread a document. This was held not to amount to fabrication or causing a circumstance to exist, probably on the ground the document was there for the Magistrate to get it properly read if he so chose. But in **29 A. 351=4 A. L. J. 237=5 Cr. L. J. 285**, the brother of an accused desired the court to get the prosecution witnesses to identify the accused and produced ten or twelve men none of whom could the witnesses identify as the accused. When asked by the court where the accused really was, the brother pointed out a man other than the accused as the accused, and this was held to amount to fabrication of false evidence. But where there being disputes between brothers regarding articles in a box, the one who scooped out a hole in the wall and secretly removed some of the articles with a view to make it appear there was a theft was held not guilty of any offence as he had no intention of charging anyone with having committed theft. **10 C. L. R. 187**. Unless the intention of the accused is clear that the fabrication was with a view to be used in one of the proceedings contemplated by s. 192, it is not an offence. **1905 A. W. N. 52**. Thus, when a *patwari* made entries in his book out of documents he knew to be forged, **1890 P. R. No. 26**, and where a *kabuliyat* was made and signed by the lessees with the intention of causing it to be believed that a false recital contained therein that there was a lease by the landowner, **1894 P. R. No.** const these facts were held not to constitute an offence of a false

the following facts appeared in a case decided in 1866. — A purchaser of land obtained a registered sale in which the property was rightly described boundaries, but its revenue number was wrongly stated as 10 instead of 272. Subsequent to registration, the purchaser altered the number from 10 to 272, and produced so altered as evidence in a suit in which

the plaintiff had sued him for this very land, claiming it as his own under the number 272. The vendee established his defence, but upon the alteration being discovered, he was indicted under ss 171 and 193. The High Court held that the charge could not be sustained under either section, inasmuch as there was no such fraud as was essential to constitute forgery, nor any intention to cause any person to entertain an erroneous opinion touching any point material to the result of a proceeding, which was essential to make out an offence under s. 193 or s. 196, 5 A 217 at 221. It was admitted that the case would have been different if the object of the alteration were to make it appear that the property intended to be conveyed by the sale-deed was other than that which it actually did purport to convey. The Court, however, seems to have been of opinion that, as the property was completely identified by boundaries, the insertion of the number, whether right or wrong, was merely immaterial. On the other hand, it is obvious that considerable doubt would have been thrown upon the title, if the title-deed professed, upon its face, to refer to a different piece of land, and that it was very material to the result of the proceeding to alter the number so as to remove this doubt. Supposing it shown that the number was altered in order to improve the title-deed as evidence in the event of proceedings commenced, or contemplated as likely, it seems with great respect, that a conviction under s. 193 or s. 196 would have been correct. If the alteration was merely made so as to remove what might be a blot upon the title in case of a future mortgage or sale, then, no offence would have been committed. The date at which the alteration was made does not appear in the case.

It is not necessary, in a charge based upon s. 192, to show that any actual use has been made of the evidence so fabricated. The mere fabrication is punishable under s. 193. The use of the fabricated article is punishable under s. 196.

It will be remarked that the same element of materiality, which is essential to the offence defined by

s. 192, is also introduced into the subsequent sections 197—200 where the offence is committed out of court. But for anything done *in facie curiæ* materiality of the false statement is not made the gist of the offence. Thus the offence of giving false evidence, as defined by s. 191, is made to consist in giving *any* false statement, and nothing is said as to its being a statement material to the point. The omission is evidently intentional, since in the original draft (s. 188) the words "touching any point material to the result" were introduced. And so it has been ruled, that the materiality of the subject-matter of the statement is not a substantial part of the offence of giving false evidence under ss. 191 and 199. 1 M. H. C. R. 38; Ratanlal 2; 6 W. R. (Cr.) 84; 19 W. R. (Cr.) 69; 16 W. R. (Cr.) 37; 1903 A. W. N. 68; 5 B. H. C. R. (Cr. Ca.) 68; 26 A. 509=1 Cr. L. J. 434=1904 A. W. N. 115=1 A. L. J. 236. Where, however, a criminal indictment is based upon a false statement as to a wholly immaterial fact, it will often be successfully contended that the knowledge of its falsity, which is necessary to secure conviction, has not been made out, and in any event, it would affect the question of sentence. Where a party deliberately makes an untrue statement as to a very material circumstance, to which his attention is likely to have been directed, and when this false statement is for his own benefit, or for that of the person calling him, it may be assumed that he knew he was deposing falsely. But no such presumption can arise where the point was irrelevant, and one upon which he might have answered either way, with equal absence of result. In such a case a Court would seldom be justified in exercising the powers vested in it by the Crim. P. C., s. 195.

118. Judicial Proceeding.—Under s 193 the punishment for giving or fabricating false evidence in any stage of a judicial proceeding is heavier than when it is given in any other case. The phrase is borrowed from English law, which made it one of the elements of perjury that the oath had been taken in a judicial proceeding—*Per Lord Mansfield, R. v. Aylett, 1 T. R., 63.* *Hawkins* says upon this: "It seems to be clearly agreed that all such

false oaths as are taken before those who are in any ways entrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries." "And it is said to be no way material, whether such false oath be taken in the face of a Court, or by persons authorized by it to examine a matter, the knowledge whereof is necessary for the right determination of a cause, and therefore, that a false oath before a sheriff, upon a writ of inquiry of damages, is as much punishable as if it were taken before the Court on trial of the cause." 1 Hawk, P. C. 430. In the earliest case in which this question arose, Scotland, C. J., in the course of argument, asked counsel to define a judicial proceeding. The answer was, "Any step which the Court may take from the commencement of a suit to its termination." This definition was accepted in the judgment as correct. The Chief Justice said "It is nothing more nor less than a step taken by the Court in the course of the administration of justice, in connection with a case pending" 2 M. H. C. R. 43, at 45, 56. The question there arose in a civil suit, in which all the proceedings from first to last are under the control of a single court. The definition would have to be extended to meet the case of criminal proceedings, which are conducted by a series of authorities before the court of trial. With this view, a judicial proceeding might be defined as "any step in the lawful administration of justice, in which evidence may be legally recorded for the decision of the matter in issue in the case, or of any question necessary for the decision or final disposal of such matter." In the Madras case above referred to, where it appeared that the bailiffs of a Court, twelve in number, were constantly called upon to give evidence as to the service of summonses in the different cases before the Court, and that it was the practice to call them all up at the beginning of each day, and to affirm them solemnly to give true evidence in all the cases coming before the Court that day, and one of the bailiffs at a later period of the day gave false evidence, it was held that he was properly convicted under s. 193, the affirmation being administered in "a stage of a judicial proceeding." So false evidence given upon an application

for bail, (1 Hawk, P. C. 430) or as to facts which had to be proved in order to admit secondary evidence of a document, *R. v. Rhillpotts*, 2 Den. C. C. 302 = 21 L. J. (M. C.) 18, would be similarly punishable. If after a prisoner was convicted, evidence was offered that he had been previously convicted, in order to enhance the punishment under s 75, I P. C., that again would clearly be a stage of a judicial proceeding, just as much as proceedings in execution in a civil suit 6 Bom. L. R. 886 = 1 Cr. L. J. 959; 16 W. R. (Cr.) 57; 26 A. 509 = 1904 A. W. N. 115 = 1 A. L. J. 236; 10 B. 288; 6 A. 626 = 1884 A. W. N. 253; 7 Sind L. R. 25 = 14 Cr. L. J. 456 = 20 Ind. Ca. 616; 1910 P. R. No. 1. (The ruling in 35 C. 133 that execution proceedings are not judicial proceedings does not appear to be sound.) So it was held in 3 W. R. (Cr.) 89 that where a police-inspector was conducting an inquiry into infractions of the salt laws, preliminary to a proceeding before a court of justice, this was a stage of a judicial proceeding. The report gives no information as to the nature of the inquiry, or the authority under which it was conducted. Similarly in the case of an enquiry made by a magistrate before issuing an order under s 144, Cr. P. C., 19 M. 18 or recording statements under s 164, Cr. P. C. (29 M. 89 following 16 M. 421) or a preliminary inquiry under s. 476, Cr. P. C. (37 C. 52 = 14 C. W. N. 132 = 11 Cr. L. J. 45 = 5 Ind. Ca. 62), or an inquiry under s 122, Cr. P. C., as to the fitness of a surety, (26 A. 371 = 1904 A. W. N. 52 = 1 Cr. L. J. 190.) But a judge may do several acts in virtue of his office which are not judicial. An enquiry is judicial only if the object of it is to determine a legal relation between one person and another, 12 B. 36 at 42, 10 M. L. A. 340. A man appeared before a District Magistrate and stated that the police officer was oppressing him but did not desire to make a complaint. Held the magistrate was not moved *quamagistrate* but only as the district head of the police and it was not proper for the magistrate to have put him on oath. The conviction under s 193, I. P. C., was annulled and one under s 182 substituted 35 A. 102 = 11 A. L. J. 15 = 14 Cr. L. J. 56 = 18 Ind. Ca. 344. In another case an application for transfer was sought to be supported by a statement

that the magistrate had received a bribe in the presence of two persons. After granting the application the magistrate recorded a statement from these two persons on oath on a different date and directed their prosecution for perjury in respect of those statements. Held no perjury had been committed and the magistrate had no jurisdiction to administer an oath after the disposal of the transfer application and the false statement was not covered by either part of s. 193, 7 N. L. R. 65=12 Cr. L. J. 326=10 Ind. Ca. 622. It would, however, be otherwise where the inquiry was conducted for some purpose wholly unconnected with the judicial proceedings. For instance, where a magistrate received an anonymous letter, charging some persons with murder, and took evidence, not for the purpose of tracing the murderer, but of ascertaining the author of the letter, it was held that the inquiry was not a "stage of a judicial proceeding," and that a conviction under s. 192 could not be sustained. 5 W. R. (Cr.) 72. The same principle was applied to an enquiry by a magistrate to discover the writer of a scandalous petition, 11 B. H. C. R. 11, and to preliminary enquiry held by a Sub-Magistrate to help the District Magistrate if certain complaints against the police were true, 23 M. 223. It would be otherwise where a magistrate takes a sworn statement under s. 200, Cr. P. C., from a complainant, 4 N.-W. P. H. C. R. 6. And, similarly, where the object of the inquiry was to discover the genuineness of the statements made by the heir of a deceased person to the telegraph authorities, claiming money due to the deceased, 6 A. 103; 27 C. 455; or where the proceedings were wholly without jurisdiction. In 1 A. 1 two prisoners were acquitted on a charge of murder. Pending an application by the Government for a new trial, the police apprehended the accused, and brought them before the magistrate, who, in order to prevent them from absconding, if the appeal should be decided against them, ordered them to be detained in custody. He had no power to issue any such order. It was held not to be a judicial proceeding. The proper course would have been to apply to the High Court for an order under s. 127, Cr. P. C. In Stephen's Digest of Crim. Law, Art. 148, judicial proceeding is

defined "as any proceeding which takes place in or under the authority of a Court of Justice, or which relates in any way to the administration of justice, or which legally ascertains any right or liability."

A magistrate who records a statement under s. 161 of the Crim. P. C., has authority to take it on oath, and the statement is evidence within s. 191, I. P. C. 16 M. 421. So, as to a statement made before a village headman in Madras, 11 M. 375, a police patel under Bombay Act VIII of 1867, s. 13, 4 B. 479; before a sub-registrar, 6 W. R. (Cr.) 81; Registrar, 2 W. R. (Cr. Let.) 9 See further 1 Cr. L. J. 118; 3 L. B. R. 1; 26 A. 371; 2 C. L. J. 149=2 Cr. L. J. 575; 29 M. 89=3 Cr. L. J. 370; 22 A. 115; 9 C. W. N. 127=2 C. L. J. 149=2 Cr. L. J. 15; 5 Sind. L. R. 174=13 Cr. L. J. 33=13 Ind. Ca. 273. A police officer who makes an investigation under Chapter XIV of the Crim. P. C. may examine orally any person acquainted with the facts of the case. He cannot administer an oath, and as s. 161 of the Cr. P. C. no longer requires the person interrogated to answer *truly* all questions put to him by such officer, the statements made in reply are not evidence within s. 191. 7 C. 121 (F. B.); 23 M. 544. A statement volunteered to a police officer does not come within s. 191. 16 C. 349. The Code of 1898 having reverted to the law as it stood under the 1872 Code it has to be borne in mind that a number of rulings between the years 1883 and 1898 have now become obsolete. The protection thus extended by the 1898 Code to a person examined at a police investigation is only from liability under s. 193, I. P. C. If he intentionally makes false statements to the police, he may make himself liable under s. 182. See 1907 A. W. N. 22; (1905) U. B. R. 13=2 Cr. L. J. 474; 1894 P. R. 27. The same principle applies to statements which are not in the nature of depositions. Pleadings in a civil suit must be verified as true, (O VI, r. 15, Civ. Pr. Code) and come within s. 191, I. P. C., as being statements which are required by law to be true. 6 A. 626=1884 A. W. N. 253; Weir I. 154 & 174; Ratanlal 25; 1894 P. R. No. 27. But a bare denial of the plaintiff's allegations, except some portions, would not make the defendant liable

under s. 193 should the plaintiff succeed in making good the allegations so denied, 10 Cr. L. J. 364=3 Ind. Cas. 723. The numerous statutory declarations which persons are required by law to make, for purposes of customs, taxation, assessment, and the like, will also be criminal if false. See 38 C. 368=12 Cr. L. J. 411=11 Ind. Cas. 595. On the other hand, the mere fact that a document is verified does not bring it within the terms of s. 191, unless it is required by law to be verified, or unless it is a statement which the person making it is required to make. Accordingly, false statements made in an application for re-hearing of an *ex-parte* decree under s. 209 of Act VII of 1859, 9 W. R. (Cr.) 58; 19 A. 200, or for a new trial in a Small Cause Court under s. 21 of the Small Cause Court Act XI of 1865, 2 B. L. R. (A. Cr.) 1=10 W. R. (Cr.) 31 [see also 6 C. 440 & 1905 A. W. N. 42] were held not to be criminally punishable. The statements were voluntary statements of the case, which the applicant was prepared to prove. They need not have been verified, and derived no additional weight from the fact that they were so.

The Crim. P. C., s. 4 (m), defines a judicial proceeding as including "any proceeding, in the course of which evidence is or may be legally taken on oath." This definition, however, is only applicable for the purposes of the Procedure Code, and is not a definition of the term "judicial proceeding" in ss. 192 and 193 of the Penal Code. Statements made under s. 161, though lawfully required, are not themselves evidence, either in the preliminary inquiry, or the final trial; and the investigation made is not a judicial proceeding under s. 192, I. P. C., 7 C. 121 (F. E.), 23 M. 544; *Ra'anlal* 452, nor does the provision in Crim. P. C., s. 161 (2), that every person shall be bound to answer all questions *except* "an express provision of the law to state the contrary" within s. 191, I. P. C. Hence a person who gives a false statement is not punishable under s. 193, *unless* he refuses to give any statement he is not punishable under ss. 176 or 187. 11 B. 659 & 702; 19 A. 250, *Case* 1890 A. W. N. 100. But it is not to be forgotten that a person who wilfully makes false statements in a judicial

investigation can do so with impunity. If while under oath he denies that he made a particular statement to the police (in spite of the ruling in 1908 A. W. N. 22 = 4 A. L. J. 811 = 7 Cr. L. J. 3 which seems to be erroneous on this point) he may be charged with perjury and the guilt established in the same way in which it could be if he had wilfully denied any other fact, e.g., by the evidence of the policeman and of bystanders who heard what he said, or he may be charged with giving false information. But statements made to a magistrate acting under s. 164, Cr. P. C., stand on a different footing having regard to explanation (2) to s. 193, I. P. C. The magistrate is empowered to administer an oath. The statement is therefore one made in the course of a criminal proceeding, 16 M. 421, 29 M. 89 = 3 Cr. L. J. 370, 5 Sind. L. R. 174 = 13 Cr. L. J. 33 = 13 Ind. Ca. 273; see however, 11 B. 702; followed in 14 Bom. L. R. 753 = 12 Cr. L. J. 709 = 16 Ind. Ca. 517.

False statements intentionally made, whether on oath or not, and whether recorded or not, before any officer acting in execution of the Registration Act, or in any proceeding or enquiry under it, are specially punishable under that Act, but the proceedings of the Registrar are only judicial proceedings for the purposes of s. 228 I. P. C. — Act XVI of 1908, ss. 82, 94 12 B. 36 at 41. An inquiry under the *Legal Practitioners' Act*, XVIII of 1879, is a judicial proceeding. 6 M. 252, and so is one under the *Crown's Act*, IV of 1871, s. 8. The proceedings of a coroner are in their nature regular criminal proceedings, having a distinct result, and a result upon which, if it affects any particular person at all, ulterior proceedings can be taken against that person. There is nothing in common between a coroner's inquest and the inquiry which is directed by the Crim. P. C., s. 176, into the cause of the death of a person who has died in the custody of the police. No finding or report is required by the section, and if any report is made by the magistrate, it is not a judicial proceeding. 3 C. 742, p. 752. Nor is an attachment of property by a magistrate under s. 68, Cr. P. C., a judicial proceeding, as he is not required to make any investigation. 6 A. 487.

Several false statements in the same deposition only amount to one offence. "Testing it by the law of evidence the whole deposition must be looked at, if desired, and one part qualified by the other. The falsity of the second statement was proper evidence on the first trial, but there were not two offences." 6 M. H. C. R. Appx. XXVII.

119. Proof of False Statement.—Where the false statement is contained in a document signed by the accused, such as a verified statement, or affidavit, the original document must be produced, and the signature proved. A certified copy will not do, unless under circumstances which admit of secondary evidence. Even then the mere production of a certified copy is insufficient. It only proves that there was once on the record an original corresponding with the copy. Further evidence will be necessary to connect the defendant with the original, and to show that he actually signed it, and knew its contents. Mere signature is, in the case of an adult male, sufficient to bind him in civil suits; but in a criminal case it would be necessary to give at least *prima facie* evidence of actual knowledge of the contents. This would especially be so in the case of legal documents, which are generally prepared by a *Vakil* or *Mukhtar*, and signed on trust. Where the document avowedly comes from an agent, the strictest proof would be necessary, not only that the agent was authorized to sign that class of document, which again would be sufficient in civil suits, but that the contents of the particular document were known to, and understood, and authorized by, the principal. Where the agency is created by writing, the production of the original *Mukhtarnamah* is indispensable, if any reliance is to be placed upon the general authority, as distinct from the special recognition of it in the particular instance.

Where the false evidence is given in a statement or deposition, the actual evidence consists in the words the man used, as he uttered them, not in the formal deposition, if any, in which they are recorded. It is sufficient to prove his words by the oath of anyone who

heard and can remember them. It is not necessary that the witness should remember the whole statement, but he must remember enough to be certain that there was nothing said to alter or qualify what is remembered. *R. v. Rowley*, Ry. & M. 299=1 Moo. C. C. 111; *R. v. Munton*, 3 C. & P. 438. Where a deposition has been taken down in writing, the proper mode of proof is to call the clerk who took it down, who will be able to swear that he took it down correctly, and that it contains what the witness said. If necessary, he may use the deposition to refresh his memory as to what the witness actually said. *Ind. Ev. Act*, s. 159; see *Ratanlal* 401. The statement must be proved to have been made by the accused, 13 W. R. (Cr.) 56; 10 W. R. (Cr.) 37; 25 W. R. (Cr.) 23, and proof of the exact words used can alone be a safe foundation for a conviction. 7 N. W. P. H. C. R. 137; 23 W. R. (Cr.) 28. Perjury must be specifically assigned by quoting the actual words constituting the same. A lengthy deposition ought not to be put in as a whole. 28 C. 348; 14 Cr. L. J. 422=20 *Ind. Ca.* 406. If the accused is charged with making contradictory statements the offending passages must be specified in the precise words of the deposition. 9 W. R. (Cr.) 25, 17 W. R. (Cr.)

W. R. (Cr.) 28; 1 L. B. R. 268. Sometimes, however, what the witness said in one language, was interpreted to the clerk in another language, in which he wrote the deposition. It will then be necessary to call the interpreter, to prove that the words he gave to the clerk correctly represented those used by the witness. Where the document has been read over to the witness, acknowledged by him as correct, and signed by him, this should also be proved. 7 W. R. (Cr.) 13; 8 B. H. C. R. (Cr. Ca.) 37; A conviction cannot be based on mere notes of evidence made by a small cause Judge. 6 P. L. R. 730. In a case where the only evidence offered for the purpose of satisfying the Court, that a deposition taken in English represented a true translation of the words which the accused person actually spoke in Hindustani, was the memorandum at the foot of the deposition signed by the magistrate in these words: "The above was read to the witness in Hindustani, which he understood, and by him acknowledged to be correct",

Phear, J., held that, under s. 80 of the Evidence Act, the English deposition was probably evidence, upon which alone the jury could lawfully act, of what the prisoner had said in Hindustani. At the same time, he commented on its unsatisfactory character, and said it would have been only fair to the prisoner that the person who took down in English what the prisoner had said in Hindustani, should have been examined as a witness, that the prisoner might have an opportunity of cross-examining him. 22 W. R. (Cr.) 2. In another case, where exactly the same evidence was given, Jackson, J., said "The evidence as to the prisoner's deposition before the Assistant Commissioner is, in fact, no evidence at all." 3 B. L. R. (A. Cr.) 36=12 W. R. (Cr.) 31. See 1 B. L. R. (A. Cr.) 13=10 W. R. (Cr.) 37. Where anything turns upon the special words of the written deposition, such meagre evidence, if technically admissible, is eminently, unsatisfactory. It must be remembered that such a deposition, when taken in the narrative form, does not even profess to repeat *verbatim* what the witness had said. It is a compound of the question put in the words of the examining counsel, and of the answer in the words of the witness. The statement as finally recorded is often the result of an animated discussion between the clerk, the counsel, and the judge, not as to what the witness said, but as to what he meant to say. When the recorded evidence is read out to him, he soon finds that he can hardly recognize any of the language he really used in what has been put down. His admission that it is correct, if anything more than a matter of politeness, is really only an admission that the story is itself correct though he could never have got it into those words. As to admissibility of depositions made in a different language, in the absence of the safeguards of its having been read over, interpreted and acknowledged to be correct, see 10 B. H. C. R. 166; 1 E. at p. 220; 6 C. 762; 9 M. 224.

Where the formalities prescribed by law for recording depositions have not been complied with, the question has been raised whether a conviction for perjury could be sustained. Thus s. 360, Cr. P. C., and O. XVIII rr. 5 & 6

C. P. C. prescribe the manner in which evidence is to be recorded. In 28 M. 308=2 Cr. L.J. 756, a conviction for perjury was quashed on the ground the deposition was not read to the accused in open court; but in 34 M. 141=20 M. L. J. 943=1910 M. W. N. 435=8 M. L. T. 117=11 Cr. L. J. 482=7 Ind. Ca. 414, Miller, J., doubted the soundness of this ruling and refused to annul a conviction for perjury where a witness had acknowledged his statement when irregularly recorded as correct, the learned judge being of opinion that the deposition is not a nullity for all purposes and accused is in no way prejudiced by his evidence not being read over in the presence of the parties, the pleaders or the presiding Judge. This view was followed by a Division Bench in 21 M. L. J. 411=9 M. L. T. 325=12 Cr. L. J. 44=9 Ind. Ca. 262. The Calcutta High Court in a long series of decisions had held the view an irregularly recorded deposition is insufficient to sustain a conviction for perjury 23 W. R. (Cr.) 28, 6 C. 762, 36 C. 955=14 C. W. N. 82, 12 C. W. N. 845=8 Cr. L. J. 116. But the later view seems to be that a conviction for perjury is not necessarily bad if the accused is not prejudiced by his deposition being irregularly recorded 11 C. W. N. 470, 36 C. 808 at 815=10 Cr. L. J. 150=9 C. L. J. 693=2 Ind. Ca. 697. s. 91, Ind. Ev. Act would render inadmissible oral evidence where the statute requires the evidence to be reduced to writing Ratanlal 401; *Contra* 1890 P. R. (Cr.) 25; 1887 P. R. (Cr.) 54. Where, however, the record of the evidence is in the shape of notes made in summary proceedings or by a Judge not bound to record depositions at length, a charge of perjury cannot be grounded on such notes not read over to the deponent and acknowledged by him to be correct. M. H. C. Cr. R. case 466 of 1912; M. H. C. Cr. Mis. Petn. 571 of 1912. Where a Magistrate takes a sworn statement under s. 200, Cr. P. C. but omits to comply with the requirements of the provision by way of getting the complainant to sign his deposition, such a statement cannot be made the basis of a prosecution for perjury 6 C. W. N. 840.

It is necessary to give sufficient proof, not only of the words used and of their falsity, and of the defendant's

knowledge that they were false, but also of the circumstances which raise mere lies into a criminal offence. These circumstances have been already stated. The most important is the competence of the person before whom the evidence was taken. So much of the proceedings as show the origin of the case, and that the officer had jurisdiction to deal with it must be put in. For instance, the plaint in a civil suit, the proceedings on committal, and the charge in a criminal case; the reference to arbitration, and the civil proceedings, if any, which preceded the arbitration, where the false evidence was given before an arbitrator. Where the statement has been made on a police inquiry, it must be shown how the inquiry was being made, and that the statements were not volunteered, but in reply to questions, 16 C. 347. Where any question as to materiality can arise, it is necessary, and in all cases it is advisable, to produce the plaint, written statements, issues, and judgments, so as to show the bearing of the evidence, and what the witness came to swear to *R. v. Carr*, 10 Cox. 564. And, similarly, where it is alleged that the evidence was given in a stage of a judicial proceeding, all the proceedings ought to be produced to enable the Court to judge of their character.

It is a long-established rule in England that a conviction for perjury cannot be rested upon the uncorroborated evidence of a single witness. Either there must be a second witness, or the testimony of the single witness must be supported by some material fact tending to prove the guilt of the accused. This rule was recognised by Act II of 1855, s. 28 which, after laying down that "except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact," went on to enact that "this provision shall not affect any rule or practice, of any court that requires corroborative evidence in support of the testimony of an accomplice, or of a single witness in the case of perjury." In 1866 it was decided by a Full Bench of the Calcutta Court that this act was binding on the *Mofussil* courts as well as on those created by Royal Charter, and it was pointed out that the rule had been in

C. P. C. prescribe the manner in which evidence is to be recorded. In 28 M. 308=2 Cr. L.J. 756, a conviction for perjury was quashed on the ground the deposition was not read to the accused in open court; but in 34 M. 141=20 M. L. J. 943=1910 M. W. N. 435=8 M. L. T. 117=11 Cr. L. J. 482=7 Ind. Ca. 414, Miller, J., doubted the soundness of this ruling and refused to annul a conviction for perjury where a witness had acknowledged his statement when irregularly recorded as correct, the learned judge being of opinion that the deposition is not a nullity for all purposes and accused is in no way prejudiced by his evidence not being read over in the presence of the parties, the pleaders or the presiding Judge. This view was followed by a Division Bench in 21 M. L. J. 411=9 M. L. T. 325=12 Cr. L. J. 44=9 Ind. Ca. 262. The Calcutta High Court in a long series of decisions had held the view an irregularly recorded deposition is insufficient to sustain a conviction for perjury 23 W. R. (Cr.) 28, 6 C. 762, 36 C. 955=14 C. W. N. 82, 12 C. W. N. 845=8 Cr. L. J. 116. But the later view seems to be that a conviction for perjury is not necessarily bad if the accused is not prejudiced by his deposition being irregularly recorded 11 C. W. N. 470, 36 C. 808 at 815=10 Cr. L. J. 150=9 C. L. J. 693=2 Ind. Ca. 697. s. 91, Ind. Ev. Act would render inadmissible oral evidence where the statute requires the evidence to be reduced to writing. *Ratanlal* 401; *Contra* 1890 P. R. (Cr.) 25; 1887 P. R. (Cr.) 54. Where, however, the record of the evidence is in the shape of notes made in summary proceedings or by a Judge not bound to record depositions at length, a charge of perjury cannot be grounded on such notes not read over to the deponent and acknowledged by him to be correct. M. H. C. Cr. R. case 466 of 1912; M. H. C. Cr. Mis. Petn. 571 of 1912. Where a Magistrate takes a sworn statement under s. 200, Cr. P. C. but omits to comply with the requirements of the provision by way of getting the complainant to sign his deposition, such a statement cannot be made the basis of a prosecution for perjury 6 C. W. N. 840.

It is necessary to give sufficient proof, not only of the words used and of their falsity, and of the defendant's

foreigner out of British India may not be within this section] and (2) to establish a guilty knowledge. The latter point will generally be established by the mere fact that the party has produced the false evidence, at all events to the extent of throwing upon him the burthen of showing that he did so, not corruptly but honestly. The law upon this point was laid down by Sir Adam Bittleston in *R. v Gungammah* [1860, 3rd Mad. Sess.]

“ If a person calls witnesses in support of a statement which he makes, and causes those witnesses to come into the box for the purpose of giving evidence which he knows to be untrue, and they give that evidence, and the jury find that they knew it to be untrue, that is evidence on which a jury may find that he solicited them, but the jury must be satisfied that he knew that the statement which they were called to make must be untrue to their own knowledge ”

It is not sufficient that he should know or believe the statement to be untrue. It is necessary that the witnesses should have the same knowledge, for, otherwise, the evidence is not false. S. 196 does not cover all cases of subornation of perjury. It must be shown the accused made use of the false evidence, after it was in existence 1 Ind. Jur. (O. S.) 122. Again as regards documentary evidence the scope of the section may seem to overlap that of s. 471 *infra*. 3 W. R. (Cr.) 17, 5 C. 717=6 C. L. R. 118; 7 W. R. (Cr.) 23; 1887 A. W. N. 285. In cases of doubt, the charge may be framed alternatively 2 W. R. (Cr.) 9. The case in 7 C. L. J. 169=7 Cr. L. J. 196 would serve to bring out the exact scope of s. 196. Here the accused brought a complaint of assault and produced an instrument containing red stains saying the stains were caused by the blood that came from his head. The chemical examiner certified the stains not to be blood stains. It was held that though the case of assault may be true and no prosecution under s. 211 could be sustained, the attempt to bolster up the charge by the

but in any event the false or fabricated evidence must be material to constitute a corrupt user, 7 W. R. (Cr.) 23.

If the evidence was fabricated, and was known to be so, it is immaterial that it was not originally fabricated for the purposes of the proceedings in which it was so used. 7 M. 289. In this case the document which was used before the civil court had been fabricated for use before the registrar.

A curious point was raised, though not decided, in the above case whether a false document, which had originally been prepared without the intention of using it as evidence, could be considered as fabricated evidence, if afterwards used as evidence. The argument was, that when it was prepared it was not fabricated evidence, and when it was used as evidence it was not fabricated. Exactly the same point would arise under s. 471, if a document, to which a false signature had been appended for some purpose, which was neither fraudulent nor dishonest, and was therefore not a forgery under s. 464, was afterwards fraudulently passed off as genuine by the original maker. Suppose, for instance, that a person who was fond of imitating handwriting amused himself by signing a friend's name to a receipt or a cheque; that he threw the papers aside, and afterwards finding them, used the receipt as evidence of a debt, and presented the cheque at the bank. Could he be convicted under s. 471? If anything was added to the document at the time of using it, such as a stamp, a date, or a sum of money, he certainly could be convicted. If the papers were presented exactly as originally framed, it might be different. The case is never likely to occur. If it did, the defendant would probably find it difficult to establish the original purity of his motives. A charge of using in a civil suit as genuine a document which was known to be forged, is an offence cognizable under s. 471, and should be charged as such. A magistrates' court has no jurisdiction to deal with it himself under s. 471. no jurisdiction to
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121. False Certificate

s. 197 it is necessary to show that the evidence was contained in a certificate, and that the law to be given to any fact of which the evidence is given is not in accordance with the law.

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directed to be given, come under the first head, whether the copy when so given is primary or only secondary evidence of the original. See *Ind. Ex. Act*, ss. 65, 76—78; Registration Act XVI of 1908, s. 57. Section 60 of the Registration Act of 1908, which provides that a certified copy of a registered document shall be evidence that the facts stated to have occurred at the time of registration really did occur, is an illustration of the second head. Intent to cause injury is not necessary to constitute the offence under s. 197, 1879 P. R. No. 15. In this case a copyist who made an incorrect copy was held liable. But guilty knowledge or belief is essential 3 W. R. (Cr.) 37.

Under s. 199 the statement must be contained in a declaration which any court of justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact. The fact there is no prohibition against the reception of such declaration in evidence would not make the declarant amenable to the provisions of s. 199, I P. C. 10 A. L. J. 462. A petition *not bearing the petitioner's signature* cannot be made the basis of a prosecution under s. 199 as such a petition is not covered by the language of that section, 7 C. L. R. 536. The section is not satisfied by the fact that a person has made a statement which could afterwards be used in evidence against himself. This would be true of everything that a man says or writes. See *per* Phear, J., 2 B. L. R. (A. Cr.) 1 at 5; 22 C. 131 at 137. Nor by the fact that he has made application to a court to take certain steps, and that this application contains statements which are false unless the statement is in itself evidence (*e.g.*, an affidavit) upon which the court is authorized to act without anything further. 10 B. 288 at 298; 14 C. 63, 27 M. 223=14 M. L. J. 74=1 Cr. L. J. 321. The declaration must itself, if believed, furnish the court, or the officer before whom it is made, with a sufficient warrant to do the act which the declarant desires or assists in bringing about. Such, for instance, are the statements made under ss. 35 & 58 of the Registration Act XVI of 1908, or under the Marriage Acts, III of 1872, s. 21; II of 1891, s. 66. If the court or

public servant is not legally authorised to receive the declaration but erroneously receives and acts upon one, the maker of the declaration is not liable. 20 C. 724; 14 C. 653; Weir I. 176; 9 C. W. N. 69=2 Cr. L. J. 8. But where the inadmissibility of the declaration arises out of some informality in making it, the maker would none the less be liable under the explanation to s. 200. The reference to materiality in s. 199 would exclude cases of examination of a witness in a judicial proceeding. 4 M. H. C. R. 185. A petition containing false statements if not signed by the petitioner himself but only by a pleader would not make the petitioner liable. 7 C. L. R. 536. Nor would a person make himself liable for a statement which is evidence not for him but against him. 22 C. 131 & 10 B. 288. A false verification in a plaint or an execution application is not within this section because it is not admissible as evidence of any fact, 10 B. 288, though it would be covered by s. 193.

Section 181 deals with false statements before a public servant while s. 193 is limited to similar statements in the course of a judicial proceeding. The former section is therefore properly confined to non-judicial proceedings, 7 W. R. (Cr.) 68; 2 M. H. C. R. 438; 6 M. 252; Weir I. 116; 1905 U. B. R. 13=2 Cr. L. J. 474; 8 W. R. (Cr.) 27 & 30; 11 W. R. (Cr.) 24; 8 B. H. C. R. (Cr. Ca.) 21. The rulings in 4 M. H. C. R. Appx. XVII & Weir I. 115 to the contrary effect that a case of perjury may be tried under this section is not sound especially under the law now in force, the same tribunal has jurisdiction to try offences under ss. 181 & 193, I. P. C. A false return on oath of the service of a summons, 8 W. R. (Cr.) 27 and a false statement before an income-tax commissioner, 8 B. H. C. R. (Cr. Ca.) 21, Weir I. 115 would fail under s. 193.

122. Causing disappearance of Evidence, or giving False Information.—Besides the sections which relate to the giving of false evidence, there are some subsidiary sections relating to analogous offences, of which s. 201 is the most important. The first essential to a conviction under this section is to prove that there was an

offence actually committed, 1895 P. R. No. 19; 1911 P. W.R. (Cr.) 17=12 Cr. L.J. 425=11 Ind. Ca. 609; 1 L. B. R. 308, that the accused knew, or had, as a reasonable man, sufficient reason to believe that the offence had been committed, 1867 P.R. No. 7; 2 W.R. Cr. Let.) 1, and that he took the steps alleged for the purpose of screening the offender. A mere belief that there had been a crime, however well founded, or however strongly entertained, is not sufficient 3 M. H. C. R. 251; 3 A. 279 11 C. 619, Weir I. 180. A person cannot be convicted of screening an offender when the offender himself has been tried and acquitted of the offence, 3 A. 279. It has been held in Calcutta that it is not necessary to show that the person intended to be screened was actually guilty of the offence. 8 W.R. (Cr.) 69; 11 Bur. L. R. 8=2 Cr. L. J. 133. The offender must be a person different from the person who screens him 5 W.R. (Cr. Let.) 5; 1877 P.R. No. 4; 1881 P.R. No. 25; 27 M. 271=1 Cr. L. J. 641. The actual criminal cannot be charged with screening himself from prosecution, either by causing evidence to disappear, 7 W. R. (Cr.) 52; 8 B. H. C. R. (Cr. Ca.) 126; 8 A. 252; 22 C. 638, 8 Bom. L. R. 538=4 Cr. L. J. 89; 1909 P. W. R. (Cr.) 8=10 Cr. L. J. 321=3 Ind. Ca. 322; 28 A. 89 & 705; 12 C. P. L. R. 17, or by making false statements inculcating another in order to exculpate himself, 6 C. 789; 1906 A. W. N. 191=4 Cr. L. J. 66. Not can a person who is charged with both the principal crime, and with getting rid of the evidence of it, be punished on both charges. 7 W. R. (Cr.) 52; 7 A. 749. But a person who has been innocently present at the commission of a crime—as, for instance, murder—may be charged with the offence of concealing the body. 6 W.R. (Cr.) 80. In that case it appeared that he was frightened by the actual criminals into helping them to hide the evidence of their act; but it would have been equally within the section if he had done so voluntarily, knowing that by screening them he was also helping to keep himself from suspicion. The authorities are all considered by Jardine and Ranade, JJ., in *Ratanlal* 799 and they came to the conclusion that a conviction under s. 201 is not illegal merely because it is

suspected (but not proved or admitted) that the accused committed or was one of several persons who committed the principal offence, 7 W.R. (Cr.) 22, 1902 P.R. No. 6; 1 L. B. R. 316 & 327. After an accused has been tried and acquitted of the principal offence he may still be charged and convicted under s. 201 if it could be established that he caused evidence to disappear in order to screen some unknown offender, 1904 P.R. No. 1=5 P.L. R. 95=1 Cr. L. J. 113; 1913 P.R. No. 8=14 Cr. L. J. 278=19 Ind. Ca. 710. In 6 Sind L. R. 76=13 Cr. L. J. 721=16 Ind. Ca. 753, the accused caused evidence of a murder to disappear in order to screen his sons whom he suspected as the authors of the murder. The sons were tried and acquitted of murder, but the father was found guilty under s. 201 as the ordinary consequences of his act would be to screen the actual murderer whoever he might be. The motive of the accused, viz., to screen his sons, is different from intention. A man must be taken to have intended the natural consequences of his acts. It is not of the essence of the offence under s. 201 the accused must be aware of the identity of the offender. The section ought not to be controlled by the illustration.

Where the charge is founded upon an allegation that the accused had caused evidence of the commission of the offence to disappear, it is not necessary to show that what was caused to disappear was evidence of the offence, but that what was caused to disappear was evidence of the commission of the offence, ch. if it had remained as it is. 7 A. 748.

In 2 A. 713, it appeared that *Kishna* and *Bhikan* had murdered *Jiwan* in *Bhikan's* field. *Kishna* was convicted of the murder, and also under s. 201 for having carried the corpse out of *Bhikan's* field, and left it on the land of the murdered man. *Pearson, J.*, said: "He did not, by removing the corpse of *Jiwan* from one field to another, cause any evidence of *Jiwan's* murder, which that corpse afforded, to disappear. His object may have been to divert suspicion from himself or from *Bhikan*, but his act does not constitute the offence defined in s. 201." He certainly did not cause the evidence that *Jiwan* was murdered, derivable from the fact that *Jiwan* was a corpse, to disappear; but he undoubtedly caused

the disappearance of the evidence that Bhikan was the murderer, derivable from the fact that the corpse was found in his field. In a case noted in 2 Cr. L. J. 148, (Sh. n) after considering 2 A. 713, it was held by the Sadar Court of Sind that the lie of the body, its condition and actual surroundings being important evidence the shifting of the corpse might amount to an offence under s. 201, 5 Sind L. R. 123=13 Cr. L. J. 48=13 Ind. Ca. 210. In 1905 P. R. No. 53=6 P. L. R. 674=3 Cr. L. J. 136, the accused finding in her house the corpse of a girl murdered by her own son merely locked the outer door without removing the corpse or concealing it. This act was held not to constitute an offence under s. 201. In 1882 P. R. No. 21 the accused took away the wife of a murdered man so that she might not immediately communicate to the police the information she had of her husband's murder. This was held not to constitute an offence under s. 201.

Under s. 201, mere knowledge that the act of the accused is likely to screen the offender is not sufficient; actual intention to screen must be established, 5 N.-W. P. H. C. R. 186; 2 W. R. (Cr.) 43; 1881 P. R. No. 28; 3 M. H. C. R. 251. Where the charge of giving false information is framed under s. 203, it is unnecessary to prove any particular intention; 1 W. R. (Cr.) 18, but it is still necessary, as under s. 201, to prove that an actual offence had been committed, and that the accused knew, and had reason to believe in its commission. 20 W. R. (Cr.) 66, 2 W. R. (Cr. Let.) 1. The same remarks apply to s. 202, where the offence consists in intentionally omitting to give information which the person is legally bound to give. In *Ratanlal* 783, it appeared the *Patel* ordered the *Kulkarni* to write a report regarding a suspicious death in his village. His good faith being thus apparent, it was held the intention required to constitute an offence under s. 202 has not been made out. The same result would follow where a village headman has gone in pursuit of murderers or has taken down statements. See 11 Bur. L.R. 815; L.B.R. (1893—1900) 382. As to circumstances under which there is a legal duty to give information, see 18 W. R. Cr. 31;

suspected (but not proved or admitted) that the accused committed or was one of several persons who committed the principal offence, 7 W.R. (Cr.) 22, 1902 P.R. No. 6; 1 L. B. R. 316 & 327. After an accused has been tried and acquitted of the principal offence he may still be charged and convicted under s. 201 if it could be established that he caused evidence to disappear in order to screen some unknown offender, 1904 P.R. No. 1=5 P.L. R. 95=1 Cr. L. J. 113; 1913 P.R. No. 8=14 Cr. L. J. 278=19 Ind. Ca. 710. In 6 Sind L. R. 76=13 Cr. L. J. 721=16 Ind. Ca. 753, the accused caused evidence of a murder to disappear in order to screen his sons whom he suspected as the authors of the murder. The sons were tried and acquitted of murder, but the father was found guilty under s. 201 as the ordinary consequences of his act would be to screen the actual murderer whoever he might be. The motive of the accused, viz., to screen his sons, is different from intention. A man must be taken to have intended the natural consequences of his acts. It is not of the essence of the offence under s. 201 the accused must be aware of the identity of the offender. The section ought not to be controlled by the illustration

Where the charge is founded upon an allegation that the accused had caused evidence of the commission of the offence to disappear, it must be shown that what was caused to disappear was something which, if it had remained as it was, would have been evidence. 7 A. 748. In 2 A. 713, it appeared that *Kishna* and *Bhikan* had murdered *Jiwan* in *Bhikan's* field. *Kishna* was convicted of the murder, and also under s. 201 for having carried the corpse out of *Bhikan's* field, and left it on the land of the murdered man. *Pe arson, J.*, said: "He did not, by removing the corpse of *Jiwan* from one field to another, cause any evidence of *Jiwan's* murder, which that corpse afforded, to disappear. His object may have been to divert suspicion from himself or from *Bhikan*, but his act does not constitute the offence defined in s. 201." He certainly did not cause the evidence that *Jiwan* was murdered, derivable from the fact that *Jiwan* was a corpse, to disappear; but he undoubtedly caused

the disappearance of the evidence that Bhukan was the murderer, derivable from the fact that the corpse was found in his field. In a case noted in 2 Cr. L. J. 148, (Sh. n) after considering 2 A. 713, it was held by the Sadar Court of Sind that the lie of the body, its condition and actual surroundings being important evidence the shifting of the corpse might amount to an offence under s. 201, 5 Sind L. R. 123=13 Cr. L. J. 18=13 Ind. Ca. 210. In 1905 P. R. No. 53=6 P. L. R. 674=3 Cr. L. J. 136, the accused finding in her house the corpse of a girl murdered by her own son merely locked the outer door without removing the corpse or concealing it. This act was held not to constitute an offence under s 201. In 1882 P. R. No. 21 the accused took away the wife of a murdered man so that she might not immediately communicate to the police the information she had of her husband's murder. This was held not to constitute an offence under s 201.

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Under s. 201, mere knowledge that the act of the accused is likely to screen the offender is not sufficient, actual intention to screen must be established, 5 N.-W. P. H. C. R. 186; 2 W. R. (Cr.) 43; 1881 P. R. No. 28; 3 M. H. C. R. 251. Where the charge of giving false information is framed under s. 203, it is unnecessary to prove any particular intention, 1 W. R. (Cr.) 18, but it is still necessary, as under s. 201, to prove that an actual offence had been committed, and that the accused knew, and had reason to believe in its commission. 20 W. R. (Cr.) 66, 2 W. R. (Cr. Let.) 1. The same remarks apply to s. 202, where the offence consists in intentionally omitting to give information which the person is legally bound to give. In *Ratanlal* 783, it appeared the *Patel* ordered the *Kulkarni* to write a report regarding a suspicious death in his village. His good faith being thus apparent, it was held the intention required to constitute an offence under s. 202 has not been made out. The same result would follow where a village headman has gone in pursuit of murderers or has taken down statements. See 11 Bur. L.R. 815; L.B.R. (1893—1900) 382. As to circumstances under which there is a legal duty to give information, see 18 W. R. Cr. 31;

1887 P. R. No. 20, 1881 P. R. No. 25, S. 203 will not apply to a person answering falsely questions put to him by the police under S. 161, Cr. P. C. This section contemplates giving information voluntarily. 7 A. L. J. 1150 = 11 Cr. L. J. 438 = 7 Ind. Ca. 50, 20 W. R. (Cr.) 66, 6 Sind. L. R. 143 = 14 Cr. L. J. 252 = 19 Ind. Ca. 508 = 5 Sind. L. R. 174 at 179 = 13 Ind. Cas. 273 = 13 Cr. L. J. 33. It is only necessary to refer to the observations contained in § 86, *supra*, as to the latter point. As to the somewhat similar sections (213 and 214), see *ante* § 88.

In cases under s. 181, for giving false statements on oath to a public servant, it is necessary to prove that the person accused was legally bound by an oath, which the public servant was authorized to administer 5 A. 17; 6 M. 252; 5 M. H. C. R. 326; 6 W. R. (Cr.) 81 and that his statements were false to his knowledge or that he did not believe it to be true. 2 W. R. (Cr.) 47. In a criminal appeal, the accused cannot be examined as a witness and consequently cannot be held liable for making a false statement. 12 M. 451. The same principle has been applied to proceedings under the *Legal Practitioners Act* where a pleader is called on to explain his conduct. The pleader whose conduct is under enquiry cannot be asked to make a statement on solemn affirmation, 6 M. 252; *contra*, see 12 O. C. 308 = 10 Cr. L. J. 509 = 4 Ind. Cas. 160 where an accused was held liable not for any statement made when examined under s. 342, Cr. P. Code, but for having made false statements with a view to get the case transferred.

As to the necessity for sanction in case of proceedings for giving and fabricating and making use of false evidence, see Crim. P. C., s. 195. As to the power of courts to deal with such offences when committed before themselves, see ss. 477, 478 and 487, Cr. P. C.

II. FRAUDULENT TRANSFERS AND SUITS

123. Transfers that are Fraudulent.—Sections 206, 207 and 208 aim at rendering criminal all contri-

vances by which the owner of property withdraws it from liability to seizure under a sentence or judgment of court. Of these three no difficulty, except one of fact, is likely to arise under s. 208. It is impossible that anyone can allow a decree to be passed, or process to be executed against him, for property which is his own, or money which is not due by him, except to cheat someone else. Where he does so, it is not necessary to allege or prove any special intention. The offence consists in a fraudulent employment of the machinery of the court. Nor, again, can there be any legal difficulty under s. 207, supposing the facts to be established. It is different with s. 206, where the accused is an owner dealing with his own property, and where acts which would otherwise be innocent, are rendered criminal, if done for certain specified purposes, and with that state of mind which is described by the word "fraudulently". Both elements must co-exist, 18 W. R. (Cr.) 65, but the most difficult question will commonly be, "What constitutes *fraud*?" Upon this point it may safely be asserted, that something will be necessary beyond that general flavour of deception which pervades every transaction, where the appearance and the reality do not correspond. Fraud cannot be presumed, 1906 A. W. N. 26. *Benami* transactions are so universal among Indians, that they have received recognition from the highest tribunals, and are now regulated by a well-defined system of rules (See Mayne, Hindu Law, chap. xiii). Probably the best guidance will be found in that large body of decisions which sprang from the English statute, 13 Eliz. c. 5, and which are discussed in the notes to *Twyne's case* in Smith L. C. (Vol. I.) 1. It is certain that nothing will be considered fraudulent under s. 206 which has been held not to be fraudulent under that Act, though it is possible that transactions which are liable to be set aside under the statute of Elizabeth may not necessarily be treated as criminal under the Penal Code.

Statute 13 Eliz., c. 5, recites that gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions have been contrived of fraud, malice, covin and collusion, to delay, hinder or defraud creditors or others of their just and lawful actions,

suits, debts, etc., and then declares that all such transactions made for any of the above intents, shall be utterly void as against persons whose suits, etc., are, or might be, in anywise disturbed, hindered, delayed or defrauded. By s. 5, this provision is declared not to apply to any conveyance made to any person, who takes it *bona fide* for valuable consideration, without notice of the fraud intended. This statute has been declared by Lord Mansfield to enact nothing beyond what would have been attained by the common law. *Cadogan v. Kennet, Cowper*, p. 434.

As embodying sound principles of justice and equity, it has been adopted as a rule of decision by the Indian courts, in districts where the statute itself is not in force; *Per* Lord Fitzgerald in 11 I. A. 10, p. 18=10 C. 616 at 624; *per* West, J., 11 B. 666 at 675; *per* Sargent, C.J., 13 B. 297 at 300, and as regards transfers of immovable property, it and the cognate Statute 27 Eliz., c. 4 have been almost literally copied in s. 53 of the *Transfer of Property Act*, IV of 1882. It may safely be assumed that the framers of the Penal Code had in view the statute itself, and the decisions upon it, and that they intended to give it a sanction by means of the criminal law.

A conveyance will not be fraudulent merely because it deprives another of a security which he would otherwise have had, if that is not the object of the act. For instance, there will be no fraud in a sale by a debtor of his landed property for a fair and adequate consideration, though it will, of course, be much less convenient to the creditors to pursue the purchase-money than the property. And it would make no difference whatever that the debtor was actually in the throes of a lawsuit. For he is not bound to keep his property in one form rather than another for the convenience of his creditors. And in England it has been repeatedly held that the fact of such a sale having been effected when an immediate execution was anticipated will not vitiate the sale.

In one of the later cases upon the point, it appeared that a trader, effecting the execution of a writ issued out of the Court for payment of costs of a suit, effected a sale of furniture and stock in trade. The only document produced was a receipt for the purchase-money. A few days after the sale, the creditor had taken possession, a writ was issued,

and a suit was brought by the sheriff to decide whether the sale was fraudulent. *Kindersley, V. C.*, said:—

"At the present day, whatever fluctuations of opinion there may have been in the courts of this country as to the construction of that statute (13 Eliz., c. 5), it is not a ground for vitiating a sale that it was made with a view to defeat an intended execution on the goods of the vendor, the subject of the sale, supposing it was in all other respects *bona fide*. The case of *Wood v. Dixie*, 7 Q. B. 892 has settled that at law in the most solemn manner, on a motion for a new trial. With respect to the question whether the sale was *bona fide*, it was at one time attempted to lay down rules that particular things were indelible badges of fraud, but in truth every case must stand upon its own footing, and the Court or jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a good and valuable consideration." *Hale v. Metropolitan Saloon Omnibus Co.*, 28 L. J. Ch., 777=4 Drew., 492; *Darvill v. Terry*, 30 L. J. Ex., 355=6 H. & N., 807. And it makes no difference that the sale was of all that the debtor possessed. In *Atton v. Harrison*, 4 Ch., 622, at 626. Giffard, L. J., said "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth, whether the deed deals with the whole, or only a part of the grantor's property. If the deed is *bona fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth." This dictum was adopted and followed in *In Re Bamford*, 12 Ch D 314, where B executed a bill of sale to G of all his property then existing, or afterwards to be acquired, in order to secure an existing debt and future advances. In a similar case, J granted his farming property, which was all he possessed, to his daughters, in consideration of their paying all his debts incurred up to that time in connection with working his farm, and maintaining him. The plaintiff, who was his creditor in respect of a transaction unconnected with the farm, sued to set it aside. Fry, J., in affirming the grant, said "It is obvious that the intent of the statute is not to provide equal distribution of the estate of debtors among their creditors—there are other statutes which have that object,—nor is it the intention of the statute to prevent any honest dealing between one man and another, although the result of such dealing may be to delay creditors. And cases have been cited, accordingly, where deeds of this kind have been held good, though the result of them has been that creditors have been not only delayed but excluded." *Golden v. Gillam*, 20 Ch D. 389, at 392.

The mere fact that a transfer of property is for valuable or sufficient consideration, is not conclusive against its being fraudulent, though it throws a very heavy burden upon those who allege that it is so. *Per* Lord Mansfield, *Cadogan v. Kennett*, Cowper, p. 434;

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The mere fact that a transfer of property is for valuable or sufficient consideration, is not conclusive against its being fraudulent, though it throws a very heavy burden upon those who allege that it is so. *Per Lord Mansfield, Cadogan v. Kennett, Cowper*, p. 434;

per Turner, V. C., *Harman v. Richards*, 10 Hare, 89. The question will still be, was it a *bonâ fide* transaction, which may be good though it has the effect of delaying or excluding creditors, or was it one which originated from an intention to defeat or hinder just claims? The intention which makes a deed fraudulent must have been the substantial, effectual, or dominating view. It is not necessary that it should have been the sole view. *In Re Bird*, 23 Ch. D. 695. The language of the judges in some cases seems to make it sufficient to show that the intention of the debtor in making the transfer was to defeat, hinder, or delay his creditors. *Holmes v. Penny*, 3 K. & J. 90; *per* Wood, V. C., p. 99; *Thompson v. Webster*, 4 Drew. 628; *per* Kindersley, V. C., p. 632; *Golden v. Gillam*, *per* Fry, J., 20 Ch. D. 389 at 393. It must be remembered that no deed for a valuable consideration can be void under the statute of Elizabeth, unless it was intended to carry out some fraud, to which the purchaser made himself a party. In general the fraud consists in the whole transaction being unreal. Either it appears to be a sale or mortgage, when it is not, or if it is, as far as actual payment goes, a sale, it is accompanied by some secret trust, which undoes it.

In a case of this sort, Baron Rolfe said: "In one sense it may be considered fraudulent for a man to prefer one of his creditors to the rest, and give him a security which left his other creditors unprovided for. But that is not the sense in which the law understands the term 'fraudulent.' The law leaves it open to a debtor to make his own arrangements with his several creditors, and to pay them in such order as he thinks proper. What is meant by an instrument of this kind being fraudulent is, that the parties never intended it to have operation as a real instrument, according to its apparent character and effect." *Eveleigh v. Pursford*, 2 M. & R. 541.

Suppose, however, that a debtor made arrangements to realize all his tangible property, in order to abscond with the proceeds and leave his creditors unpaid, and that a friend, knowing his plan, helped him in it by taking his property off his hands, even at a fair price, this would apparently make the sale void under the statute, and would no doubt be punishable under s. 206, if the object was to defeat justice in any of the ways specified in that section.

The law, as administered in India, seems in accordance with these decisions. Under s. 61 of the Civil P. C., the debtor is free to make any private alienation of his property, until an actual attachment of the property has been made. (As to the effect of dealing with property according as the attachment was actually made, or only impending, compare 28 C., 217; 25 B. 202.) A creditor commits no fraud under s. 207 who anticipates other creditors and obtains assignment of property not already under attachment by another creditor, *Ratanlal* 110. Similarly where a debt has been attached, the transfer of a decree passed on the basis of the attached debt is no offence as the transfer cannot affect the rights of the attaching creditor, 1906 A. W. N. 26=3 A. L. J. 1=3 Cr. L. J. 92. It has also been repeatedly held that, "where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution." 3 M. H. C. R. 231; 5 M. H. C. R. 368; 24 C., 825. And so, "if a man owes another a real debt, and in satisfaction thereof sells to his creditor an equivalent portion of his property, transferring it to the vendee, and thereby extinguishing the debt, the transaction cannot be assailed, though the effect of it is to give the selected creditor a preference." 8 A. 178; 23 M., 184. Such transactions though made with a view to defeat a probable execution, are not void under ss. 21 and 24 of the Contract Act, IX. of 1872, as being forbidden by law, or fraudulent, or involving injury to the property of another, or opposed to public policy. They involve no dealing with a man's own property which the law does not allow. 4 B., 70. "But if the sale or mortgage be only a colourable transaction, or a mere sham, and not intended to confer upon the alleged grantee or mortgagee any beneficial interest in the property, and simply (for the purpose of screening it from execution) to substitute in lieu of nominal owner, to make such owner (the debtor), and thus to endeavour to preserve the property for the latter, such a sale or mortgage

124. Fraudulent Gifts.—The law as regards gifts was laid down as follows by Lord Justice Giffard in *Freeman v Pope*, 5 Ch. 538, at 545, qualifying the too strong terms used by Lord Westbury, in *Spiro v. Willows*, 5 Giff. 49=33 L. J. Ch. 365.

"If after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent to defraud, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them."

Probably a judge in putting a case to the jury under s. 206 ought not to direct them, as a matter of law, that they must convict upon finding the above facts, but that such facts were very strong evidence upon which they might convict, if there was nothing to explain them away. Debt is the normal condition of many classes of the Indian community, and with persons in high position the making of considerable gifts is a part of their ordinary expenditure. A man executed a bond in May, 1858, and about a year after the execution, and shortly before suit, he transferred to his wife 25,000 rupees as a gift; and the creditor after decree sued to set aside the gift, and to establish his right to take the securities in execution. The original court found that the gift was a *bona fide* disposition of the securities, and not a mere

blind, or really with the intention of defrauding the plaintiff of the amount of his debt. The civil judge considered that the mere fact of the transfer, after the debt was incurred, and without provision for its payment, was itself a fraud on the plaintiff. The Madras High Court directed an issue as to the specific motives and intent of the debtor. They said

"In the case of a voluntary transfer, the *bona fides* of it with reference to the intention of the debtor is the point for consideration. In every such case, we think the proper question to be considered is, whether the circumstances in evidence, taken together, lead reasonably to the conclusion that the real motive and intention of the transaction was to deprive the creditor of the means of obtaining payment of his debt from the debtor's property generally. If so, the disposition is fraudulent and void to the extent of the debt due to the creditor by whom it is impeached. No general rule can be laid down as to the nature or extent of the evidence which should be acted upon. Being a question of intention, each case must necessarily be decided on the particular evidence offered in it, as to the acts of the parties and the position in which they stood to each other, the amount of the debt, the means possessed by the debtor, and the other circumstances shown to be connected with the transaction." 4 M. H. C. R. 81, at p. 83; *In re Lane Fox* (1900) 2 Q. B., 503.

It seems to me that this would be the proper mode of directing a jury in a prosecution under s. 206, remembering always that more conclusive evidence is necessary to convict a man of a criminal offence based upon fraud, than to upset a transfer which defeats the claim of a creditor.

In the Madras case it does not appear what amount of property remained to the debtor after the transfer. Possibly the creditor wished to invalidate the transfer, so as to save himself the trouble of hunting for assets which were less valuable and less easily identified. In 13 B. 297 the debtor, being in pecuniary difficulties, executed a gift of all his property in favour of his wife and minor sons. This, of course, left the debtor absolutely without assets, and the transaction was at once set aside.

A voluntary conveyance by a man who is about to be tried for any crime, where conviction works a forfeiture,

will be fraudulent. And even considerations of affection will not support the transfer, where the object is to remove the property from the effect of the sentence; as, for instance, where the conveyance by a man about to be tried for a felony was made in trust for a wife. *Re Saunders' estate*, 32 L. J. Ch. 224=4 Giff., 179. But such an assignment at any time before conviction will bind the property, if made *bona fide* and for valuable consideration. *Whitaker v. Wisbey*, 12 C. B. 44=21 L. J. C. P. 116; *Choune v. Baylis*, 31 L. J. Ch. 757=31 Beav. 351. Where, however, the assignment was made by a person who, under a mistake of fact, thought he had committed a crime when he really had not, it was held that the transaction was not illegal, and a re-conveyance to himself decreed. *Daries v. Otty*, 34 L. J. Ch. 252.

125. Transactions on the eve of Insolvency.—Ss. 55-57 of *The Presidency Towns Insolvency Act*, III of 1899, (which correspond to ss. 36-38 of *The Provincial Insolvency Act*, III of 1907) declare what transactions of the Insolvent before his adjudication are good and what void as against the general body of creditors.

Where the widow of a man who died insolvent conveyed his whole property to his separated brothers in consideration of two time-barred debts, it was held that this transfer could not be set up as against an attachment, made after the death of the husband under a decree obtained against him while still alive.* West, J., seems to have rested the case on the ground of fraudulent preference; and the disfavour with which the jurisprudence of civilized nations regards unequal dispositions of property by a man in insolvent circumstances, and known to be such by the donee, which leads to their being set aside, unless where the transferee has simply pressed a valid claim, or made a purchase in good faith. 11 B. 666, at 676. In the particular case the conveyance was a purely voluntary gift, and probably a sham. If the impropriety of the transaction consisted in preferring one creditor to all the others, then the Court did exactly the same thing in favour of the plaintiff. As Sargent, C.J., pointed out in 13 B. 434 the proper

remedy in such a case is to take some proceeding, to have the whole property dealt with for the benefit of all the creditors. This is exactly what was said by Fry, J., in *Golden v Gillam*, 20 Ch. D. 389 at 392 and by Thesiger, L. J., in *re Bamford*, 12 Ch. D. 324. In a case where a very large debt was due to the defendants, who were some of many creditors, and the debtor assigned to them a decree, out of which they were to pay themselves, and hand over the balance to the debtor's father, and where the defendants accepted and carried out the arrangement in good faith, the Madras High Court held that it could not be set aside at the suit of another creditor. 16 M. 397. The Court spoke of the debtor as having acted fraudulently in contemplation of his approaching failure and insolvency. But the term *fraudulently* in this application means nothing more than that the arrangement was opposed to the equal distribution prescribed by the insolvency laws, when they are put into operation. See *per* Lord Hobhouse, 19 I. A., p 19. Here they had not been put into operation, and, till they are, a man is master of his own money, and may pay any creditor he wishes, in any order he wishes, provided he really does pay him, and does not only pretend to pay him. Apparently, then, no payment by way of preference by a man in difficulties would be punishable under s 206, merely because the insolvency law calls it a fraudulent preference.

Chapter XVII contains another set of sections—421 to 424—the object of which appears to be so similar to that of ss 206 to 208, that it is difficult to understand why they are found in a different part of the Code. In order to satisfy s. 206, a definite intention must be found to prevent the property dealt with from being seized under an impending decree, or execution of a court of justice. Under s 421, the intention must be to prevent property from being distributed according to law amongst creditors, and the section covers *benami* transaction in fraud of creditors. 1899 P. J. L. B. 593, though there is nothing necessarily fraudulent in such a transaction by itself, 6 M. I. A. 63. Under s 422, there must be an intent to prevent a debt or demand from being made

available according to law for the payment of debts. No specific intent is stated in ss. 423 and 424. It is sufficient to make out that the acts done were dishonestly or fraudulently done. Taken together, the two series of sections seem intended to punish every conceivable mode in which a man can deal with his own property, for the purpose of cheating somebody else.

The intention which governs the whole of s. 421 is "to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors, or the creditors of any other person". This can only refer to proceedings in the nature of insolvency, either under the Presidency or under the Provincial Insolvency Acts, III of 1909 & III of 1907. The criminal court's jurisdiction to entertain a complaint under this section is not taken away by anything in the former Act. 12 Bom. L. R. 750=11 Cr. L. J. 548=7 Ind. Ca. 963. There is no other process known to the law by which a man's property is distributed among his creditors. Section 206 plainly refers to the ordinary process, by which each creditor seizes on his own account whatever he can get. It is not necessary, under s. 421, that the defendant should have actually come under the operation of the insolvent law, or that steps should have been taken, or even be about to be taken, to bring him under the operation of the law. It is necessary that the act should be done in contemplation of insolvency; that is to say, that at the time the act complained of is done, or in consequence of that act after it is done, he should be made unable to pay his creditors in the ordinary way. *Smith v. Cannan*, 2 E. & B. 35=22 L. J. Q. B. 291; *Morris v. Morris* (1895), A. C. 625. Further, it must be done with the intention of preventing the equal distribution of the debtor's property among his creditors, and in a manner which can be described as dishonest or fraudulent. This section is intended to cover *benami* transactions in fraud of creditors rather than fraudulent preferences given to one *bona fide* creditor over another. L. B. R. (1893-1900) 593.

Where an insolvent debtor removes, or conceals, or delivers over his property to any person, simply in order that it may escape seizure for his debts, there can be no doubt as to both the dishonesty and fraud of the proceeding. The only difficulty will arise under the next clause of the section, where he dishonestly or fraudulently transfers, or causes to be transferred to any person without adequate consideration, any property, with the intent described in the section. This seems to aim at what is known in bankruptcy as fraudulent preference. The use of the words "dishonestly or fraudulently," shows that the section contemplates different states of mind, of which, probably, fraudulent is the weaker, and is used because it is a technical term, which has been frequently defined by the courts in reference to this particular class of acts. In *Young v Fletcher*, 3 H. & C. 732=34 L. J. Ex. 154. Pigott, B., said, with regard to s. 67 of 12 & 13 Vict. c. 106, which declares that a fraudulent transfer by a trader of any of his goods with intent to defeat or delay his creditors, shall be an act of bankruptcy. "We have to say what is the meaning of the word 'fraudulent' in the section. It seems to me that all the authorities almost are uniform upon that subject, and it is not necessary that there shall be moral fraud. The great point to look at is this. Would it have the effect of defeating and delaying the creditors?" and if so, it is fraudulent within the meaning of the bankruptcy acts, the object of which is that the goods of the debtor shall be divided rateably among his creditors." As to what acts are considered to have such an effect, the law was laid down as follows by Wightman, J. in *Smith v Timmins*, 1 H. & C. 849=32 L. J. Ex. 215. "The assignment of the whole of a trader's property is an act of bankruptcy, as the necessary effect of such a deed is to delay and defeat creditors. It makes no difference that the assignment is to trustees for the benefit of all the creditors who assent to it. It is in itself an act of bankruptcy and void against the official assignee. The question whether it is voluntary or not is immaterial. 26 B. 476 & 765. So also the assignment of the whole, with a colourable

exception only of part, is an act of bankruptcy for the like reason, for though a small part is left out, it is in effect an assignment of the whole. An assignment of part by way of fraudulent preference would be an act of bankruptcy, but if it be assigned under pressure, the authorities show that it is not an act of bankruptcy." It is not a necessary ingredient in the fraud which constitutes an act of bankruptcy that the grantee should have notice of the fraud. *Hall v Wallace*, 7 M. & W. 353; *Smith v Cannan*, 2 E. & B. 35=22 L. J. Q. B. 291.

An assignment even of the whole of a trader's property, present and future, is not fraudulent under the bankruptcy law, if at the time of the assignment he receives some substantial contemporaneous payment or some substantial undertaking to make payment *in futuro*; for such an arrangement, so far from defeating or delaying his creditors, may enable him to continue his business so as to put them in a better position. 19 L. A. 15, p. 19. Nor is the mere fact that a debtor under insolvent circumstances pays the whole of his claim to a single creditor either an act of bankruptcy or an indictable offence. It is a preference, but it is not a fraudulent preference, unless the act is done by the debtor of his own accord, for the purpose of defeating the law, and preventing the due distribution of his assets, by preferring one creditor at the expense of the rest.—*Per Cockburn, C.J., Bills v. Smith*, 34 L. J. Q. B. 68, at 72, *per Lord Romilly, Johnson v. Fesenmeyer*, 25 Beav. p. 93, *affd* in 3 De. G. & J. 13; *followed* in *Smith v Pilgrim*, 2 Ch. D., p. 134. Hence the transaction is not fraudulent, where it is a *bonâ fide* act on the part of the debtor, resulting from the pressure for payment of a genuine creditor, *Brown v. Kempton*, 19 L. J. C. P. 169, *re Vantin* [1900], 2 Q. B. 325, or is the result of a preference, after the debtor has become insolvent, of which element to give security entered into before the debtor had become desperate, *Ex p. Tempest*, 6 Ch., p. 73, of creditor, L. J. *In re Tweedale* [1892], 2 Q. B. 216, to one *bonâ fide* of a promissory note in order to relieve
In re Warren [1900], 2 Q. B. 138; *In re*

Eaton [1897], 2 Q. B. 16. And so it was held in a case where the debt had been incurred through a criminal breach of trust, and the payment was made under a threat of exposure and prosecution. The preference was undoubtedly made for the benefit of the debtor, but it was made under coercion, and with no wish to give a personal preference to the creditor. *Ex p Taylor*, 18 Q. B. D. 295; *Sharp v Jackson* [1899], A. C. 419.

In the majority of cases of so-called fraudulent preference there is a complete consideration for the act, as the payment discharges a debt which is legally binding. Where the transfer is, in the language of the section, "without adequate consideration", the mere inadequacy of the consideration, though tending to evidence fraud, is not conclusive of it. A man who is known to be in difficulties can seldom dispose of his property for its full value. An important question, however, arises upon these words, whether inadequacy of consideration for the transfer is not an essential element in the offence created by the section, so that it would be necessary to prove that a transfer was (1) fraudulent, (2) without adequate consideration, and (3) with the intention to prevent a rateable distribution among creditors. If so, the act which is punishable under s 421 will be something much beyond what is required to make out a fraudulent preference under the Insolvency Acts.

The remaining sections refer to frauds unconnected with insolvency, or the proceedings under it. Section 422 relates to fraudulent proceedings to prevent the attachment and sale under s 60 of the Civil P C of debts due to the accused himself, or to any other person. A mere breach of contract would not constitute an offence under this section unless the prevention is made dishonestly or fraudulently, 22 W.R. (Cr.) 46; 28 C. 314 = 5 C. W. N. 174. Section 423 punishes the fraudulent insertion of false statements in deeds affecting property.

Two ingredients are required to make up the offence in the latter section. First, a fraudulent intention, and,

secondly, a false statement as to the consideration for the document or the person in whose favour it is to operate. 25 A. 31; 1869 P. R. (Cr.) 23; 1902 P. R. No. 10; 1907 P. R. No. 16=6 Cr. L. J. 111; 1908 P. R. No. 16=1908 P. W. R. No. 93=8 Cr. L. J. 486. In this last case, fictitious mention of a price in a sale-deed to scare away pre-emptors was held to be an offence under this section provided the subsistence of a legal right of pre-emption is established. 1868 P. R. No. 16. In such a case not only the vendor who executes the document but also the vendee who takes the same would be liable 1902 P. L. R. 75. Criminal courts are not entitled to throw on the civil court the duty of ascertaining the existence of a right of pre-emption 1883 A. W. N. 209. The mere fact that an assignment has been taken in the name of the person not really interested will not be sufficient. Such transactions, known in Bengal as *benamee* transactions, have nothing necessarily fraudulent. But if a debtor were to purchase an estate in the name of another for the purpose of shielding it from his creditors; or to execute a mortgage deed, reciting a fictitious loan; or if the manager of a Hindu family, assigning the family property without any necessity, were to insert in the deed a statement that the assignment was made to pay the Government dues, or to discharge an ancestral debt, this would be such a fraudulent falsehood as would bring his act within s. 423. But it is not every false statement in a deed of sale that is an offence under this section. Its operation is confined to statements relating to consideration or to the person to be benefited by the instrument. (1911) 2 M. W. N. 413=10 M. L. J. 383=12 Cr. L. J. 547=12 Ind. Ca. 523.

Section 424 appears to render punishable the same acts which were dealt with in the first clause of s. 421 and in s. 423, whatever the motive for doing them was, provided it was a fraudulent motive.

Such acts as the
or crops, to avoid,

al by a tenant of his furniture,
for rent or attachment, 22 M.

151=8 M.L.J. 259; 1 Bom. L.R. 515; 5 Sind L. R. 130 =12 Cr. L. J. 611=12 Ind. Cas. 987; 25 M. 729, are punishable. But a removal of crops in violation of an order which the person making it has no authority to pass would not be within this section. *Weir* I. 483 & 484. In the case of a distress, its legality must be strictly proved, *Weir* I. 485. If, however, the removal was for protecting the ryot from injury or damage to the crops owing to the Zemindar's act in delaying the harvesting such removal would not be an offence not being dishonest, 26 M. 481. A release of a debt by one of several executors, partners, or joint-creditors, to the injury of the others, and without their consent, would come within this section. And so it has been held that one partner may be convicted under this section for dishonestly removing the partnership account books, in fraud of his co-partners. 13 B. L. R. 308 n. =21 W. R. (Cr.) 10; 22 M. 151=8 M. L. J. 259. But care must be taken that purely civil rights are not disposed of under this section in criminal courts, *Weir* I. 483; 14 K. L. R. 23 =1 Cr. L. J. 491, but legality or formality of a mode of attachment allowed by the civil courts is not a matter for the magistrate's consideration 8 W. R. (Cr.) 17.

III. FALSE INFORMATION TO PUBLIC SERVANTS AND FALSE CHARGES.

126. **False information to public servant.**—Sections 182 and 211 are placed in different chapters of the Penal Code, but are so similar that they may advantageously be considered together. The offence under s. 182 consists in knowingly giving a public servant false information, with the intention of inducing the public servant either to use his lawful power to the injury or annoyance of any person, or to do or omit anything which he would not have done or omitted, if he had known the true state of facts. Thus, where an accused person makes false allegations against a magistrate with a view to get his case transferred from his file he would be liable under s. 182 but not under s. 211. 12 O. C. 308 =10 Cr. L. J. 509=4 Ind. Ca. 160. See also 1 Sind

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L. R. 124=8 Cr. L. J. 379; 11 Cr. L. J. 537=7 Ind. Ca. 914. It is no defence to say the petition giving the information was not signed by the accused. 3 Sind L. R. 132=11 Cr. L. J. 3=4 Ind. Ca. 477. The offence under s. 211 is what is known in England as a false and malicious prosecution. It is obvious that almost all offences under s. 211 could be made to fit into the terms of s. 182, and that many, but not all, offences under s. 182 would also be offences under s. 211. It has, however, to be borne in mind that s. 211 makes one liable when there is no just or lawful ground for the charge so that one may come under that section for acting without due care and caution. But under s. 182 there must be positive and conscious falsehood on the part of the accused in order to sustain the charge. 31 B. 204=9 Bom. L. R. 33=5 Cr. L. J. 105, 19 B. 717. Where, however, the scope of the two sections 182 and 211 seem to overlap, each section ought to be interpreted not in isolation but in association with the other. If this is done, it would appear that where information conveyed to the authorities is directed against a defined person charging him with a definite offence, s. 211 would apply and s. 182 must be reserved as referring to cases where the information falls short of the institution of criminal proceedings against a defined person charging him with a definite offence. 15 Bom. L.R. 574=14 Cr. L.J. 491=20 Ind. Cas. 747; 1885 A. W. N. 95; 7 B. 184; 22 B. 596; 1 B. H. C. R. 87; 1870 P. R. (Cr.) 16.

Where the charge is based on the second clause of s. 182, the essence of the offence consists in the intention of inducing the public servant to cause injury or annoyance to some other person. *It is not an offence under s. 182 to give false information to a Collector that a Zemindar had usurped Government land, as the only result would be, that, if the Collector agreed with the informant, he would take due and lawful steps to assert the rights of Government.* 4 A. 498. The Madras High Court has held that false information given to a village magistrate, who could not himself act upon it, but could only pass it on to some higher authority, did

not come within the words of this section. 'They thought that "the words 'to use his lawful power' referred to some power to be exercised by the officer misinformed, which shall tend to some direct and immediate prejudice of the person against whom the information is levelled."

4 M. 241. See, however, 28 M. 565=3 Cr. L. J. 108 and 6 M. L. T. 175=11 Cr. L. J. 154=4 Ind. Cas.

1039. Weir L. 117, which was decided after s 182 was made clear by the rearrangement effected by Act III of 1895, s. 1. Where a person gives false information to an officer who can exercise his power to the direct and immediate prejudice of another against whom the information is levelled, this offence is complete. **Ratanlal**

946. But, conceding this to be so, surely information given to A, for the purpose of being passed on to B, and which it was his bounden duty so to pass on, must be considered as having been given, and intended to be given, to B. See *Kendillon v. Maltby*, Car. & M. 402=

2. M. & Rob. 438; 17 C. 574. It would, of course, be different if the false information was given to someone who was under no legal obligation to take any action upon it. 6 C. 620. In **Ratanlal** 315 the vendor at a liquor-

shop informed his master that an Inspector had asked him for money and had watered some liquor to get him (the shopman) into trouble. The master reported the matter to the Collector who granted sanction to the Inspector to prefer a complaint under s 182. Held the offence, if any, was one of defamation, as the master to whom the accused gave information was not a public servant. False information that stolen property

would be found in a particular house, if searched for, does come within the section. **Ratanlal** 72. If the information names the houses of several persons, only one offence has been committed. The offence consists in the false information, with a particular intent. The offence is not multiplied by the number of persons likely to suffer from it. 13 C. 270. The information may be volunteered or given in answer to a question put by a public servant, 10 B. 124; **Ratanlal**, 124; 1905

U. B. R. (P. C.) 13=2 Cr. L. J. 474, where 1 L. B. R. 101 is disapproved of.

The Calcutta High Court held, in one case, that the same intention must exist where the charge was under the first clause; consequently, that the section would not apply where a person gave false information to the police of a robbery, without naming anyone against whom they could act. 14 C. 314. As a result of this decision the section was redrafted by s. 1 of Act III of 1895. The new illustration (c) to the section *overrides*, 14 C. 314, 4 M. 241; Ratanlal 76, and other cases to the same effect which had held the intention must be to cause injury or annoyance to a particular person 14 C. 314. The Bombay High Court had declined to follow this view and held that the mere fact of giving a public servant false information in order to induce him to take, or omit, a particular line of action, is itself criminal, though no individual is hurt. The mere taking up the tune of a public servant by a hoax ought to be punishable. Such a proceeding might have very grave public consequences, if the police or the troops were sent off on a false alarm, given from criminal motives, or even from mere wantonness. 13 B. 506; 19 M.L.J. 271=4 M. L. T. 324=8 Cr. L. J. 421; 28 M. 565=3 Cr. L. J. 108; Weir I. 122. The motive may be self-protection rather than to injure another, but in any way, it is immaterial to establish liability under s. 182, Weir I. 120. The same view was taken by the High Court of Allahabad, in a case where the offence consisted in a telegram sent to the magistrate during the *Mohurrum*, giving him false information of a riot in another part of his district. 13 A. 351. In the Bombay case, a candidate for office had got a more learned friend to pass an examination in his name, and then forwarded the certificate granted to his proxy to the Assistant Magistrate. This was held to be an offence under s. 182. In a somewhat similar case, the defendant applied for his enlistment in the police of the Farukhabad district, and not knowing that the rules prohibited the enlistment of a resident in the district, falsely stated that he was not a resident. The Allahabad High Court held that this was not an offence under either

s. 177 or s. 182, but this is no longer law. When an *Ahir* got himself enrolled in the Police force representing himself to be a *Jat* his conviction under this section was upheld in 1880 P. R. No. 14. It certainly did not come under s. 177, as he was not legally bound to make any statement on the subject, but since the false statement was a necessary step towards inducing the police authority to do what the defendant wanted to have done, I cannot see why it did not come within s. 182. In *Ratanlal* 761 B appeared before a Registrar and falsely personated W in getting a lease executed. When B made some mistakes in giving the area of the land, C corrected him. E identified B as W and E and D assured the attesting witnesses that B was W. It was held that C, D and E could not be convicted under s. 82 (b) of the Registration Act, 1877, but that they were guilty of an offence under s. 182 I. P. C.

It is not necessary under either clause to show that any action has in fact been taken by the public servant. The offence consists in the attempt to induce him to act. 13 A. 351 dissenting from 14 C. 314; 15 A. 336; 28 M. 565 at 567=3 Cr. L.J. 108. It is immaterial whether the public servant is misled or not. *Weir* I. 118. Positive and conscious falsehood is the sole essence of the offence, 31 B. 204=9 Bom. L. R. 33=5 Cr. L. J. 105, and it is essentially an offence against the public servant to whom false information is furnished and not necessarily against persons about whom such information is given. 3 N.-W. P. H. C. R. 194.

The punishment that may be awarded under s. 182 is much lighter than that under s. 211, and the jurisdiction over the offences is in some degree different. It is therefore not right to prosecute under s. 182 where the facts come more properly under s. 211. When the false information consists of a specific charge of a criminal offence against persons who are named, it is desirable proceedings are taken under s. 211. 7 M. H. C. R. App. V.; 32 C. 180=2 Cr. L. J. 171=4 C. L. J. 89=5 C. W. N. 727; 8 W.R. (Cr.) 67; 5 C. 184; 5 A. 36, *affd.* on this

point, in 8 A. 382; 1885 A.W.N. 95; 7 B. 184; 22 B. 596; 1870 P. R. (Cr.) 16 (F. B.) and a charge of having preferred a false complaint ought not to be proceeded with till the truth or falsity of the original complaint has been finally determined by judicial investigation 4 C.L.J. 88=4 Cr. L.J. 68; 3 C.W.N. 758; 5 A. 387. A decision in a previous case is not admissible. Evidence must be adduced in the presence of the accused. 11 W. R. (Cr.) 35. In 15 A. 336, it was held when a police investigation showed the information to be false the informer is not entitled to have any further opportunity of substantiating his information before his prosecution is sanctioned under s. 182. It would be otherwise if the contemplated prosecution is one under s. 211. The accused is entitled to demand the disposal of his complaint in one of the modes recognised by law. 2 C. L. R. 389, 6 C. 496. 7 C. 87, 8 C. 435, 27 C. 921. Statements made by a prisoner in his defence do not come within this section. 2 N.-W. P. H. C. R. 128. Same principle applies to statement in an appeal memorandum, 1881 P. R. No. 41; 1879 P. R. No. 34 & 17. See 1905 P. R. No. 44, where this principle was held inapplicable to an ordinary petition.

When the false information has been given with the intention of injuring or annoying any private person, who is in fact injured or annoyed in consequence, he may prosecute for the offence, subject to obtaining sanction necessary under s 195 of the Cr. P. C. 8 A. 382, (*overruling* in this respect, 5 A. 36); 5 C. 184; 13 C. 270; 4 C. 869; 9 W. R. (Cr.) 31. In 14 C.W.N. 765=11 Cr. L. J. 354=6 Ind. Ca. 415, for information supplied to a subordinate officer an inspector of police sanctioned a prosecution under s 195, Cr. P. C., for an offence under s 182, I. P.C., but it was held that the magistrate was wrong in taking cognisance of the offence without the complaint of the public servant to whom the false information was given. If the person informed was not a public servant, the informer might be liable for defamation, but not under Ratanlal 315; an acquittal under 182 to a subsequent prosecution under 30, As regards the

evidence to support such a prosecution, there is a difference between a false charge under s. 211 and false information under s. 182. In the latter case, it would not be necessary to prove malice and want of probable cause, except so far as they are implied in the act of giving information known to be false, with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. But it is not enough to show merely that the accused acted recklessly and had insufficient foundation for his knowledge or belief, 31 B. 204=9 Bom. L. R. 33=5 Cr. L. J. 105. In an enquiry under s. 211 on the other hand, proof of the absence of just and lawful ground for making the charge is an important element—*Per* Ranade, J., 19 B. 717 at 725; 26 M. 640. In both cases the fact the information is shown to be false does not cast upon the accused the burden of showing that he believed it to be true. The prosecution must make out that the only reasonable inference is that he must have known or believed it to be false, 26 M. 640; 1884 P. R. No. 32; Weir I. 121 & 190; 9 W. R. (Cr.) 31; 1908 U. B. R. Cr. 190=10 Cr. L. J. 12. Thus positive and conscious falsehood must be established by the prosecution, 31 B. 204=5 Cr. L. J. 105=9 Bom. L. R. 33; 17 M. L. J. 24n. The person who actually gave the information or instigated giving such information will alone be liable, not a third party on whose words the informer relied, 6 A. L. J. 236=9 Cr. L. J. 518=2 Ind. Ca. 199. If the informer shows that he had reasonable grounds for believing the information to be true he escapes liability. He is not bound to show that his information was in fact true, 1890 P. R. No. 35.

A head-constable is a public servant within the meaning of this section. 11 W.R. (Cr.) 22; 19 W.R. (Cr.) 33. So is a vaccinator. 6 M. H. C. R. XLVIII.

127. False Charge.—Section 211 contemplates two different offences—a false charge and the institution of criminal proceedings. The latter necessarily assumes the former, but the former may be committed where no criminal proceedings follow. Where the charge had

point, in 8 A. 382; 1885 A.W.N. 95; 7 B. 184; 22 B. 596; 1870 P. R. (Cr.) 16 (F. B.) and a charge of having preferred a false complaint ought not to be proceeded with till the truth or falsity of the original complaint has been finally determined by judicial investigation 4 C.L.J. 88=4 Cr. L.J. 68; 3 C.W.N. 758; 5 A. 387. A decision in a previous case is not admissible. Evidence must be adduced in the presence of the accused 11 W. R. (Cr.) 35. In 15 A. 336, it was held when a police investigation showed the information to be false the informer is not entitled to have any further opportunity of substantiating his information before his prosecution is sanctioned under s. 182. It would be otherwise if the contemplated prosecution is one under s. 211. The accused is entitled to demand the disposal of his complaint in one of the modes recognised by law. 2 C. L. R. 389, 6 C. 496. 7 C. 87, 8 C. 435, 27 C. 921. Statements made by a prisoner in his defence do not come within this section. 2 N.-W. P. H. C. R. 128. Same principle applies to statement in an appeal memorandum, 1881 P. R. No. 41; 1879 P. R. No. 34 & 17. See 1905 P. R. No. 44, where this principle was held inapplicable to an ordinary petition.

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evidence to support such a prosecution, there is a difference between a false charge under s. 211 and false information under s. 182. In the latter case, it would not be necessary to prove malice and want of probable cause, except so far as they are implied in the act of giving information known to be false, with the knowledge or likelihood that such information would lead a public servant to use his power to the injury or annoyance of the complainant. But it is not enough to show merely that the accused acted recklessly and had insufficient foundation for his knowledge or belief, 31 B. 204=9 Bom. L. R. 33=5 Cr. L. J. 105. In an enquiry under s. 211 on the other hand, proof of the absence of just and lawful ground for making the charge is an important element—*Per* Ranade, J., 19 B. 717 at 725; 26 M. 640. In both cases the fact the information is shown to be false does not cast upon the accused the burden of showing that he believed it to be true. The prosecution must make out that the only reasonable inference is that he must have known or believed it to be false, 26 M. 640; 1884 P. R. No. 32; Weir I. 121 & 190; 9 W. R. (Cr.) 31; 1908 U. B. R. Cr. 190=10 Cr. L. J. 12. Thus positive and conscious falsehood must be established by the prosecution, 31 B. 204=5 Cr. L. J. 105=9 Bom. L. R. 33; 17 M. L. J. 24n. The person who actually gave the information or instigated giving such information will alone be liable, not a third party on whose words the informer relied, 6 A. L. J. 236=9 Cr. L. J. 518=2 Ind. Ca. 199. If the informer shows that he had reasonable grounds for believing the information to be true he escapes liability. He is not bound to show that his information was in fact true, 1890 P. R. No. 35.

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127. False Charge.—Section 211 contemplates two different offences—a false charge and the institution of criminal proceedings. The latter necessarily assumes the former, but the former may be committed where no criminal proceedings follow. Where the charge had

been preferred before an inspector of police, who disbelieved it, and refused to act upon it, Scotland, C.J., remarked: "To constitute the offence of preferring a false charge contemplated in s. 211, I. P. C., it is not necessary that that charge should be before a magistrate. It is enough if it appear, as it does in the present case, that the charge was deliberately made before an officer of police with a view to its being brought before a magistrate. Of course a mere random conversation or remark would not amount to a charge" 1 M. H. C. R. 30, *folld.* 4 W. R. (Cr. Let.) 11; 1 A. 497; 5 C. 281; 26 M. 640; Ratanlal 524; 2 N. L. R. 119=4 Cr. L. J. 240. On the same principle it has been held that a prisoner may be charged under two heads for bringing a false charge, and for instituting criminal proceedings, the offences being different. 8 W. R. (Cr.) 87; 1886 P. R. No. 1; 1900 P. R. No. 26. This offence has been held to be only punishable under the first head of s. 211, even though the false charge relates to any offence punishable with death, transportation for life, or imprisonment for seven years or upwards. 5 A. 215 & 598. A contrary decision was given by a Full Bench of the High Court of Calcutta, in a case where the defendant had made to the police a charge of setting fire to his house, which upon a local inquiry was held to be false. If true, it would have been punishable under s. 436 with transportation for life. The defendant was charged under the first head of s. 211, and sentenced to three years' imprisonment. The conviction was affirmed by the High Court. 17 C. 574, *overruling* 14 C. 633.

The referring order relied upon 3 W. R. (Cr.) 12, in which a false charge of dacoity made to the police had been held legally punishable with three years' imprisonment; to 5 W. R. (Cr.) 32, in which the Court said that "to prefer a complaint to the police in respect of an offence which they were competent to deal with, and thereby to set the police in motion, is to institute a criminal proceeding within the s. 211." But it did not appear what the charge was, or what the question was which came before the Court. Also to 8 W. R. (Cr.) 67 & 21 W. R. (Cr.) 34, in which it appears to have been held that a mere false complaint to the police of a crime coming within the second head of s. 211, was an institution of a criminal proceeding, which made the offence triable only

by a sessions judge. The Full Bench decision admitted that a false charge, and the institution of criminal proceedings, must be taken to mean two different things, though not things mutually exclusive. They considered that a man who made a false charge to the police of a *recognizable offence* did institute criminal proceedings within the meaning of s. 211, but not when the charge was of a *non-recognizable offence*. The ground of the distinction was, that in the former case, the proper officer of police may proceed to make an investigation, and if the result of that investigation is adverse to the accused, he is in due course brought by the police before a magistrate. In the latter case the police cannot take any step of their own authority. Everything that is done must proceed from the direct action of the complainant himself. It is, of course, quite clear that if a person lays a charge before the police, who take up the matter in a way which results in criminal proceedings being taken before a magistrate, those proceedings are instituted by the complainant, inasmuch as he has set the police in motion in a manner which must have that result, if his charge is believed. The same conclusion, however, does not appear to follow if his charge is discredited. In that case the outside which takes place is a mere local inquiry, of which the person falsely charged may never hear, and which can cause him neither injury nor annoyance. No criminal proceeding is ever taken against him. It is a very grave offence to bring a false charge which may result in the institution of criminal proceedings, but the injury to the person charged is very different if the charge matures into a criminal proceeding, with all its annoyance, disgrace, and expense, and the risk that a false charge may possibly be believed. With all these distinctions present to their mind, the Calcutta High Court held preferring a false charge to the Police of a grave offence is punishable under the second part of s. 211. 7 C. W. N. 556. The Madras High Court has taken the same view in 20 M. 79=7 M. L. J. 16, 31 M. 503 and 27 M. 127, see 2 N. L. R. 119=4 Cr. L. J. 240, 32 M. 258; 1884 P. R. No. 17. The Allahabad High Court and the Punjab Chief Court have taken a different view holding actual criminal proceedings in a court should be instituted to bring a case under the second part of s. 211, 16 A. 124; 1907 A. W. N. 149; 7 A. L. J. 989=11 Cr. L. J. 54=4 Ind. Ca. 812; 5 A. 215 & 598; 1888 P. R. No. 3 & 26. The Bombay High Court has not made any pronouncement on the point though it was raised in 22 B. 596.

A false charge made to a person who has no magisterial or police authority does not come within s. 211. 13 C. W. N. 398. In 6 C. 620, a woman appeared before the station staff officer, and accused a non-commissioned officer of rape. There was an inquiry, apparently of a regimental nature, and the military authorities held that the charge was false, and directed the complainant to be

prosecuted under s. 211. The conviction was set aside. Mitter, J., said "We do not think it is unduly refining the words of the section to say that the false charge must be made to a court or to an officer who has powers to investigate and send up for trial." The language goes further than was probably meant. An information lodged before a magistrate to compel the party's opponent either to perform a contract to sell or to return the purchase-money is of a civil nature and if the facts alleged are found to be false a prosecution under s. 211 cannot be sustained. *Ratanlal* 3; 7 A. L. J. 618=11 Cr. L. J. 351=6 Ind. Ca. 390. Similarly a complaint of an offence made to an executive officer as such is not within the section, 1909 P. W. R. (Cr.) 2=1909 P. L. R. 37=9 Cr. L. J. 152=1 Ind. Ca. 93; *cf.* 1908 P. R. No. 26; 1904 P. L. R. 397=1 Cr. L. J. 957; 1904 P. L. R. 109. Similarly, when a man presented a petition to a District Magistrate who happened to be in charge of papers connected with a municipal election praying for permission to inspect the file and vouchsafing the information that the inspection was desired for starting criminal proceedings against a municipal employee for giving voting papers to persons not entitled to vote, held the presentation of the petition did not constitute an offence under s. 211. 8 A. L. J. 1106=12 Cr. L. J. 433=11 Ind. Ca. 617. As already remarked the gist of the offence is setting the criminal law in motion. If this is found as a fact it would make no difference that the petition was addressed to a Collector of Taxes, where the latter had also magisterial powers. 11 A. L. J. 529. Even if it is addressed to a magistrate, if the prayer is confined to asking the party complained against to be warned for his misdeeds, it would be no offence under s. 211. 15 C. W. N. 1051; 1882 A. W. N. 242. The question whether false information given to a village headman with intention that he should under s. 45, Cr. P. C. pass it on to the police and to the magistrate would amount to an offence under s. 211 was considered by a Full Bench in 32 M. 258=5 M. L. T. 269=9 Cr. L. J. 170, and the majority held *overruling* 31 M. 506=18 M. L. J. 573=9 Cr. L. J. 77 and possibly *Weir* I. 122, that it amounted to making a false charge as it is the usual practice in this

presidency to set the criminal law in motion by informing the village headman, well-knowing that he would pass it on to the police and the nearest magistrate. In 27 M. 129=1 Cr. L. J. 426 it was held that information of murder against specific persons given to a village headman was enough to constitute an offence under s. 211 though as a matter of fact there were no criminal proceedings as the police on investigation referred the case as false. See 1908 P. W. R. (Cr.) 22=7 Cr. L. J. 291; 1879 P. R. No. 14; 1888 P. R. No. 3. If a charge of a non-cognizable offence is made to a police officer, he has no power to investigate it. All he can do under Cr. P. C., s 155, is to enter it in his book, and refer the complainant to a magistrate, without whose order he cannot do anything more. Nor is a complaint of that which is not an offence punishable as a false charge of having committed an offence; as where the defendant was convicted of falsely charging the prosecutor with refusing to give her a receipt on stamped paper for money paid by her to him. 1 B. H. C. R. 92; [Had the case occurred after the passing of Act I of 1879, s 64, the decision might have been different.] 30 C. 415; 1904 P. L. R. 397. A person who is summoned to appear before a magistrate in the course of an inquiry, and who, in answer to his questions, makes an untrue statement, cannot be convicted of bringing a false charge under s. 211, because he does not set the criminal law in motion, 19 B. 51 at 69. Similarly where a person appeared before a magistrate and falsely stated that the police were concocting evidence against his friend against whom criminal proceedings were pending, it was held the intention of the accused was not to set the criminal law in motion against any police-officer and he was not liable under s 211. 26 M. 640; 1872 P. R. No. 14. Where the intention to set the criminal law in motion is clear it is no defence the police-officer to whom the false information was given failed to comply with s. 154, Cr. P. C., and did not reduce the information to writing 27 M. 127=1 Cr. L. J. 425. Where a person merely gives the police his suspicion against a particular person such expression of suspicion cannot amount to an offence under s. 211, 8 C. L. R. 233; 19 B. 51, 1905 P.

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The knowledge that the charge was a false one must, of course be inferred from the circumstances of each case, but this must be judged of according to the facts as they were known, or supposed to be when the charge was made, not as they are ascertained by more complete inquiry. And, accordingly, the party accused of making a false charge will always be allowed to show the information on which he acted, and the rumours, or even suspicions, which were afloat against the person accused. Not, of course, for the purpose of establishing the guilt of the latter, but of showing the *bona fides* of his own conduct. 3 B. H. C. R. (Cr. Ca.) 16. The prosecution must establish that there was no just or lawful ground for the proceedings, and that the defendant had not taken reasonable care to inform himself of the true facts. Any evidence which shows that he believed, and had

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remarks of Hawkins, J., in *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167 at 171. See also 1894 P. R. No. 20. "Belief is essential to the existence of reasonable and probable cause. I do not mean abstract belief, but a belief upon which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense. Proof of the absence of belief is almost always involved in the proof of malice"—*Per* Lord Denman, C. J., *Haddrick v. Heslop*, 12 Q. B., 267 at 274; *Weir* I. 185; 2 W. R. (Cr.) 10; 1 C. W. N. 301; 1894 P. R. No. 29. In prosecutions under s. 211, it must be borne in mind that a mere failure to establish the truth of the original allegation is no proof that the complaint was false. It must be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence. 16 C. L. J. 453 Proof that the original charge is false is not enough, in addition, it must have been preferred without reasonable and probable cause. 1 C. W. N. 301, 1 B. H. C. R. 87.

Rashness in making a charge, which is in fact believed, is not of itself indictable. 6 W. R. (Cr.) 15; *Weir* I. 185. But where there is a ready and obvious mode of ascertaining the truth of the charge—as, for instance, by personal inquiry from the person on whose information the accuser acts, and the opportunity of so doing is neglected by the defendant, the absence of inquiry is an element in determining the question of the presence, or absence, of probable cause. What its weight may be must depend on the circumstances of each case. Therefore, where the defendant gave A into custody on a charge of felony, acting on information received from B, which was itself derived from C, and he made no inquiry himself from C, and the judge directed the jury that on that state of circumstances there was no reasonable and probable cause, the Court of Appeal refused to disturb the verdict on

Perryman v. Lister, L. R., :
of Lords in L. R., 4 H. L., 521 ordered a new trial, being of opinion that the necessity for inquiry from C would

depend upon the position and circumstances of the informant B, and was not in itself conclusive and necessary evidence of want of reasonable and probable cause.

The intent to cause injury, or that malice which is necessary to support a suit for a malicious prosecution, cannot be inferred from the mere fact that a charge has been brought which turns out to be unfounded, or brought without probable cause 13 M., 394. Nor does it require proof of personal hostility to the person charged. As Parke, J., said "Malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives" *Mitchell v Jenkins*, 5 B. & Ad., p 595; *per* Lord MacNaghten, 25 B. at 335 (P. C.), 24 A., 363. As, for instance, where the defendant had brought a charge of perjury against the plaintiff, because it would stop the plaintiff's mouth in a proceeding in which he would be likely to give evidence against the defendant. *Haddrich v Heslop*, 12 Q. B., 267. But the baselessness of the charge, and the motive with which it is brought, mutually act upon each as a matter of evidence. Mere spite does not prove that the charge is unfounded. A man may bring a perfectly true charge from the worst of motives, without committing a crime. 3 N.-W. P. H. C. R. 327; 4 C., 583; 10 B., 506; *Corporation of Bradford v Pickles* [1894], 3 Ch., at 68. Nor does the fact that a charge has been dismissed, or that it has been abandoned, prove that it was brought maliciously or without reasonable and probable cause. *Willans v Taylor*, 6 Bing., 183; 11 B. L. R. p 330 (P. C.); 25 B., p 335 (P. C.) If, however, a man brings a charge which is false, on grounds which no reasonable man would believe, it goes a long way towards showing that he did not believe it, and that he acted with the sole intention of injuring the person charged. And conversely, if a man who brings an unreasonable charge, is shown to be acting from malicious motives, this leads to a very strong inference that he did not believe that his accusation was true. See *per* Lord Mansfield, C. J., *Johnstone v. Sutton*, 1 T. R., p. 545; *per* Bowen, L. J., *Brown v. Hawkes* (1891), 2 Q. B., at p. 727.

Where a case of this sort is tried by a judge and jury, it is the duty of the judge to direct the jury, as a matter of law, whether the facts alleged on behalf of the defence amount to reasonable and probable cause; and it is the province of the jury to find, as a matter of fact, whether the facts so alleged actually exist *Willans v. Taylor*, 6 Bingh., pp 186, 188; *Howard v. Clarke*, 20 Q. B. D. 558; *Lister v. Perryman*, L.R., 3 Ex. 197 & 4 H. L. C. 521; *Brown v. Hawkes* (1891), 2 Q. B., at 727. It is not, however, the duty of the judge to submit any issue of fact to the jury which is not fairly raised by the evidence. Where there is no fact or circumstance calculated to support such an issue, it is the duty of the judge to direct the jury accordingly. *King v. Henderson* (1898), A. C., p. 733. But where the case is tried without a jury, there is really nothing but a question of fact, and a question of fact to be tried by one and the same person. *Per Lord MacNaghten*, 25 B. 332 (P. C.); 28 C. 591.

In an action for a malicious prosecution, the plaintiff has to prove that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made. *Basèbè v. Matthews*, L. R., 2 C. P. 684; 6 B. 376; *Abrath v. N. E. Ry. Co.*, 11 A. C. 247; affg., 11 Q. B. D. 440. The object of the rule is to prevent a conflict of decisions between a civil and a criminal tribunal, and also because it would be impossible in most cases to find that a charge was not only false, but made without reasonable and probable cause, which had been found to be true by the tribunal before which it had been preferred. Even where a conviction upon the original charge had been subsequently reversed, the Madras High Court held in 3 M. H. C. R. 238, following *Reynolds v. Kennedy*, 1 Wilson 232; that, in the absence of very special circumstances, the judgment of one competent tribunal against the plaintiff afforded very strong evidence of reasonable and probable cause. 21 A. 26. It is obvious, however, that although a conviction unreversed would be strong evidence that the charge was properly made, it might be shown that the conviction was itself procured by means of forward false evidence in support

of a false charge. In one of the earliest cases under this section, Scotland, C J., said; in 1 M. H. C. R. 30; "It is said that it must appear that the charge was fully heard and dismissed. This is not necessary. It is enough in a case like the present, if it appear that the charge is not still pending. An indictment for falsely charging could not be sustained if the accusation were entertained, and still remained under proper legal inquiry. Here the facts that the inspector of police refused to act upon the charges, and that no further step was taken, are enough to bring the case within s. 211." 5 C. 281; 6 C. 582. Accordingly, where a charge of theft was reported as false by the police, upon which the complainant was prosecuted under s. 211, and he then appeared in court and formally renewed his complaint, which remained still pending, a conviction under s. 211 was set aside. 16 W. R. (Cr.) 77; 6 C. 496=4 C. L. R. 467; 14 C. 707. Where, however, the magistrate acting under Cr. P. C., s. 203, examined the complainant, and agreeing with the report of the police, dismissed the complaint without hearing evidence, it was held that a subsequent prosecution under s. 211 was not illegal. 4 A. 182; 7 M. 292; 24 M. 337. It is not necessary that person falsely charged should have been summoned. 26 A. 244=1904 A. W. N. 10=1 Cr. L. J. 7. But in a Civil suit for malicious prosecution an order of a magistrate under Cr. P. C., s. 209, refusing to commit the plaintiff for trial, was held insufficient to make out his innocence 24 M. 59. The fact that the complainant did not proceed with the charge, because he had compounded it with the accused under s. 345 of the Cr. P. C., is no defence to an indictment under s. 211. 11 C. 79. It is essential however that the original criminal proceedings if any should have terminated before the complainant is proceeded against 1 A. 497 & 527; 4 C. L. J. 88=4 Cr. L. J. 68, 1886 P. R. No. 28; 3 C. W. N. 758.

The same principles have been followed in the comparatively rare cases in which an indictment under s. 182 has been preferred, in respect of a false charge of a triable offence. In several cases such as 5 A. 36, 1882 A. W. N. 1; 29 A. 587, 8 A. 38, 6 C. 496=4 C.

L. R. 467, 7 C. 87=8 C. L. R. 87, 8 C. 435=10 C. L. R. 46, 2 C. L. R. 389, 14 C. 707, 27 C. 921, 1 C. W. N. 452, 3 C. W. N. 758, 5 C. W. N. 106, 33 C. 1=10 C. W. N. 158=2 C. L. J. 28=4 C. L. J. 88=4 Cr. L. J. 68; Weir l. 188, 10 M. 232, 1909 P. W. R. (Cr.) 2=9 Cr. L. J. 152, 7 C. P. L. R. 6, 4 N. L. R. 1, 30 A. 52=1907 A. W. N. 288=4 A. L. J. 790=6 Cr. L. J. 396; 1907 A. W. N. 195=6 Cr. L. J. 42; 1907 A. W. N. 268=6 Cr. L. J. 340; 3 Sind. L. R. 189=11 Cr. L. J. 199=4 Ind. Cas. 1160, 30 C. 415; 4 C. W. N. 305; 5 C. W. N. 254, 8 C. L. R. 289, 2 C. L. R. 315, Oud. S. C. 94,

where the police had refused to proceed upon the charge, considering it to be false, and the magistrate had dealt with the case under s. 203. Cr. P. C. on the police report, but the complainant had persisted before the magistrate in asserting its truth, it was held that a conviction was illegal, where the magistrate had refused to deal with the original charge, and afforded the complainant an opportunity to substantiate his complaint. But though it is desirable that a complainant should have every opportunity to substantiate his allegations, if a trial under s. 211 had proceeded, it cannot be held invalid, because the original charge had the disadvantage of being gone into by way of accused's defence and not as a case of prosecution. Ratanlal 524; 22 B. 596; 1907 A. W. N. 268; 4 N. L. R. 136=8 Cr. L. J. 349; 15 A. 336; 6 C. W. N. 295; 1906 P. W. R. (Cr.) 63=6 Cr. L. J. 258; 7 C. 208; 4 A. 182; 12 Bom. L. R. 229=11 Cr. L. J. 338=5 Ind. Cas. 971; 7 M. 292; 4 C. L. R. 134; 6 C. 582=8 C. L. R. 255; 4 C. L. R. 413. The charge which the prosecutor actually intended to bring, and not that which was framed by the magistrate upon his evidence, must form the basis of a prosecution under s. 211. If he alleges an assault and theft, he cannot be

indicted for making a false charge of dacoity. 3 Wym. (Cr.) 9. But where the facts stated by the prosecutor are not to a particular offence, and no other, and that statement is maliciously false, his ignorance of the truth of those facts cannot alter the character of his statement. No sanction is required under the Cr. P. C. that s. 195, where the false charge is only made by a magistrate. 1 292. A prosecution under

s. 211 is not an essential pre-requisite for maintaining a suit for malicious prosecution, 3 M. 6; 6 W. R. (Cr. Ref.) 9 and the latter remedy is often resorted to especially where parties feel that sanction under s. 195, Cr. P. C., might not easily be obtained or sustained in the course of a series of appeals from an order granting sanction under rulings like 30 M. 382 (F. B.). The language of s. 211 is so wide that a police officer who puts in a false charge, may be liable under the section. 11 W. R. (Cr.) 2; 2 W. R. (Cr.) 44; but a false report of investigation to the effect that a false case was proved even if made with a corrupt motive was held in 4 C. W. N. 347 not to amount to an offence under s. 211.

It must be remembered that an offence under s. 182 is triable even by a second-class magistrate, while one under s. 211 is not triable by a magistrate below the rank of a first-class magistrate. It would be illegal in a second-class magistrate to treat an offence under s. 211 as one under s. 182 so as to give himself jurisdiction. *Ratanlal* 670. When an offence under s. 211 is disclosed

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s. 211 or s. 182. But if the false charge was a serious one it is better to proceed under s. 211. 32 C. 180=2 Cr. L. J. 171, *followed* in 4 C. L. J. 88, see also 5 C. 184; 7 C. L. R. 382; 7 C. W. N. 556; 20 C. 474; 1836 A. W. N. 259; 1882 A. W. N. 178; The ruling in 8 W. R. (Cr.) 67 is no longer an authority. It is a matter not of law but of expediency whether the High Court would quash a conviction under s. 182 and direct the re-trial of the accused under s. 211, 7 M. H. C. R. App. V; 15 A. 336 at 338, which modifies the view in 8 A. 382. The Punjab Chief Court concurs with the Bombay High Court in holding that the two sections 211 & 182 cannot be indifferently applied, but that each has its own sphere of operation, 1910 P. R. Cr. 20=11 Cr. L. J. 420=6 Ind. Cas 944; 1870 P. R. No. 16 & 1882 P. R. No. 14. Again, where a man burnt his own house and charged another with arson, his offence was not fabricating false evidence under s. 195, *supra* but one under s. 211. 8 W. R. (Cr.) 65.

CHAPTER VIII.

ACTS AFFECTING THE PUBLIC HEALTH AND SAFETY.

I ACTS OF NUISANCE.

128. Public Nuisance and Private Nuisance distinguished.—Nuisances are either public or private. The appropriate remedy for a public nuisance which is defined in s. 268, I.P.C. * is by way of proceeding under criminal law: for a private nuisance, is by action or injunction. An indictment will fail if the nuisance complained of only affects one or a few individuals; where, upon an indictment against a tinman for the noise made in carrying on his trade, it appeared in evidence that the noise only affected the inhabitants of three sets of chambers in *Clifford's Inn*, and that, by shutting the windows, the noise was in a great measure prevented, it was ruled by Lord Ellenborough, C. J., in *R. v. Lloyd*, 4 Esp., 200, that the indictment could not be sustained, as the annoyance was, if anything, a private nuisance. So also where a wall collapses and causes injury to neighbouring property, 14 K. L. R. 19=1 Cr. L. J. 488. Similarly, an action will fail if the plaintiff complains of something which is a public nuisance, which causes him no special and particular damage beyond that which results from it to the community in general; for, otherwise, the offending party might be ruined by a million of suits. *Winterbottom v. Lord Derby*, L. R., 2 Ex. 316=36 L. J. Ex. 194; 10 A. 498; 2 B. 457. But an individual who has suffered special damage thereby is entitled to sue, 3 B. L. R. (A. C.) 295=12 W. R. 160, 27 C. 793, 1913 M. W. N. 991=12 M. L. T. 491; 1913 M. W. N. 1001. Two or more persons who have not suffered any damage may sue after obtaining the necessary sanction under s. 91, C. P. C.

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In general, it may be laid down that anything which seriously affects the health, safety, comfort, or convenience of the community may be indicted as a public nuisance. For instance, drawing water for a canal from a filthy and polluted source, *Atty.-Gen. v. Bradford Canal*, L. R., 2 Eq., 71; carrying on trades which caused offensive smells, *Malton Board of Health v. Malton Manure Co.*, 4 Ex. D., 302; *Rapier v. London Tramways Co.* [1893,] 2 Ch., 588; or intolerable noises, *Lambton v. Mellish* (1894), 3 Ch., 163; working a couple of *Jandars* or rice-husking machines at night in a residential quarter, 1904 P.R. (Cr.) 9=1904 P. L. R. 256=1 Cr. L. J. 513, keeping gunpowder, naphtha, or similar inflammable substances in such large quantities as to be dangerous to life and property. *R. v. Lister*, D. & B. 209=26 L. J. (M. C.) 196; *Hepburn v. Lordan*, 2 Hem. & M. 345=34 L. J. Ch. 293, or the trotting of rams trained to fight in a crowded market-place, *Weir I.* 243, or fouling the water of a *Nala* by putting into it bundles of stalks of *Thur* Plants, *Ratanlal* 203. And so every act will be

R., 9 C. P. 400=43 L.J.C.P. 162; *R. v. Lord Grosvenor*, 2 Stark. 511=2 Wil. 18; 14 C. 656; 20 M. 433; 7 M. L.J. 95; *Weir I.* 232; 11 M. 343; 18 W.R. (Cr.) 38. In 20 C. 665, it was laid down that an encroachment however slight on a tidal navigable river would not constitute public nuisance in the absence of proof that the encroachment caused one of the results specified in s 268. Similarly enclosing village-site the property of Government was held not to amount to public nuisance in *Weir I.* 245; 12 M.C.C.R. 104=9 Cr. L. J. 338; 20 M. 433. But where a man places a board over the drain in front of his house obstructing a considerable portion of the street and sits thereon writing and delivering to a large crowd of persons vouchers for bets which they made with him for government opium sales, 1906 A. W.N. 317=4 Cr. L.J. 492, or causes such a noxious smell as to be a substantial annoyance to those using the highway, although not to the neighbourhood in general, *R. v. Pappinian*, 2 Stra., 686=93 Eng. Rep. 137; *R. v. Neil*,

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2 C. & P. 485; *Ogston v. Aberdeen* (1897) A. C. 111, or places anything on the land next to the highway, which can be a source of danger to persons properly using it. *Fenna v. Clare* [1895], 1 Q. B. 199, he is liable under ss. 268 & 290, I. P. C. So it has been held, that where a man uses his premises in a perfectly innocent manner, as by giving entertainments with music and fireworks, if the result is to bring together crowds of disorderly persons, and this is repeated so often as to be a serious annoyance to the neighbourhood, it is indictable as a nuisance. 1 Hawk., P. C. 693; *R. v. Moore*, 3 B. & Ad., 184; *Walker v. Brewster*, L. R. 5 Eq., 25. It is not a *Sine Qua non* that the annoyance should injuriously affect every member of the public within its range of operation; it is sufficient in the language of s. 268 that it affects people in general who dwell in the vicinity, 1904 P. R. No. 9=1904 P. L. R. 256=1 Cr. L. J. 513. The expression 'people in general' means a body or a considerable number of persons. 1 L. B. R. 213. Acts which merely cause a partial or temporary inconvenience, such as the omission to prevent ponies or buffaloes or pigs straying on the highway, are not indictable as public nuisances under s. 290. 6 W. R. (Cr.), 71; 9 W. R. (Cr.), 70. *Weir* L. 244. Every omission causing a nuisance is not *per se* punishable. It must be an illegal omission in the sense of the definition in s. 43, I. P. C., e.g., an omission to fence a well on private ground within eight yards of a highway, 6 M. 280. Similarly the omission of a *Lambardar* to make proper sanitary arrangements at a village-fair was held not to be an illegal omission within the meaning of this section, 1875 P. R. No. 11.

Under English law the keeping of a brothel or a gambling-house is indictable as a nuisance, chiefly, as it would appear, from the injury thereby caused to public morals. 1 Hawk., P. C. 693, 5 Bac. Abr., 788, Nuisance A. I doubt, however, whether such an injury comes within any of the terms of s. 268. Where a person kept a common gambling-house, which brought together crowds of disorderly persons to the general annoyance of the neighbourhood, the keeper of the house was properly convicted under s. 290 of a nuisance. 14 M., 364. If the

house is proved to be a common gaming house, no proof of actual annoyance to the public would be required. But the mere fact that a person admitted gamblers to his house would not make those that take part in the game liable under s. 290 without such specific proof, **7 B. H. C. R. (Cr. Ca.) 74; Weir I. 240, 1867 P. R. No. 61, 7 M. 307.** When keeping a common gaming house and gambling therein is punishable separately under various special and local Acts, it is doubtful whether the same facts should be held to constitute an offence under s. 290 also. The view of the Bombay High Court has not been adopted elsewhere. In **Weir I. 239**, the accused had stationed themselves on a public road inviting villagers to play at cards and winning money from them. This was held to constitute an offence under s. 209; similarly gambling in the open market-place, **Weir I. 242.** The Calcutta High Court in **7 C. W. N. 710** has taken an altogether different view holding gambling is not an offence under s. 290. It is an offence under various Police Acts to keep or to resort to a common gambling-house **19 A. 311; 25 C. 432; 22 B. 745.** The fact that an act is punishable under a special law does not prevent the offender being dealt with under the code if an offence rightly punishable under the code has been established, **9 W. R. (Cr.) 70.** In **8 Bom. L. R. 414=3 Cr. L. J. 494**, Jenkins, C.J., approved of a double conviction both under a special act as well as under the code.

The fact that a prostitute visited a dak bungalow, after being warned by the person in charge not to do so, is not indictable as a public nuisance under s. 290, when she was not shown to have annoyed anyone, or committed any impropriety, beyond what was involved in her attending upon a traveller at his request **2 N.-W. P. H. C. R. 349.** The same decision was given in the case of three prostitutes who were charged under s. 290 for soliciting a passer-by on a public road about midnight. The Court pointed out that this annoyance was one which could be provided for by the *Cantonments Act* 1889, and by the *Municipal Boards Act* 1883 **22 A. 113; Ratanlal 765.** If prostitutes settled themselves in numbers in a particular street or quarter of a town,

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exhibiting themselves in an indecent manner, and annoying the persons passing by with their solicitations, this would probably be held to be a public nuisance. But the existence of one or more brothels, simply occupied by prostitutes, and resorted to by those who desired them, though very offensive to the immediate neighbours, would hardly, I think, come within the definition of s 268, as being an "annoyance to the public in general who dwell or occupy property in the vicinity." Where a magistrate had ordered the removal of a house which a prostitute had built on her own land, and in which she was living, upon a finding by a jury that she was a nuisance under the provision of the 1872 Code corresponding to s. 133 of the 1898 Cr. Pr. Code, the order was set aside. The Court said: "If she made her house the resort of bad characters, or filled it with noisy dwellers at night, or entertained her admirers with music or disreputable nautches, her continuance where she is might well be a discomfort amounting to a positive nuisance to the neighbourhood. It may be very unpleasant to have such a neighbour, but so long as the woman behaves herself orderly and quietly, and creates no open scandal by riotous living, I do not see how the law can interfere with her." 24 W. R. (Cr.), 68. *Singleton v. Ellison* [1895] 1 Q. B. 607; *Gf. Durose v. Wilson*, 71 J. P. 263=96 L. T. 645. In the Presidency towns ample powers for the removal of brothels are given by the various Town Police Acts. Even under these acts a house in which a prostitute dwells, and in which she is constantly visited by men is not a brothel. The term in its legal acceptation applies to a place resorted to by persons of both sexes for purposes of prostitution. *Singleton v. Ellison* [1895], 1 Q. B. 607.

129. Acts that would amount to indictable nuisance.

—The definition in s. 268 treats as sufficiently constituting a nuisance, "any act which causes any common injury or annoyance to the public." Taking this in its literal sense, floating blacks from a chimney, which entered a window and soiled a carpet, or the whistle of a railway engine which awoke people at night, might be indictable. I imagine, however, that these general terms

must be taken only as indicating the nature of the acts or omissions which constitute a nuisance, while, as to degree, the facts of each case must be governed by the the well-known practice in such matters laid down by the rules of common sense, as pointed out by s 95 and by English courts. The injury must be such as reasonable persons would complain of, *Atty.-Gen. v. Corporation of Nottingham*, [1904] 1 Ch. 673. The law makes no allowance for the susceptibilities of the hypersensitive. In *St Helens Smelting Co v Tipping* 11 H. L. Ca. 642 at 650 the leading case on nuisance,—Lord Westbury, C., said “It is a very desirable thing to mark the distinction between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible discomfort.” “If a man lives in a town, it is necessary that he should submit himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large.” “But when an occupation is carried on by one person in the neighbourhood of another, and the result of that occupation is a material injury to property, then there unquestionably arises a very different consideration. I think that, in a case of that description, the submission which is required from persons in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of his property.” In the same case, Lord Wensleydale said, at p. 653 “Everything must be looked at from a reasonable point of view. Therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.” In that case
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As regards personal discomfort arising from noxious fumes, smells, and the like, it was long ago laid down by Lord Mansfield, C. J., that, "It is not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable" *R. v. White*, 1 Burr., at p. 337; *per* Abbott, C. J., *R. v. Neil*, 2 C. & P., 485; *Malton Board of Health v. Malton Manure Co.*, 4 Ex. D., 302. The vitiation of the atmosphere so as to make it noxious to health is specially punishable by s. 278. As to the degree of personal discomfort which constitutes a nuisance, Knight Bruce, V. C., said: "The important point for decision may properly be thus put: Ought this inconvenience to be considered as more than fanciful, or as one of mere delicacy or fastidiousness, or as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among English people." *Walter v. Selfe*, 4 De. G. & Sm., 315, at p. 322=20 L. J. Ch., 433. In considering this question, however, regard must be had to the character of the locality, and the class of persons of whom the public is composed. To make a nuisance indictable, it must be a nuisance to the public or to the people in general, not merely to a few persons, drawn from a higher class and accustomed to a higher standard of comfort than their neighbours. Where any act or occupation causes an undoubted public nuisance, a person who is charged with such a nuisance cannot plead that a number of other persons are committing other nuisances as bad as, or worse than, his own, and that his contribution to the general annoyance is a merely imperceptible addition. As Abbott, C. J., said: "The presence of a number of nuisances will not justify any one of them, or the more nuisances there were the more fixed they would be." *R. v. Neil*, 2 C. & P. 485; *Crossley v. Lightowler*, or *R. 2 Ch. Ap.* 478=36 L. J. Ch. 584. But when sent come to consider whether discomfort, which might be a wintry con-
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The same question has arisen in India in reference to the annoyance caused by burning grounds. In 7 M. L. J. 33 it had been the practice for forty years to burn corpses at a place adjoining a bathing ghaut on the *Cauvery*. Ultimately this was objected to by the villagers, and after a magisterial order (which turned out to be illegal), directing that the burning ground should be transferred to another position, the defendants were charged under s. 290 for a fresh act of burning. The Magistrate and the Sessions Court on appeal convicted the accused, finding that "the cremation caused substantial annoyance and discomfort to the persons who were at the ghaut, and to the passers by" This sentence was reversed by the High Court, on the ground that the material annoyance and discomfort caused to inhabitants could not render unlawful an act which was done in accordance with the usage of the country. "When persons like the accused, entitled to use a particular spot dedicated for the communal purpose of cremation, use it for that purpose in a manner neither unusual nor calculated to aggravate the inconvenience necessarily incident to such an act, as it is generally performed in

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the Sabbath as a day of rest and religious exercise, the Court refused to grant an injunction. They thought that the rule was that the injury must be one which would affect all alike who come within the influence of the disturbance. It must be something about the effects of which all agree. Otherwise that which might be no nuisance to the majority might be claimed to deteriorate property by particular persons *Bigelow Torts*, 470. The same principle has been repeatedly acted upon in India.

In 7 M. 590 the defendants, who were *Labbaik*, were convicted on the charge of having caused a public nuisance under s. 268, by placing a Mohamedan symbol, during the Mohurram festival, on a part of the village waste, in the neighbourhood of Hindu temples, whereby they were likely to cause serious annoyance to the Hindu public. The conviction was set aside by the Madras High Court. Turner, C. J., said "It is obvious from the language of the Act that it was not intended to apply to acts or omissions calculated to offend the sentiments of a class. In this country it must often happen that acts are done by the followers of a creed which must be offensive to the sentiments of those who follow other creeds. The erection of a place of worship in a particular spot is likely to offend the sentiments of adherents of other creeds residing in the neighbourhood, but the Penal Code does not regard such an act as a public nuisance. The scope of the provision we are considering is to protect the public, or people in general, as distinguished from the members of a sect." See 1893 P. R. No. 3, where a person refusing to have any social intercourse with a class of people belonging to *shunsees*, and refusing to associate with them as Hindus, was held to have committed no offence under s. 290. See also U. B. R. (1892-1896) I 183.

The Madras decision was followed by the Bombay High Court, in a case where the accused had been convicted of a nuisance, by exposing meat that was about to be cooked for a feast, to the annoyance of certain Jains who were on the road to their temple. 12 B., 437. Exposing meat for sale in an open shop, so as to wound the feelings of vegetarians, was held to be no offence in *Ratanlal* 903, 1867 P. R. No. 18, 1868 P. R. No. 15.

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this country, it must be admitted that he does what is perfectly lawful." 19 M. 464; 25 M. 118. An application was made to the Privy Council for leave to appeal against the decision, on the ground that there had been concurrent findings of the two Lower Courts that the acts complained of produced the very results which, by s. 268 of the Indian Penal Code, constituted the definition of a punishable nuisance. The application was refused on the ground that every question, as to what constituted a nuisance, was a mixed question of law and fact, and that the Privy Council would not decide in opposition to the High Court that an act, apparently a nuisance, was in fact such according to native ideas.

In Calcutta, on the other hand, it was held that a burning ghaut, though not necessarily a nuisance, might be shown to be in such an offensive state, or to be used in such an offensive manner, as to be a source of injury, danger or annoyance to persons living in the vicinity, so as to justify an order for its removal under C. P. C., 1893, s. 133 25 C., 425. The question in fact in each case is one of degree. It has been held villagers accumulating filth and manure in their villages, or throwing rubbish into one's garden, are not guilty of public nuisance, 1872 P. R. No. 25, 1875 P. R. No. 11, Weir I. 242; but where accused kept on her premises vegetable matter which caused an offensive smell to persons using the public street or threw dust and sweepings in front of his house, a conviction was upheld. Weir I. 242. But placing cowdung cakes by the side of a road to dry was held not to be an offence in Ratanlal 297. Every act which causes an offensive odour is not necessarily a public nuisance. The offence under s. 268 involves other elements also, Ratanlal 11, 24 C., 494.

In America several cases have arisen where it has been attempted to bring within the law of nuisance cases in, which acts have exercised a disturbing influence upon the minds of persons entertaining particular religious opinions. As, for instance, where proceedings were instituted to stop the running of trams on Sunday, on the ground that it prevented the plaintiffs from enjoying

the Sabbath as a day of rest and religious exercise, the Court refused to grant an injunction. They thought that the rule was that the injury must be one which would affect all alike who come within the influence of the disturbance. It must be something about the effects of which all agree. Otherwise that which might be no nuisance to the majority might be claimed to deteriorate property by particular persons. *Bigelow Torts*, 470. The same principle has been repeatedly acted upon in India.

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of animals in a public street, in a manner to cause pain and disgust to all persons of ordinary humanity, would be punishable under s. 290. 10 A., 44. See also 2 B. 457; 18 B. 693. In 30 A. 181=1908 A. W. N. 64=5 A. L. J. 147=7 Cr. L. J. 381, certain Muhammadan inhabitants of a village sued for a declaration of their rights to slaughter cows in their own premises, and in decreeing the suit the High Court remarked on an examination of the authorities, it is the legal right of every person to make such use of his own property as he thinks fit, provided that in doing so he does not cause real injury to others or offend against the law, even though he may thereby hurt the susceptibilities of others.

130. **Pleas in defence of an act of nuisance examined.**—Where an act is a nuisance to the public, it is no defence that it is in itself a perfectly lawful act, and that it is done upon a man's own ground, in a convenient place, and in a proper manner, for the illegality consists in using your own property so as to harm the public. *Bamford v. Turnley*, 2 F. & F. 231=3 B. & S. 62=31 L. J. Q. B. 286; *Carey v. Lidbetter*, 3 F. & F. 14=3 C. B. (N. S.) 470=32 L. J. C. P. 104; 10 B. L. R. 241 at 253. Nor is it any answer, that the injury to the public is more than counterbalanced by the benefits resulting from the act or occupation complained of to the general community, or to the locality itself. *R. v. Ward*, 4 A. & E. 384, at 404; *R. v. Train*, 2 B. & S. 640=31 L. J. (M. C.), 169=9 Cox, 180. (The fact the act complained of facilitates the lawful exercise of their rights by a part of the public may, however, show that it is not a nuisance to any of the public); nor that the acts complained of were continuously done in the same place before the public came there; for this is only saying that the acts were lawful when they began, and were continued after they became unlawful. *Sturges v. Bridgman*, 11 Ch. D. p. 865, *per* Lord Halsbury, *Fleming v. Hislop*, 11 A. C. p. 697; *Hole v. Barlow*, 4 C. B. (N. S.) 334=27 L. J. (C. P.) 267. Nor that the nuisance had continued during a length of time which would have established an easement as against a private person. For no lapse of time can bar an indictment which is brought by

the Crown for the protection of the community. *Per* Lord Ellenborough, C J., *R. v. Cross*, 3 Camp. 227; *Weld v. Hornby*, 7 East, p. 199; 7 B. L. R. 499=16 W. R. (Cr.) 6. *Shott's Iron Co. v. Inglis*, L. R. 7 A. C. 518 at 528; *Atty.-Gen. v. Richmond*, L. R. 2 Eq. 306 at 311; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Ca. 642; but long continuance of the nuisance might enable a party when proceeded against under Ch. X, Cr. P. C., to set up *bond fides* so as to make the question a proper one for the civil court and not for the magistrate to be dealt with, 25 C. 278. Where, however, private property has been dedicated to the public, subject to an obstruction or a right of user, which would be a nuisance if commenced after the dedication, no action or indictment will lie. The thing complained of is not an infringement of the public right, but a limitation of it. *Fisher v. Prowse*, 31 L. J. Q. B. 212=2 B. & S. 770; *Arnold v. Blaker*, L. R. 6 Q. B. 433.

Where the Legislature authorizes the doing an act which would otherwise be a nuisance, of course no indictment will lie for the necessary consequences which follow from the doing of that act. Where a railway company was authorized to make a line parallel to and adjoining a highway, it was held that they could not be indicted for a nuisance, because the engines and trains frightened horses on the high road. *R v Pease*, 4 B. & Ad., 30; *per* Lord Cairns, *Hammersmith Ry Co v. Brand*, L. R., 4 H. L., p 215; *per* Lord Blackburn, *Metropolitan Asylum v Hill*, 6 A. C., p 203; *London and Brighton Ry. Co v Truman*, 11 A. C. 45; *Canadian Pacific Ry v Roy*, [1902] A.C. 220; *Eastern and S African Telegraph Co v Capetown Tramways* [1902], A. C. 381; *Wittington Local Board v Corporation of Manchester*, [1893] 2 Ch. 19; *Atty -Gen. v. Corporation of Nottingham*, [1904] 1 Ch. 673. Nor is there any obligation on the company to erect screens to conceal the engines, or to take any such extraordinary precautions beyond what are implied in conducting their business in a careful and proper manner *Simkin v. London and North-Western Ry. Co.*, 21 Q. B. D., 453; *per* Lord Blackburn, *London and Brighton Ry. Co. v.*

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aggrieved party can resort to the Civil Court with or without the sanction required by s. 91, C. P. C. Antecedent criminal proceedings are not essential for the maintenance of a civil suit. 1 B. H. C. R. 1.

Very large powers are also given by the various Municipal Acts, for the abatement of nuisances of all sorts, and for the prevention of infectious diseases.

131. Provisions of the Code dealing with special classes of Nuisance.—Sections 269 and 270 make it a punishable offence to do any act which is, and which the accused knows, or has reason to believe, (Weir I. 226) to be likely to spread the infection of any disease dangerous to life. 7 C. P. L. R. (Cr.) 5. It is further necessary, under the former section, that the act should have been done unlawfully or negligently, under the latter section, malignantly, which, I suppose, means with a deliberate intention that the above result should follow. *Bromage v Prosser*, 4 B. & C. 247. If a death ensued from an act done under s. 270, it would undoubtedly be murder. Section 269 agrees with the English common law. It is not an offence to inoculate with small-pox, when done *bona fide* as a remedial measure, *R. v. Burnett*, 4 M. & S. 272; see Penal Code, ss 81, 87—99; Weir, I. 226; 1 U. B. R. (1897-1901) 280, but it is an offence to carry a child suffering from small-pox through the public streets, or into any place of public resort, without necessity; *R. v. Vantandillo*, 4 M. & S., 73; *R. v. Burnett*, *ibid* 272, or to enter a railway carriage when suffering from cholera, 7 M., 276; or contrary to orders of detention and segregation as a plague contact, 1902 P. R. No. 22. But the mere burial of a carcase in or near a village is not an offence either under s. 269 or s. 270, 7 C. P. L. R. (Cr.) 5; Weir I. 230, or to take a glandered horse into a public place, to the danger of persons whom it might infect. *R. v Henson*, *Dears* 24.

The duty not to spread infectious illness and the limitations upon that duty were fully examined by Lord Blackburn in the case of the *Metropolitan Asylum District v. Hill*, 6 A. C. 193, pp 204, 205. where it had to be decided whether a small-pox hospital was a public

Truman, 11 A. C. p. 61. In all such cases it must be determined upon the wording of the particular statute, and upon the facts of the case, whether the Legislature intended that the thing complained of should be done, even though it created a nuisance, *London and Brighton Ry. Co. v. Truman*, 11 A. C. 45=29 Ch. D. 89; *City of Montreal v. Standard Co.*, [1897] A. C. 527; *Mayor of East Fremantle v. Annois*, [1902] A. C. 213; or merely authorized the doing of it, provided it could be done without being a nuisance. *Metropolitan Asylum v. Hill*, 6 A. C. 193, explained, 11 A. C. pp. 53, 57, 63; *R. v. Bradford Navigation Co.*, 32 L. J. Q. B. 191=6 B. & S. 631; *Canadian Pacific Co. v. Parke* [1899] A. C. 535. Nor in any case can the authority of the Legislature be relied on, where the proceeding authorized by it might have been carried out in a manner which would not cause a nuisance. Where persons were empowered to cut channels through a highway to make a line of navigation, this threw on them the obligation to build a bridge over the channel, *R. v. Kerrison*, 3 M. & S., p. 531; 30 L. A. 60. A railway company which is permitted to construct their line on a level crossing over a highway is bound to construct it so that carriages may cross the rails without injury. *Olicer v. North-Eastern Ry.*, L. R. 9 Q. B., 409. An authority to erect workshops or cattledocks is not an authority for placing them where they will be an injury to others. 10 B. L. R. 241. An authority to construct a tramway authorizes the company to create a certain amount of obstruction on the road, but not to collect such a number of horses in a stable near the road as to be a nuisance to the neighbours. *Rapier v. London Tramways Co.* [1893] 2 Ch., 588. In a Madras case, *Weir* L. 243, for keeping a Municipal rubbish depot in the neighbourhood of houses it was held the prosecution, if any, should be against the Municipal corporation and not against the chairman.

A summary mode of removing nuisances is provided by Chapter X of the Cr. P. Code of 1893. But proceedings under that chapter need not necessarily precede an indictment under s. 290, I. P. C. *Ratanlal* 23. Also the

aggrieved party can resort to the Civil Court with or without the sanction required by s. 91, C. P. C. Antecedent criminal proceedings are not essential for the maintenance of a civil suit. 1 B. H. C. R. 1.

Very large powers are also given by the various Municipal Acts, for the abatement of nuisances of all sorts, and for the prevention of infectious diseases.

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nuisance. He pointed out that *prima facie* it was an indictable offence to take an infected person into any place where he would come into contact with other persons, but that it would be a defence to an indictment if it could be shown that there was a sufficient reason to excuse what is *prima facie* wrong. As, for instance, where those who have charge of a person suffering from an infectious disorder have not the means of isolating him from others, or where they can in no other way discharge their legal obligation of doing their best to procure advice and assistance for him; or where some overwhelming necessity, such as a fire in the house, compels them to carry the patient through a crowd. A person who keeps a member of the family who is attacked with small-pox in the house, and refuses to allow his removal to a hospital, does not commit an offence under s. 269, I P. C. 24 C. 494. A similar question arose in Bombay, where an action was brought against a steamship company for breach of contract in not shipping five hundred pilgrims from Bombay to Jeddah. The plea was that the pilgrims had arrived at Bombay from Singapore in a ship in which small-pox had broken out on the voyage, and that on the day on which they should have been shipped, fresh cases were occurring—not among the five hundred tendered for shipment, but amongst the others,—and that the shipment of the five hundred would have been an act punishable under s. 269. This plea was held to be insufficient, apparently on the ground that the company might, by taking sufficient precautions, have shipped the five hundred so as not to endanger anyone else, and that their contract bound them to do so, if it was in any way possible. 14 B. 147.

Except for the contrary opinion of so eminent an authority as Sir Raymond West, one should have thought it absolutely certain that this section would apply to the case of any person who, knowing that he or she was suffering from syphilis, solicited or consented to connection with another. It is, and must be known to be, a necessary result that the disease will be communicated, and its dangerous consequences are equally known. Where, however, a prostitute had been convicted under

this section for communicating syphilis to the prosecutor, whom she had assured that she was healthy, the conviction was set aside by the High Court of Bombay. West, J., said. "Assuming that there was dangerous disease, and culpable negligence, still accused's act of sexual intercourse would not spread infection without the intervention of the complaining party, himself a responsible person and himself generally an accomplice." 11 B. 59.

It may, however, be suggested with all respect for the learned judge, that neither reason is satisfactory. The intervention of the prosecutor merely amounted to this: that in doing an act which was immoral but lawful, he exposed himself to a risk which he did not intend to incur, and which, on the assurance of the defendant, he did not believe he was incurring. Suppose a man enters a gambling saloon which is kept by a person who is in the infectious stage of small-pox, could it be contended that his "intervention" would be an answer to a charge against the other, if he were to sicken of the disease? As to his being an accomplice, it is difficult to understand in what sense the word is used, or how the circumstance could be relevant. Upon the statement of the case, he certainly was not an accomplice in an offence under s. 269, as he did not believe the woman was committing such an offence. He was an accomplice in the commission of an immoral act. But even an accomplice in an illegal act, such as a burglary, would be entitled to complain if his associate tried to kill him during the commission of the crime.

A similar question arose, under a different branch of the law, in the case of *R. v. Clarence*, 22 Q. B. D. 23. There a husband was indicted under 24 & 25 Vict., c. 100, s. 34, for committing an offence against his wife, by carnal knowledge of her, without her consent, and for causing her to contract a venereal disease, to the bodily harm, and for causing her to contract a venereal disease, to the harm, upon his wife. The offence was committed by carnal course with her while suffering from venereal disease of which she was not aware. If she had been aware she would not have consented. It was necessary, under the statute, to make out an assault, which could not be where the

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act was consented to. The conviction had to rest upon the principle that a consent obtained by fraud under a mistake of fact, is not a consent. Acting upon this principle, Willes, J., had, in two cases, convicted of assault, where the prisoner had communicated disease to girls, who consented to the intercourse in ignorance of the disease. *R. v. Bennett*, 4 F. & F., 1105; *R. v. Sinclair*, 13 Cox, 28; doubted in Ireland; *Hegarty v. Shine*, 13 Cox, 124. Hawkins and Field, JJ., thought the conviction was right. The rest of the Court reversed it. It is submitted that this decision has no bearing upon the present question, which is simply, whether a particular act comes within the letter and spirit of a particular section. If it does, the fact that incalculable benefit may be effected by enforcing it, can be no reason for allowing it to lie idle.

II CRIMINAL NEGLIGENCE.

132. Negligence in Law involves more than mere carelessness.—Sections 279—289 contain a series of provisions by which mere negligence is made punishable, apart from any injury actually done. It is plain that the essence of the offence consists in the possibility of injury, and not in its actual occurrence, as all the clauses contain the words "likely to cause hurt or injury," or words of a similar nature, 1882 P. R. No. 16; 1912 P. W. R. (Cr.) 2. The occurrence of actual injury meets with punishment under ss. 337 and 338; 28 A. 464 though, strangely enough, the actual inflicting of hurt is liable to less punishment under s. 337 than the commission of the same act would be if no hurt resulted. Nor is it necessary that there should be any intention to injure, or reason to anticipate the particular injury that ensued, if it was in fact caused by the defendant's negligence. *Smith v. London & South-Western Ry. Co.*, L. R. 6 C. P. 14, or acting without due regard to his civic duty of circumspection, 4 C. 764, 7 M. H. C. R. 119. It is sufficient if the carelessness is such as does cause, or is likely to cause, injury.

Legal negligence is something more than carelessness. It involves some act or omission, which is a breach of the duty which the person charged owes to somebody, who suffers or may suffer an injury in consequence. There must be an obligation to take care before anyone can be punished, either civilly or criminally, for not taking care. *Gautret v Egerton*, L. R., 2 C. P. 371; *Collis v Seldon*, L. R., 3 C. P. 495. The obligation may arise by contract, or by statute, or may be implied by law from the relation between the parties, or from the nature of the act done; but it cannot be assumed. "The definition of negligence is the omitting to do something which a reasonable man would do, or the doing something which a reasonable man would not do." Each case must be judged in reference to the precautions which, in respect to it, the ordinary experience of men has found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident which happened. *Per Alderson, B., Blyth v Birmingham Waterworks Co.*, 11 Ex., 781 = 25 L. J. Ex. 212; adopted by Brett, J. *Smith v. London and South-Western Ry. Co.*, L. R., 5 C. P. 98 at 102. On the other hand, it is not enough to show that the person accused acted *bonâ fide*, and to the best of his skill and judgment. The rule requires in all cases a regard to caution such as a man of ordinary prudence would observe. Where the act that is being done requires special skill, those who do it are bound to conduct themselves in a skilful manner, *Jones v. Bird*, 3 B. & C. 837; *Vaughan v Menlove*, 5 B. & A., 463, p. 475, unless the necessity of the case forces an unskilled person to make the attempt.

How far a master may be liable criminally for the acts of his servants is a question which has already been discussed (*ante* Ch. I., § 10.) It is only necessary to refer to that discussion, and to repeat generally, that negligence, to be criminal, must be the personal act of the person charged; that is, he must either have ordered the act to be done in an improper manner, or he must have omitted the precautions which he was bound individually to take, or he must have knowingly employed

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an incompetent person See *Hardaker v. Idle District* [1896], 1 Q. B. 335; *Penny v. Wimbledon* [1898], 2 Q. B. 212; *Chisholm v. Doulton*, L. R. 22 Q. B. D. 736; *Allen* 7 C. & P. 153; *Green* 7 C. & P. 156, otherwise in a case of improper driving the actual driver and not the owner would be liable, 14 W. R. (Cr.) 32.

It is incumbent on the prosecution to prove not only that there was negligence on the part of the defendant, but that the negligence caused, or materially contributed to, the injury, if any happened; or was so likely to cause injury as to be punishable under some particular section of the Code, where none has happened. Where the facts are equally consistent with the guilt or innocence of the person accused, the case fails. For instance, where a person is run over by a carriage or train, and there is no evidence that the accident arose from any carelessness on the part of the driver, there is nothing to show that the vehicle ran over the man rather than the man against the vehicle. *Cotton v. Wood*, 8 C. B. (N. S.) 568=29 L. J. C. P. 333; *Wakelin v. London and South-Western Ry. Co.*, 12 A. C., 41; 6 M. H. C. R. 32; see, too, *Hammock v. White*, 11 C. B. (N. S.) 588=31 L. J. C. P. 129, where Willes, J., citing *1 East*, P. 600, said: "If the death had followed, the per- show that he took that car. in similar situations are most accustomed to do. On the other hand, "where the thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen to those who have the management of machinery and use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." *Per Erle, C. J., Scott v. London Dock Co.*, 3 H. & C., 596=34 L. J. Ex., 220. Accordingly, where a man was walking along a public highway, and goods which the defendant was raising or lowering by machinery fell upon him, it was held that in the absence of explanation from the defendant as to how the accident occurred, negligence must be assumed. *Byrune v. Boadle*, 2 H. & C. 722=33 L. J. Ex., 13-

Kearney v. London, Brighton, and South Coast Ry Co., L. R., 6 Q. B. 759; 24 C. 786. For a case where an accident occurred on the premises of the defendant, but there was nothing to connect the defendant with the person whose act probably led to the accident, see *Welfare v. London & Brighton Ry. Co.*, L. R., 4 Q. B., 693.

In all cases of this sort, it is most important to distinguish between the weight of evidence to prove negligence, and the existence of any evidence from which it can be inferred. In *Cotton v. Wood*, referred to above, Williams, J., said: "I wish to add that there is another rule as to leaving evidence to a jury, which is of the greatest importance, and that is, that where the evidence is equally consistent with either negligence or no negligence, it is not competent for the judge to leave it to the jury to find either alternative, but it must be taken as amounting to no proof at all." The same rule was laid down by Lord Cairns, C., in a case which is now the governing decision upon this point. He said: The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred, the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained and should be maintained distinct. It would be a serious inroad on the province of the jury if, in a case where there are facts from which negligence may be reasonably inferred, the judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever." *Metropolitan Ry. Co. v. Jackson*, 3 A. C. 193, at p. 197; *King v. Henderson* [1898] A. C. at 733. So held by the Madras High Court in 6 M. H. C. R. Appx. 32.

According to the rules of civil law, even although the defendant has been guilty of negligence, still, if that negligence would have been harmless only for equal or greater negligence on the part of the plaintiff, the latter cannot recover. *Radley v. London and North-Western Ry.*, 1 A. C. 754. This doctrine of contributory negligence is not, however, a defence in criminal as it is in civil cases. 6 M. H. C. R. App. 32; *Blenkinsop v. Ogden* [1898], 1 Q. B. 783; *Kew*, 12 Cox. 355; *Jones*, 11 Cox. 544; *Dart*, 10 Cox. 102. The fact that the accused allowed his cart to proceed along a road and run over a boy sleeping on the road, though not an offence under s. 279 was held to be an offence under s. 338, *Ratanlal* 198. The object of a suit is to recover damages for an injury, and it is fair that such damages should not be recovered, if the plaintiff has brought the harm upon himself. The object of an indictment is to protect the public, and it will be sustainable if the defendant has been in fault, even though someone else may have been equally in fault. The question will still be: Did he rashly or negligently do an act which was likely to endanger the public? If he did, the fact, that the actual injury to a member of the public was brought about by the carelessness of the latter, will be no defence.

The word "injury", in ss. 279, 283, 285, 286, and 287, has been held by the Bombay High Court, in a case arising under s. 285, to include injury to the property of anyone as well as his life. 5B. H. C. R. (Cr. Ca.) 67. Driving a cart the bullocks of which have no nose string is not necessarily an offence under s. 279, *Ratanlal* 19.

In cases under s. 279 the defence will generally be that the act complained of was merely an accident; as, for instance, that a horse got out of control; *Hammack v. White*, 11 C.B. (N. S.) 588=31 L. J. C. P. 129; *Manzoni v. Douglas*, 6 Q. B. D. 145; that the signals on a railway could not be seen at all, or in sufficient time, or the like. See *Accident*, ante, Chapter III, § 57, at p. 156. Where the defendant was convicted under s. 279 of rash riding

on a public road, it was held unnecessary to show that any person was on the road at the time. The probability of danger to the public by the act was in itself sufficient. 19 B. 715; 1910 P. W. R. (Cr.) 39, *Cf.* The remarks of Lord Esher, M. R. in *Le Lievre v. Gould*, [1893], 1 Q. B. 491 at 497. See also B. L. R. (Supp. Vol.) 443 F. B. A man cannot set up as a defence that he was only driving or riding at his usual pace, but an accident occurred owing to the streets being unusually crowded, *e.g.*, a procession; one who rides or drives has to remember that pedestrians and processionists have as much right to be on the public road and they are making perhaps a more natural user of the road than he. If the streets are abnormally crowded, he is bound to take greater caution. See *Murray*, 5 Cox. 509. (Ir.) So long as the pedestrian acts in a reasonable way the responsibility for any injury resulting from rash or negligent riding or driving would be upon the person who rides or drives, 1 C. P. L. R. 112. But negligence cannot be inferred from the mere fact of a person having been run over, *Weir* 1. 232. Again the offence under s. 279 is restricted to a public way as to which see *Campbell v. Lang*, 1 Macq. 451. There must be a definite enduring trackway, merely temporary and transitory tracks not passable in all seasons cannot be regarded as public ways, *Schwinge v. Dowell*, 2 F. & F. 845; *Chapman v. Cripps*, 2 F. & F. 864. Similar considerations will arise under s. 280 which is confined to navigation in inland waters, navigation on the high seas being regulated by several special acts, *e.g.*, VII of 1880 (Merchant Shipping), X of 1887 (Native Passenger's ships), XIV of 1895 (Pilgrims' ships). Mere upsetting of a ferry-boat for want of ballast would not make the contractor liable under this section, unless he intentionally omitted to provide the boat with what he knew to be necessary, *Ratanlal* 35, 1911 M. W. N. 170=12 Cr. L. J. 495 =12 Ind. Ca. 215. Similarly, the mere fact a ship ran into a boat whereby a man was killed was held insufficient to support an indictment for
 7 C. & P. 156.

1. R. 4 Ad. & Ec.

198. *The Otter* *ibid.* 203. To make one liable under this section the rashness or negligence of the navigator must

According to the rules of civil law, even although the defendant has been guilty of negligence, still, if that negligence would have been harmless only for equal or greater negligence on the part of the plaintiff, the latter cannot recover. *Radley v. London and North-Western Ry*, 1 A. C. 754. This doctrine of contributory negligence is not, however, a defence in criminal as it is in civil cases. 6 M. H. C. R. App. 32; *Blenkinsop v. Ogden* [1898], 1 Q. B. 783; *Kew*, 12 Cox. 355; *Jones*, 11 Cox. 544; *Dart*, 10 Cox. 102. The fact that the accused allowed his cart to proceed along a road and run over a boy sleeping on the road, though not an offence under s. 279 was held to be an offence under s. 338, *Ratanlal* 198. The object of a suit is to recover damages for an injury, and it is fair that such damages should not be recovered, if the plaintiff has brought the harm upon himself. The object of an indictment is to protect the public, and it will be sustainable if the defendant has been in fault, even though someone else may have been equally in fault. The question will still be: Did he rashly or negligently do an act which was likely to endanger the public? If he did, the fact, that the actual injury to a member of the public was brought about by the carelessness of the latter, will be no defence.

The word "injury", in ss. 279, 283, 285, 286, and 287, has been held by the Bombay High Court, in a case arising under s. 285, to include injury to the property of anyone as well as his life. 5 B. H. C. R. (Cr. Ca.) 67. Driving a cart the bullocks of which have no nose string is not necessarily an offence under s. 279, *Ratanlal* 19.

In cases under s. 279 the defence will generally be that the act complained of was merely an accident; as, for instance, that a horse got out of control; *Hammack v. White*, 11 C.B. (N. S.) 588=31 L. J. C. P. 129; *Manzoni v. Douglas*, 6 Q. B. D. 145; that the signals on a railway could not be seen at all, or in sufficient time, or the like. See *Accident*, ante, Chapter III, § 57, at p. 156. Where the defendant was convicted under s. 279 of rash riding

show that the act complained of is a public nuisance. It is sufficient that it causes danger, obstruction, or injury, to any person in any public way or public line of navigation. Of course, an act which causes an injury, etc., to everyone, must necessarily be an injury done to anyone, but not *vice versa*. The liability results from the consequences to the individual harmed, not from any impropriety in the act itself. If there is a legal right to do the act, of course it is not punishable, unless improperly performed and even where there is no legal right, *e.g.*, when a man repairs a public road without permission, it is no offence unless it causes danger, etc., to any person, 7 W. R. (Cr.) 31. Where a sewer had been made in a highway, or a fireplug had been fixed in it, under statutory authority, the defendant was not liable because the natural subsidence of the materials with which the trench had been properly filled left a hole in the highway, or because the wearing away of the road left the fireplug standing up, so that, in each case, a passer-by was injured. *Hyams v. Webster*, L. R., 4 Q. B. 138; *Moore v. Lambeth Waterworks*, 17 Q. B. D. 462. It would, of course, be otherwise, if the statutory authority was negligently or improperly carried out. A railway company which is authorized to carry its line across a public highway, with the obligation to provide gates and fences at the spot, is liable for injuries suffered by anyone who gets upon the line by reason of the absence of such gates and fences. *Williams v. Great Western Ry. Co.*, L. R., 9 Ex. 157, (see as to injury resulting from a rotten fence; *Harrold v. Watney*, [1898] 4 Q. B. 340.) Similarly, there are some acts which are so necessary to the ordinary enjoyment of property, that they are lawful, even though they cause a temporary obstruction to the highway, such as the stoppage of carts to unload goods into a warehouse, or the erection of a hoarding to protect the public while buildings are being repaired. *Herring v. Metropolitan Board of Works*, 34 L. J. (M. C.) 224=19 C. B. (N. S.) 510. But a private person is not at liberty to break up the highway to lay gas or water-pipes for the use of his house. *R. v. Longton Gas Co.*, 29 L. J. (M. C.) 118. The occasional inconvenience arising from crowds of persons or carriages

be the *immediate* cause of accident, and questions of contributory negligence may be taken into account not as a defence to the charge but in considering the degree of rashness and in assessing the sentence. 15 C. W. N. 835=14 C. L. J. 656=12 Cr. L. J. 362=11 Ind. Ca. 130. In 4 Bur. L. T. 140=12 Cr. L. J. 582=12 Ind. Ca. 846, it was laid down that it is a primary duty of steam vessels to keep out of the way of vessels lying at anchor, and the fact that a launch ran into a cargo boat at anchor, is in itself *prima facie* evidence of negligent navigation.

133. Provisions of the Code as to negligence in Certain Special Cases.—The offence dealt with by s. 282 is where a person conveys a passenger for hire in a vessel which is so unseaworthy, either from its own condition or from the way in which it is loaded, as to endanger his life. It is not sufficient that it was in that state; it must have been known by the defendant to be in such a state, or he must have occupied such a position that his ignorance of it amounts to negligence. The owner of a ship would be bound to take all proper precautions to ascertain whether his ship was seaworthy or not. The manager of a booking-office, at which passengers are supplied with tickets for any vessel they wish to select, would be under no such obligation. It is also to be remembered that seaworthiness is a relative term, and merely means fitness to perform the service which the vessel is about to undertake. A ship may be fit to undertake a small coasting voyage, with an ordinary cargo, when it would not be fit to go to China in the typhoon season, or to carry a load of machinery. *Kopitoff v. Wilson*, 1 Q. B. D., 377. Where acts, which would otherwise come within this section, endanger the life of a person who is not being carried for hire, they will be punishable under s. 336. Accidents to ferry boats are usually dealt with under s. 282. The man who plies is liable when he overloads his boat. 1 B. H. C. R. 137; 1911 M. W. N. 170=12 Cr. L. J. 495=12 Ind. Ca. 215; or when the boat is not watertight. 11 W. R. (Cr.) 3.

The offence constituted by s. 283 differs from that defined by s. 268 in this—that it is not necessary to—

defendant, being possessed of land abutting on a public foot-way, excavated an area in the course of building a house immediately adjoining the foot-way, and left it unprotected, and a person walking in the night fell in, the defendant was held to be liable, though, in point of law, the party who fell in was off the road, and was in law a trespasser *Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R., 1 C. P. 53; see *Brown v. Eastern and Midland Ry. Co.*, 22 Q. B. D. 391. But the contrary was held where a man made a well in the middle of his field, through which there was a right-of-way, and a person, straying off the path at night, fell into it. *Martin. B.*, after citing the last case with approval, said: "But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different. We do not see where the liability is to stop. A man going off a road in a dark night, and losing his way, may wander to any extent. We think the proper and true test of legal liability is, whether the excavation be substantially adjoining the way" *Hardcastle v. South Yorkshire Ry. Co.*, 28 L. J. (Ex.) 139=4 H. & N. 67; *Hounsell v. Smith*, 29 L. J. (C.P.) 203=7 C. B. (N.S.) 731; *Binks v. South Yorkshire Ry. Co.*, 32 L. J. (Q. B.) 26=3 B. & S. 244; see 6 M. 280. Where a shopkeeper exhibited certain clock-work toys during *Deepavali* festival with the result large crowds collected in front of his shop and several people were knocked down and people using the road obstructed, it was held following *Atty.-Gen. v. Brighton & Hove Co-operative Association* [1900], 1 Ch. 276, that the shopkeeper was liable under s. 283 though ordinarily every shopkeeper has a right to exhibit his wares in his shop in any way he likes 13 Eom. L. R. 209=12 Cr. L. J. 258=10 Ind. Ca. 804.

134. Whether Liability is on Owner or Occupier.—

Under s. 283, the person liable is the person who is in possession or charge of the property. *Prima facie* this person is the actual occupant, whether he is the owner or tenant, and it makes no difference in the latter case that, as between himself and his landlord, the latt

blocking up the road when a private entertainment is being given is not punishable, if reasonable precautions are taken to mitigate the evil; but it is a nuisance that the streets should be blocked up night after night by crowds waiting to enter a theatre, and it would be punishable, even though only a single person complained that access to his house was obstructed. *Barber v. Penley*, [1893] 2 Ch. 447, where the whole law as to nuisance to highways is discussed.

It would seem that, under this section, danger, obstruction or injury to some person must be found either expressly, or, at all events, as a matter of necessary inference. When a policeman deposed that he "saw a bad-smelling net dried on the road by the side of the defendant's house, so as to cause obstruction to persons passing by," the Court held that this did not make it sufficiently "appear that obstruction was caused to any particular individual or individuals." 4 M. 235; 20 M. 433; 20 C. 665; 11 C. L. R. 462; 25 C. 275; 7 Bur. L. R. 125. But if the net had been hung so as to stop up the way, it would not have been necessary to prove that any particular person had in fact been obstructed. In a Bengal case it appeared that the defendants had set up a bamboo dam for the purpose of catching fish across the bed of a navigable river. It contained a movable portion, through which boats could pass, and it was guarded and lighted so as to prevent accidents happening. On these facts the High Court, without deciding whether there was any such injury to any particular person as was necessary to constitute an offence under s. 283, felt no doubt that the obstruction constituted a nuisance under s. 268, and was therefore punishable under the general clause, s. 290. 14 C. 656. This ruling was followed by the Madras High Court in *Weir I. 232*. Placing *Tabuts* on the road so as to obstruct Mail Tonga was held to be an offence under s. 283 in 12 M. C. C. 68=9 Cr. L. J. 321.

Under this section also, as in all the similar cases, the danger or injury must be such as would naturally follow from the act. Therefore, where the facts were that the

defendant, being possessed of land abutting on a public foot-way, excavated an area in the course of building a house immediately adjoining the foot-way, and left it unprotected, and a person walking in the night fell in, the defendant was held to be liable. though, in point of law, the party who fell in was off the road, and was in law a trespasser *Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R., 1 C. P. 53; see *Brown v. Eastern and Midland Ry Co*, 22 Q. B. D. 391. But the contrary was held where a man made a well in the middle of his field, through which there was a right-of-way, and a person, straying off the path at night, fell into it. *Martin, B.*, after citing the last case with approval, said: "But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to be different. We do not see where the liability is to stop. A man going off a road in a dark night, and losing his way, may wander to any extent. We think the proper and true test of legal liability is, whether the excavation be substantially adjoining the way." *Harcastle v. South Yorkshire Ry. Co*, 28 L. J. (Ex.) 139=4 H. & N. 67; *Hounsell v. Smith*, 29 L. J. (C.P.) 203=7 C. B. (N.S.) 731; *Binks v. South Yorkshire Ry Co.*, 32 L. J. (Q. B.) 26=3 B. & S. 244; see 6 M. 280. Where a shopkeeper exhibited certain clock-work toys during *Deepavali* festival with the result large crowds collected in front of his shop and several people were knocked down and people using the road obstructed, it was held following *Atty.-Gen. v. Brighton & Hove Co-operative Association* [1900], 1 Ch. 276, that the shopkeeper was liable under s 283 though ordinarily every shopkeeper has a right to exhibit his wares in his shop in any way he likes 13 Eom. L. R. 209=12 Cr. L. J. 258=10 Ind. Ca. 804.

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is liable to make repairs. In an old case, the defendant was indicted for not repairing a house standing ruinous upon the highway, and likely to fall: just such a case as is pointed to by s. 283. The indictment alleged that he was bound to repair *by reason of the nature of his holding*, and the verdict found that he was a tenant-at-will, who certainly is not bound to repair as regards himself and his lessor. But the Court held that the statement that he was bound to repair by reason of his holding was "only an idle allegation; for it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing the house in that condition is continuing the nuisance. And as the danger is the matter that concerns the public, the public are to look to the occupier and not to the estate, which is not material in such case to the public." *R. v. Watts*, 1 Salk, 357; *per* Little-dale, J., 5 B. & C. p. 560. Similarly where the owner and occupier of a vacant piece of land had it surrounded by a hoarding but people threw filth and refuse over and broke up the hoarding and the condition of the land became a public nuisance, it was held there was a common law liability upon the owner to take such order with his land as to prevent its being a public nuisance. *Atty.-Gen. v. Heatley* [1897], 1 Ch. 560. But the property must be in the possession of the accused for him to take such order so as not to endanger public safety. Where a Hindoo according to the religious practice set loose a bull which was quite harmless but the animal in course of time became a danger to the public; it was held following 8 A. 51 that it ceases to be in his possession and no conviction of the original owner could be sustained under s. 289 1904 P. R. (Cr.) 5=1904 P. L. R. 308=1 Cr. L. J. 501.

According to civil law, and *a fortiori* according to criminal law, a landlord is not liable merely because premises in the occupation of a tenant are in such a state as to amount to a nuisance. *Russell v. Shenton*, 3 Q. B. 449, *Nelson v. Liverpool Brewery Co.*, 2 C. P. D. 311. Nor does he become liable for a nuisance

created by a tenant merely because, when the tenancy came to an end, he renewed it, the property with the nuisance on it never having got back again into his hands *Bowen v. Anderson*, [1894] 1 Q. B. 164. If, however, he has himself created the nuisance, he is of course the person liable, *Draper v. Sherring*, 30 L. J. (M. C.) 225, and if the nuisance is one of a continuing character, he does not free himself from liability by letting the premises to a tenant. *R. v. Peddy*, 1 A. & E. 822; *Thomson v. Gibson*, 7 M. & W. 456; *Todd v. Flight*, 9 C. B. (N. S.) 377=30 L. J. (C. P.) 21. The occupation of servants or agents will be the occupation of their employer, though of course they would be personally liable for any nuisance created by themselves. *Rich v. Basterfield*, 4 C. B. 783=16 L. J. (C. P.) 273; 5 B. & C. p. 560. When a man constructed a hut so as to cause obstruction to a public way and leased it to a shop-keeper, it was held in 8 C. W. N. 369=1 Cr. L. J. 244 the latter is not liable under s. 283 as no obstruction is caused by his exposing the goods for sale in the hut.

A liability founded upon the fact that property is in the possession or under the charge of anyone cannot last after his possession or charge has been brought to an end.

Accordingly, where the defendants' vessel, owing to the negligence of their servants, struck on a sand-bank, and becoming from that cause unmanageable was driven by the wind and tide upon a sea-wall of the plaintiffs' which it damaged, it was held that the defendants were liable for the damage so caused. The vessel then became a wreck, and could only be removed by being broken up. She had valuable property on board, and was broken up, not as fast as she might have been, but as fast as was consistent with the removal of the property. During the interval that elapsed between her becoming a wreck and the final breaking up she did further injury. It was held that for this the defendants were not responsible, as they were entitled to remove the property before breaking her up. *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Ex. 204, *affd.* L. R., 7

Ex. 217. And if the defendants had chosen to abandon the wreck at once, they might have done so without breaking her up. *Brown v. Mallett*, 5 C. B. 599; *The Douglas*, L. R., 7 P. D. 151.

135. Injury resulting from the negligent control of one's animals.—Section 289 deals with the improper or careless management of animals. The gist of the offence is a knowing or negligent omission, 5 W. R. (Cr. L.) 8. The principal point to be considered under this section will be the knowledge that the defendant had of the dangerous propensities of the animal. Where the very nature of the animal gives him warning, his knowledge will be assumed, as, for instance, if a person were to make a pet of a tiger, or a bear. Otherwise, express knowledge will have to be shown, in order to involve the necessity of unusual caution. Where injury is done by an ape, 1 A. L. J. 605=1 Cr. L. J. 1059, a horse, a pony, 19 W. R. (Cr.) 1, a bull, *Ratanlal* 606, or a dog, and it is not shown that the animal was peculiarly vicious, or that his vice was known to his master, no indictment could be maintained, unless he had neglected the ordinary precautions employed by everyone who uses such animals. *Hammack v. White*, 31 L. J. (C. P.) 129=11 C. B. (N. S.) 588; *Cox v. Burbidge*, 13 C. B. (N. S.) 430=32 L. J. (C. P.) 89; 3 M. H. C. R. Appx. xxxiii; 2 W. R. (Cr.) 51; 9 B. L. R. Appx. 36. The mere fact that a rope tied to a bullock when violently strained broke and the bullock escaped is no proof of negligence and even if there was negligence its probable consequence could not be said to be to endanger human life or to cause the danger of grievous hurt, *Weir* 1. 237. Where the animal is a domesticated one usually allowed to go at large without special precautions, no conviction can be had unless it be established that the particular animal had an abnormally vicious disposition, *Baker v. Snell*, [1905] 2 K. B. 825; *Lowery v. Walker*, [1910] T. L. R. 83; 1885 S. J. L. B. 353; *Ratanlal* 197. In the case of domesticated animals the onus of proving negligence is on the prosecution; but as regards wild animals the onus even if primarily on the prosecution will be easily shifted to the accused, 2 W. R. (Cr.) 51. *Weir* 1. 238.

In another case on the same page in *Weir* it was ruled that the presence of stray cattle on a road at night cannot be said to involve probable danger of human life or of grievous hurt so as to make the owner liable under s 289. But where a person was injured by a buffalo known to be a dangerous animal both the owner as well as the heidsman were held liable under s 289. 3 N. L. R. 90=6 Cr. L. J. 100. The heidsman will not be heard to say the animal was in the possession of the owner with a view to exculpate himself. For purposes of this section a horse-keeper has possession though for some purposes law implies the constructive possession of the owner, *Ratanlal* 163. But a bull that has been dedicated to a temple cannot be said to be in the possession of its former owner, 1889 P. R. No. 32; 1904 P. R. (Cl.) 5=1904 P. L. R. 38=1 Cr. L. J. 501. But if an animal had shown a savage disposition to the knowledge of the owner, it would not be necessary to show that he had actually injured anyone. *Worth v. Gilling*, L. R. 2 C. P. 1. In considering the knowledge of the master, it is material to inquire what knowledge as to the dangerous propensities of the animal was possessed by his servants. Then knowledge will not necessarily be imputed to him, but it will be a question for the jury whether the persons who received actual notice of such facts stood in such a relation to the defendant that it was their duty to communicate the notice to him, and whether in fact they did communicate it. *Baldwin v. Casella*, L. R., 7 Ex. 325; *Applebee v. Percy*, L. R., 9 C. P. 647, at 658.

Where the animal is known to be mischievous, or is of the class of undomesticated animals, which from their nature are dangerous, though capable of being brought under a certain degree of subjection, the rule of civil law seems to be to infer negligence absolutely, from the mere fact that an injury has followed. Where the injury arose from a savage monkey, Lord Denman laid down the law as follows: "The conclusion to be drawn from an examination of all the authorities appears to be this, that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure at his peril; and that if it does mischief, negligence is

presumed, without express averment. The negligence is in keeping such an animal after notice, *May v. Burdett*, 9 Q. B. 112; see *Fletcher v. Rylands*, L. R. 1 Ex. 265 at 281. This case was followed, and the general principle approved, where the injury was caused by an elephant which was being exhibited by the defendants. *Filburn v. People's Palace Co.*, 25 Q. B. D. 258.

It is probable, however, that the interpretation of this section would be stricter, as is always the case where the doctrine of constructive negligence is applied to criminal law; and that if every proper and reasonable precaution had been taken, no criminal indictment would lie, even though the animal finally escaped and did damage. A good deal would also turn upon the lawfulness of the object for which the creature was kept. Even if it were legal negligence in a private person to keep a tiger for his own amusement or profit, the same doctrine would not be applied to a keeper of a Government menagerie. If it were, such an institution would become impossible. Again, it would be a different thing if it could be shown that the animal was justifiably kept for purposes of self-defence. Accordingly where a man got into the garden of another by night and was there injured by a dog, and it appeared that the dog was kept for the protection of the garden, and was tied up all day, but was let loose at night. Lord Kenyon said: "That every man had a right to keep a dog for the protection of his garden or house: that the injury which this action was calculated to redress was, where an animal known to be mischievous was suffered to go at large, and the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public: that here the animal had been properly let loose, and the injury had arisen from the plaintiff's own had'n incautiously going into the defendant's garden [1905] 2, been shut up." *Brock v. Copeland*, 1 Esp.

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it kicked and killed a child, it was held that he was criminally liable, though the child had strayed on to the common a little way off the path. And the majority of the judges seemed to be of opinion that the result would have been the same though the child had strayed a considerable distance from the path *R. v. Dant*, 34 L. J. (M. C.) 119=L. & C. 567. Under s 289 the question would be merely one of fact: was the danger which followed one which was rendered probable by letting loose such an animal in such a place?

The defendant is only bound to guard against probable danger that is, such danger as may be calculated to arise from the nature of the beast itself. But that no indictment would lie if an injury arose to anyone from his own obstinate and foolhardy conduct in venturing too near it, with full knowledge of its qualities. And even in civil cases, Lord Denman said, that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that might be a ground of defence. *May v. Burdett*, 9 Q. B. 113. In *Weir* l. 238, it was held the presence of stray cattle in a road at night though it would constitute an offence under s 290, is not an offence under s. 289 as their presence cannot be said to involve probable danger to human life or of grievous hurt.

Under all these sections, and especially under ss 284—289, it will probably be held, in conformity with the principles of civil law, that much greater caution will be required in regard to the general public than will be called for in regard to a man's own servants, who are employed in any occupation of danger. Their employment is voluntary, and from its very nature gives them full notice of all the perils to which they are exposed, and of the precautions by which those perils may be avoided. In England nearly every occupation is fenced round with a network of duties, which are imposed upon the employer for the protection of those in his service. Every such statute fixes an obligation upon the employer, the neglect of which does render him civilly liable, *Baddeley v. Earl Granville*, 19 Q. B. D. 423, and may

render him criminally liable according to the circumstances. In the absence of such statutory duty, it will be a question of fact. What are the dangers necessarily incidental to the duty undertaken, and what are the precautions which it is reasonable and proper to take, so as to diminish those dangers to a *minimum*? The owner of a passenger vessel is bound properly to fence in those parts of the ship to which the passengers resort, so that they may not fall overboard or into the engine-room. A much smaller amount of protection is possible as regards the crew though every reasonable amount of protection should be afforded. A livery-stable keeper who knowingly sent a vicious untrained horse to a customer to ride, would be liable. He would not be so if he merely put a rough-rider upon the horse's back to break him in, though in fact the man were thrown and killed. But it would be his duty to give the man full notice of the danger he would encounter, not to call upon him to incur any unusual risk, and to supply him with everything that was proper to diminish the risk. See, as to the general principle *volenti non fit injuria* and its limitations, *Woodley v. Metropolitan District Ry. Co.*, 2 Ex. D. 384; *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Yarmouth v. France*, 19 Q. B. D. 647; *Thrussell v. Handyside*, 20 Q. B. D. 359; *Membery v. Great Western Ry. Co.*, 14 A. C. 179; *Smith v. Baker*, (1891) A. C. 325.

136. **Liability arising from Non-natural Use of One's Own Property.**—In *Fletcher v. Rylands*, L. R., 3 H. L. 330, at pp. 339, 340, a doctrine was laid down which is frequently referred to as extending the liability of owners of property to consequences following from acts which were in themselves lawful, and which did not become unlawful by virtue of any negligence on the part of the proprietor. There a landholder had constructed a reservoir upon his land, the water from which had escaped through some old shafts, of which no one appears to have been aware, into the plaintiff's mine. It was held that the defendant was liable on the ground, as expressed by Lord Cranworth, that "if a person or accumulates, on his land anything . . . if it

escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." And so Lord Cairns, C., spoke of this as being "a non-natural use of the land, for the purpose of introducing into the close that which in its natural condition was not in or upon it." See *Smith v. Fletcher*, 2 A. C. 781; *Eastern and S. African Telegraph Co. v. Capetown Tramways* [1902], A. C. 381.

This doctrine, however, is subject to two limitations. First, that it does not apply where the act, from which the injury arises, is the natural, proper, and necessary way of using the property, and is done for the public benefit, or for the common benefit of the person who does it, and the person who complains of it. As, for instance, the storing of water in tanks in India for agricultural purposes; L. R. 11 A. 364=14 B. L. R. 209=22 W. R. 279; 3 C. 776, or in cisterns in houses for the general use of all who occupy the house. *Carstairs v. Taylor*, L. R., 6 Ex. 217; *Ross v. Fedden*, L. R., 7 Q. B. 661; *Anderson v. Oppenheimer*, 5 Q. E. D. 602; *Blake v. Wolf*, [1898] 2 Q. B. 426. Secondly, that it does not apply where the dangerous element has been let loose by some overpowering and unforeseen cause, such as is called by lawyers *vis major* or the act of God. As, for instance, where the embankment of a reservoir was swept away by a rainfall of unprecedented violence following upon a thunderstorm. As to *vis major*, the Court said: "In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*. No doubt, not the act of God, or *vis major*, in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times, and ten times as high, and the weir ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce

them would prevent the reasonable use of property in the way most beneficial to the community." *Nichols v. Marsland*, 2 Ex. D. 1; see too, *Bor v. Jubb*, 4 Ex. D. 76.

Different considerations from those discussed in *Fletcher v. Rylands* arise, where the dangerous matter has come upon a man's property without his own act or consent. In the case of *Whalley v. Lancashire and Yorkshire Railway*, 13 Q. B. D. 131, it appeared that, in consequence of an unprecedented fall of rain, water had accumulated to such an extent against the defendants' embankment that its safety was endangered. To protect themselves the railway company cut trenches in their embankment, with the result that the water passed through and flooded the plaintiff's land, which lay on a lower level. The jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, and that it was not done negligently. Upon these findings it was held that the defendants were liable, as they had no right to protect their own property by transferring the mischief to the plaintiffs. At the same time it was admitted that if they had foreseen the danger and taken exactly the same steps to pass on the water when it came, they would have acted within their rights. See *King v. Pagham*, 8 B. & C. 355.

The fact that the owner has given permission to the public, or to a certain class of persons, to pass over his property does not make it a public way, so as to prevent his erecting dangerous constructions upon it, or even so as to cast upon him the obligation of fencing them round so as to guard against injury from them. Therefore, where the workmen in a Government dockyard were allowed to cross certain land within the premises in order to reach water-closets, and a Government contractor was allowed to erect machinery which crossed the shortest and most convenient, though not the only, way to these water-closets, and one of the workmen was injured by the machinery, it was held that no action was maintainable against the contractor. *Bolch v. Smith*, L. J. (Ex.) 201=7 H. & N. 736; *Gautret v. Egerton*,

L. R. 2 C. P. 371. But even in such a case the owner of the land is bound not to do anything likely to cause injury to those who came upon the land by his permission without giving them due notice, or otherwise placing it in their power to protect themselves. Therefore, where upon a private road, along which persons were in the habit of passing with the owner's permission, the defendant placed building materials, and gave no notice, by signal or otherwise, it was held that he was liable for the injury which accrued to a passer-by. Willes, J., said "The defendant had no right to set a trap for the plaintiff. A person coming on lands by license has a right to suppose that the person who gives him the license will not do anything which causes him injury." *Corby v. Hill*, 27 L. J. (C. P.) 318=4 C. B. (N.S.) 556. A still stronger obligation lies upon the owner of private property who invites the public to make use of it for business purposes, as a wharf or a market. He is bound to keep it in such a safe condition that those who enter upon it shall not be endangered by its condition. *White v. Phillips*, 15 C. B. (N. S.) 245=33 L. J. C. P. 33; *Lar v. Durlington*, 5 Ex. D. 28, *Muller v. Hancock*, [1893] 2 Q. B. 177. None of these cases, however, would come under s. 283, though they might be punishable under s. 290.

137. Statutory liability of Corporations, etc.—

The Municipal Acts in India, following those in England and the colonies, vest the highways in the statutory body created by the Act, and clothe it with various powers and duties in regard to the repair and maintenance of the highways. The vesting of a street or public way vests no property in the Municipal authority beyond the surface of the street, and such portion as may be absolutely and necessarily incidental to the repairing and proper management of the street, but it does not vest the soil or the land in them as owners. *Tunbridge Wells v. Baird*, [1896] A. C. 434; *Sydney v. Young*, [1898] A. C. 457; *Battersea v. Electric Light Co.*, [1899] 1 Ch. 474; 25 M. 635. In some cases the obligation to repair is limited by a provision that it shall only exist "so far as the funds at their disposal will admit."

In *Meisey Docks v. Gibbs*, L. R. 1 H. L. at p. 110, (*folld. Sanitary Commissioners of Gibraltar v. Orfila*, 15 A. C. 400 at p. 412). Blackburn, J., in delivering the opinion of the judges, said: "In our opinion the proper rule of construction of such statutes is that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose upon a private person doing the same things." Accordingly, where a municipality had constructed a barrel drain in the highway, and then allowed it to fall out of repair, so that it became a hole into which a man and horse fell, Sir Barnes Peacock said: "Their Lordships are therefore of opinion that the applicants, by reason of the construction of the drain, and their neglect to repair it, whereby the dangerous hole was formed, which was left open and unfenced, caused nuisance on the highway, for which they were liable an indictment. This being so, their Lordships are of opinion that the corporation are also liable to an action at the suit of any person who sustained a direct and particular damage from their breach of duty." *Borough of Bathurst v. Macpherson*, 4 A. C. 256 at p. 267, explained in *Municipality of Pictou v. Geldert*, [1893] A.C. 525, at p. 531, and *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433; 10 C. 445.

Where the charge against the municipality or other statutory body is for mere non-feasance, or neglect to repair the roads in their charge, more difficult questions arise. In England it has been laid down generally, "that wherever a statute prohibits a matter of public grievance to the liberties or security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offence against such statute is punishable by way of indictment for his contempt of the statute, unless such method proceeding do manifestly appear to be excluded by 2 Hawk., P. C. 289. Where, however, as in the case of municipal or similar authorities, the obligation rests entirely on statute, it is necessary to ascertain whether

statute which vests the roads in a particular authority, imposes upon it an absolute obligation to keep them in repair, or only empowers and desires the authority, as part of its function, to do so. In arriving at a conclusion on this point, it is material to inquire whether the clause which is relied on as creating an absolute obligation, is in the same words as other clauses, which are only discretionary. It is also material to consider whether any indication of an attempt to enforce the obligation is given by annexing penalties for its breach, or by providing any procedure in case of default. "When a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act in question." *per curiam, Redpath v. Allen*, L. R., 4 C.P. 511. Where there is such a distinct duty imposed, those guilty of a breach of that duty are, in England, liable to an indictment for a misdemeanour, otherwise they are not. *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433. Under the Code, however, mere breach of a statute is not sufficient, unless it is attended with some of the consequences or intentions specified in some particular section. Further, where the neglect results in an injury to an individual, it will be further necessary to show that, as regards that individual, the statute intended to impose a duty which the authority negligently failed to perform. If a statute directs the performance of a duty for the purpose of maintaining a road, and a neglect to perform it causes injury to private property adjoining the road, no action would lie against the authority by the proprietor. *Sanitary Commissioners of Gibraltar v. Orfila*, 15 A. C. 499. An indictment founded on the assumption that there had been any neglect of duty towards the injured person would probably fail. It must be remembered that none of these decisions apply where the public body is in contract with the individual for remuneration. *Beckett v. King*, [1895] A. C. 632.

CHAPTER IX.

OFFENCES AFFECTING THE HUMAN BODY.

138. Division of the Chapter.—Crimes of violence affecting the person rise by various stages, from a mere assault up to murder. Each of these stages again ramifies into various degrees of aggravation, according to the person affected by them, and the mode and circumstances of the offence.

The framers of the Code have classified offences affecting the human body under eight heads: (1) those affecting life, ss. 299—311; (2) causing of miscarriage, injuries to unborn children, exposure of infants and concealment of births, ss. 312—318; (3) hurt, ss. 319—338, (4) wrongful restraint and wrongful confinement, ss. 339—348; (5) criminal force and assault, ss. 349—358; (6) kidnapping, abduction, slavery and forced labour, ss. 359—374; (7) rape, ss. 375 & 376; (8) unnatural offences, s. 377.

I OF OFFENCES AFFECTING LIFE.

139. Offences affecting Life.—The Penal Code classifies wilful taking away of human life under the two categories of *murder* and *culpable homicide not amounting to murder*. Culpable homicide is the generic term and all murder therefore must be culpable homicide as defined in s. 299. Every act that falls under one or more of the four clauses of s. 300 (not being covered by one or other of the five exceptions thereto) is murder and therefore would necessarily be also covered by the definition in s. 299. Those acts which after satisfying one or more of the clauses of s. 300 are covered by one or more of the exceptions to that section as well as those acts which are accompanied by the mental condition specified in s. 299, but which mental condition falls short of the requirements of one or other of the clauses of s. 300 go to constitute the species of culpable homicide not amounting to murder. Thus the co-existence of

one or more of the circumstances described in the five exceptions to s 300 while taking the act out of the category of murder will not have the effect of taking it out of s 299. Hence every act that falls within s. 299 and does not fall within s 300 since it is not murder is culpable homicide not amounting to murder,—per Sharfuddin, J., 11 Cr. L. J. 295=6 Ind. Ca. 251; U. B. R. (1897—1901) I, 282. As regards killing by doing a rash or negligent act the offence comes altogether under a different category as neither criminal intention nor knowledge demanded by ss 299 and 300 exists in such cases of misadventure. This offence is dealt with in a separate section, 304A, the construction of which is comparatively free from any of those difficulties surrounding the offences of murder and culpable homicide not amounting to murder. 1913 P. W. R. (Cr.) 7=1913 P. L. R. 259.

Culpable Homicide is perhaps the one branch of criminal law in which an Indian student must be most careful in accepting the guidance of English authorities. Although, in the great majority of cases, the same results are arrived at in England and in India, the process by which they are reached is completely different. In England the main question to be considered is the character of the act. In India it is the intention, express or implied, of the person who does it. Roughly speaking it may be stated, that by the law of England, wherever death is the direct result of an unlawful act, or of a lawful act done in an unlawful way, or of an illegal omission of a duty tending to the preservation of life, the offence is *manslaughter*, however unintentional or improbable the result may have been. Killing becomes murder when it is done with what the lawyers called "malice aforethought." This state of mind is imputed in a natural sense, when the act was intended or was most likely to cause death; in a non-natural sense, when the death occurred in the commission of a felony, or in unlawful resistance to an officer of justice. 3 *Steph. Crim. L.*, pp. 19—22. In India the nature of the act is immaterial. See *ill. (c)* to s. 299. When death is caused by an act which is criminal, the prisoner may be liable

under one or other of the sections 302, 304, 304A, 323, 325 or 352 with variations on account of the weapon or means used, the provocation, etc., the degree of guilt varying with the intention or knowledge with which the act was done, see 1 L. B. R. 259. The only question is, whether the act caused death, and was done with an unlawful intention to cause death, or with the knowledge that by the act death is likely to result. In the absence of such intention or knowledge though death results from a criminal act, the act would not amount to culpable homicide. Thus in *Ratanlal* 6, the accused, a girl of seventeen, had a struggle with another girl on the bank of a river in consequence of the former having seized by force a bead of gold which the other was wearing. In the course of the struggle the accused pushed the other girl into the water and death resulted. But the act was held not to amount to culpable homicide or murder—see Ch I., § 7, at p. 10 for *Intention*. The word, as used in ss. 299 & 300, I. P. C., does not imply or assume the existence of some previous design or forethought. What is required by these sections, is not constructive, but *actual* intention to cause death, 5 W. R. (Cr.) 42, no more than the existing intention at the moment when the act is done and is a matter for inference from the act itself and the circumstances of the case. Thus where a man draws a knife and strikes, the intention required by s. 299 is presumed, *Weir* I. 300; 1894 P. R. No. 33. But where the same blow is given by a stick, it would depend upon other circumstances such as the dimensions of the stick and the aim of the accused whether he intended to cause death. The law presumes no more than that a man intends the natural and inevitable consequences of his acts. The accused's state of mind at the time cannot be taken into consideration in determining his intention, *Weir* I. 300. Where a man threw his wife from a window about 6 feet high but her fall was broken by a weather-board, and resulted in the fracture of her kneecap and several small injuries, *Parsons, J.*, said in holding him liable under s. 308, "when a man does voluntarily a highly dangerous act and causes hurt the intention and knowledge with which he must be presumed to have

acted is not the intention to cause and the knowledge that he was likely to cause only the hurt actually caused. The intention or knowledge must be presumed from the nature of the act itself and not from the result." *Ratanlal* 558. Again the fact the accused was drunk or in an easily excitable frame of mind would not in any way affect the intention or knowledge, law would impute to him as judged from the nature of his act. Thus when one of the men engaged in a drunken brawl ran to his own house and came back with a heavy pestle with which he struck and killed his opponent, his act was held to fall within cls 2 & 3 of s 300, 8 W. R. (Cr.) 71; 1899 P. J. L. B. 550; see 5 W. R. (Cr.) 58. But there may be circumstances in which voluntary drunkenness may be an element in determining the question of intention, 1864 W. R. (Cr.) 24, or in deciding whether provocation offered was grave and sudden, (Excep. I to s 300), 2 L. B. R. 204=1 Cr. L. J. 473.

Homicide is the killing of a human being by a human being. The being killed must come within what is meant by a human being, and must have acquired that amount of life which enables us to assert that it has been killed. A child in the womb does not satisfy either of these requisites until it has been born alive. 1 *Hale*, P. C. 433, 1 *Hawk*, P. C. 94. In *R. v Handley*, 13 Cox, 79, Brett, J., said "A child is born alive when breathing and living by the sense of breathing, through its own lungs, at any time after it has been born, without deriving any nourishment from its mother, by or through its mother's placenta." 17 T. L. R. 310. Sir James Stephen in his Digest, art. 218, and the English Commissioners in s 166 of their draft Code of 1879, lay down the law as follows, in accordance with the authorities cited below:

"A child becomes a human being within the meaning of this Act, when it has completely proceeded in a living state from the body of its mother, (*R. v Poulton*, 5 C. & P. 329) whether it has breathed or not, (*R. v. Brain*, 6 C. & P. 349) and whether it has an independent circulation or not (This seems contrary to *R. v. Enoch*, 5 C. & P. 539; *R. v. Wright*, 9 C. & P. 751) and whether the navel string is severed or not; (*R. v. Trilloe*, C. & Marsh, 650=

2 Mood, 260) and the killing of such child is homicide, when it dies after birth in consequence of injuries received before, during, or after birth." (*R v. West*, 2 C. & K. 784). The whole subject is discussed in *Taylor Med. Jur.*, 6th Edn., II, at pp. 180—290.

What amounts to the killing of a newly-born infant under the Code, has to be collected from two unconnected sections, viz., Explanation 3 of s. 299, and s. 315. It seems that these sections were intended to produce a state of law different from that which prevails in England, in two respects: (a) That no act done before the birth of a child can be culpable homicide, though the child is subsequently born alive, and dies afterwards from the effects of the injuries received while in the womb. Such an offence appears to be only punishable under s. 315. (b) That when any part of an existing child has once made its appearance in the world, it may be culpable homicide to do it an injury with the intention of terminating its existence. The word "may," I suppose, was inserted to meet the case, specifically stated in s. 315, when it is necessary to sacrifice the child to save the mother. The result would be, that no case could be culpable homicide, where the child was injured through its mother, or by any direct injury to itself before it had left the womb, wholly or in part. But that when it had once reached that stage, any deliberate injury might be culpable homicide, if it was done with the intention of preventing the complete birth of a living child, or of causing the death of such a child, if completely born alive. No doubt this view, if correct, would get rid of many of the difficulties which arise under English law.

There is however no warrant for holding that the law views the killing of a new born babe as less grave than that of an adult. The Bombay High Court severely disapproved in *Ratanlal* 401 of the remarks of Sessions Judge who stated "Infanticide is never held to be a crime, to be punished so severely as the murder of an older human being, arrived at adult age, or even years of understanding."

140. Causing Death by Act or Illegal Omission.—Any act is said to cause death, within the meaning of s. 299, when the death results either from the act itself, or from some consequences necessarily or naturally flowing from that act, and reasonably contemplated as its result. As if a man were to lay poison in the food or medicine which another was likely to take, or were to induce him to enter a room with a dangerous lunatic or a savage animal. *1 East, P. C. 228*. So where a woman left her infant in an orchard, covered only with leaves, in which condition it was killed by a kite; or hid it in a hogstye, where it was devoured. *1 East, P. C. 225, 1 Hawk, P. C. 92*. And where death results from a series of wrongful acts, constituting a systematic course of ill-treatment, the death is properly said to be caused by the ill-treatment, though no one of the acts, taken by itself, would have been fatal to life. *R. v. Self, 1 East, P. C. 226, R v Squire, Russ. Cr. (7th Ed.) 668*. But where this treatment has been pursued by a succession of persons, not acting in unison with each other, each is only answerable for the result of his own misconduct. (See s 37 and illustrations, *R. v. Huggins, 2 Ld. Raym. 1574; ante, § 10 at p. 17.*) As regards death from causes operating upon the mind, Lord Hale says:

“If a man, either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease whereof he dies, this may be murder or manslaughter in the sight of God, but not in *foro humano*, because no external act of violence was offered, whereof the common law can take notice, and secret things belong to God” *1 Hale, P. C. 429*.

So far as this statement is still law, it would probably rest upon the ground that the result was too remote and unlikely to be treated as the natural effect of the cause. Lord Denman held that frightening a child to death was manslaughter, but said that, in the case of a grown-up person, murder could not be committed by using language so strong and so violent as to cause that person to die, *R. v. Towers, 12 Cox, 530*. See also *R. v. Greenwood, 7 Cox, 404*. The English Draft Code, s. 167, makes it culpable homicide to cause death by wilfully frightening a child or sick person. And so Sir James S.

says, in the note to his Digest of Criminal Law, art. 221, "Suppose a man kills a sick person intentionally, by making a loud noise which wakes him, when sleep gives him a chance of life; or suppose, knowing that a man has aneurism of the heart, his heir rushes into his room, and roars into his ear. 'Your wife is dead!' intending to kill, and killing him, why are not these acts murder?" The latter case was put by the original framers of the Code, and unhesitatingly held to be murder, (Appendix, note M., p. 142; See *per* Wright, J., *Wilkinson v. Downton* [1897] 2 Q. B. 57, p. 61) and their reasoning was assented to by the Indian Law Commissioners, in their first Report of 1846 (s. 246).

S. 299 only speaks of acts done; but by s. 32, words which refer to acts done are extended to illegal omissions, unless the contrary appears from the context. The Code, as originally drawn (s. 294), included in the definition of culpable homicide the case of a person who "omits what he is legally bound to do."

As illustrations were given, the cases of a hired guide who deserted a traveller in a jungle, where he dies; of a person legally bound to supply food to the mother of a suckling child who omits to do so, knowing that the mother's death may result, and the mother survives, but the child dies; and of a person who keeps another in wrongful confinement, and, being in consequence bound to supply him with everything necessary for his life, omits to procure medical advice for him, knowing that he is likely to die for want of it. In commenting upon this section, the Commissioners give the following as further instances of their meaning:—

"A omits to tell Z that a river is swollen so high that Z cannot
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if A is a guide who has contracted to conduct Z. It is not murder, if A is a person on whom Z has no other claim than that of humanity."

"A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal (s. 289). But if A be a mere passer-by, it is not murder." Report, 1837, p. 140.

An illegal omission is an omission to do anything which a person is legally bound to do. But every illegal omission could not be charged as an act causing death. It is illegal not to pay a debt, but if a man were to die of starvation because he was not paid money due to him, his debtor could not be charged with having caused his death. The relation of cause and effect would be too remote. Nor, again, is an omission illegal, even though the death of another may obviously follow, if the act omitted is one which charity or humanity would dictate, but which is not
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"Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary, in the first place, to ascertain the duties which tend to the preservation of life. They are as follow: A duty in certain cases to provide the necessaries of life, a duty to do dangerous acts in a careful manner, and to employ reasonable knowledge, skill, care, and caution therein; a duty to take proper precautions in dealing with dangerous things; and a duty to do any act undertaken to be done, by contract or otherwise, the omission of which would be dangerous to life." 3 *Steph. H. C. L.* 10

Accordingly, where death is caused by neglect to supply the proper necessaries of life to prisoners, to children or to apprentices, *R. v. Middleship*, 5 Cox, 275; *R. v. Edwards*, 8 C. & P. 611; 5 N.-W. P. H. C. R. 44; 1883 A. W. N. 231, the offence would be culpable homicide, but a parent is under no legal obligation to procure the aid of a midwife for his daughter when in childbirth, and is not criminally liable if the daughter dies in consequence. *R. v. Shephard*, 31 L. J. (M. C.) 102=L. & C. 145; 1 Hawk, P. C. 93n. As to gaolers, see *Foster*, Cr. L. 321; s. 37, I. P. C., illus (b) & (c). And so, where a mistress was indicted for causing the death of her servant, by neglecting to supply her with proper food and lodging, *Erle*, C.J., said

"The law is clearly, that if a person has the custody and charge of another, and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody. But it is also equally clear that when a person,

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"A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death; this is murder, if A is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder, if A is a guide who has contracted to conduct Z. It is not murder, if A is a person on whom Z has no other claim than that of humanity."

"A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal (s. 289). But if A be a mere passer-by, it is not murder." Report, 1837, p. 140.

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"The law is clearly, that if a person has the custody and charge of another, and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody. But it is also equally clear that when a person,

having the free control of her actions, and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for any consequences that may ensue. The question in the present case is, whether there is evidence that the deceased was reduced to such a state of body and mind as to be helpless, and unable to take care of herself, or that she was so under the dominion and restraint of her mistress as to be unable to withdraw herself from her control. If there was substantial evidence to go to the jury upon either of these points, the conviction must, of course, be sustained." *R. v. Smith*, L. & C. 607, 624=34 L. J. (M. C.) 153

This was the ground of decision in *R. v. Instan* [1893], 1 Q. B. 450=52 L. J. (M. C.) 86, (*followed* in *R. v. Pittwood*, 19 T. L. R. 37).

The prisoner, a woman of mature age, lived with and was maintained by the deceased, who was aged 73. No one lived with them. All supplies were purchased by the prisoner with the money of the deceased, which passed through the hands of the accused. For the last ten days of her life the deceased suffered from gangrene of the leg, which prevented her from moving, or doing anything for herself. During this time the prisoner took in the usual supplies of food, but apparently gave none to the deceased. She procured for her no medical or nursing attendance, and gave no information of her condition to the neighbours or relations of the dying woman. It was found as a fact that the death of the deceased was accelerated by want of food, medical advice and proper nursing. The prisoner was convicted of manslaughter, on the ground that the helpless condition of the deceased rendered her absolutely dependent on the prisoner, and that the possession by the latter of funds, which she was bound to apply for the benefit of their owner, rendered her criminally responsible for the death.

Such a case under the Penal Code would certainly be culpable homicide, if not murder. A contrary decision was given under the following circumstances—

A servant girl, who was about to give birth to a child, concealed the fact from everyone about her, and deliberately abstained from taking any of the precautions necessary to preserve the life of the child after its birth. It was found as a fact that the child died in consequence. There was no reason to suppose that the mother was actuated by any other motive than that of keeping up to the last the deception as to her condition. Cockburn, C.J., after consulting with Williams, J., directed the jury that upon these facts the woman could not be convicted of manslaughter. *R. v. Knights*, 2 F. & F 46.

It is obvious that she had no legal duty to the child till it was born alive and after its birth it does not appear that she neglected anything which she could have done. She was convicted under an English statute, nearly in the same terms as s 318 of the Penal Code. A nearly similar case is reported in 1893 A. W. N. 100; there a young married woman gave birth to an illegitimate child in her husband's house, and 10 days after its birth she left her home. After her departure, the child was fed partly on cow's milk and partly from the breast of the infant's maternal aunt; but eventually it died 4 days after desertion by its mother owing to weakness resulting from *infantile Diarrhœa*, it was held the accused could not be made responsible for the child's death. See also 5 N.-W. P. H. C. R. 44, & 1883 A. W. N. 36. The case of *Plummer*, 1 C. & K. 600 is instructive. There the prisoner separated from his wife but had to pay her a fixed allowance. The wife fell very ill and was wandering in the streets for shelter. A police man took her to the husband and explained to him her condition but he refused to give her shelter saying that she was a nasty beast and he could not live with her. Shortly after she died and the medical evidence was to the effect that life was shortened by exposure. The prisoner was however acquitted as there was no legal obligation upon him to give her any shelter in addition to the allowance he was paying regularly. See also *R. v. Elliott*, 16 Cox, 710; *R. v. Green*, 7 C. & P. 156; *R. v. Izod*, 20 Cox, 690; *R. v. Jones*, 19 Cox, 678; *R. v. Friend*, R. & R. 20; *R. v. Marriott*, 8 C. & P. 425; and *R. v. Chandler*, Dears C. C. 453. As regards persons having a legal duty to discharge towards another, on the one hand they would incur liability if they cause death by negligence or omission to discharge that duty, while on the other hand acts causing death by doing anything in *their discharge of their duty* will be held less culpable than if similar acts had been done where no such duty existed. Thus a schoolmaster (*Hopley*, 2 F. & F. 202) a father, (*Griffin*, 11 Cox, 402) or a person in *loco parentis* (*Cheeseman*, 7 C. & P. 455) would be liable only under s. 304 if death results to a pupil child or ward from moderate chastisement inflicted for the good of the deceased.

Where there has been an omission of a clear legal duty* it is still necessary to show that the death was absolutely traceable to it, or accelerated by it. If a parent, being able to supply medical aid to his infant child, refuses or neglects to do so, and the child dies, the parent is not guilty of culpable homicide, unless it can be shown that the child's life would have been saved or prolonged if medical aid had been supplied. Several cases of this sort have arisen in England, with a sect called the Peculiar People, whose religion forbids them to interfere with the ways of Providence by calling in human assistance in case of illness. *R. v. Morley*, 8 Q. B. D. 571; and in the more recent cases of cure by "Christian Science" *R. v. Senior* [1899] 1 Q. B. 283.

Under English law, even where the deceased has voluntarily done the act which caused his death, it will still be culpable homicide if it was done from an apprehension of immediate violence. As, for instance, where, on being attacked, he threw himself into a river, or jumped out of a window, provided the apprehension was well grounded and justified by the circumstances. *R. v. Pitts*, C. & M. 284; *Hallid* [1889] L. T. 702; *R. v. Martin*, 8 Q. B. D. 54; *R. v. Hickman*, 5 C. & P. 151; *R. v. Williamson*, 1 Cox, 97. The principle was, that a person who is attacked has a right to make his escape by every possible means, and if his death happens from the means to which he is driven, the person by whose unlawful act he is compelled to such extremity is responsible for the consequence. Under s. 299 the above class of cases seems to be excluded. That section appears to assume that the death is caused by the act of the accused, and by an act which he intended, or knew to be likely, to cause death. This can hardly, without great straining, be said of a death which results entirely from the voluntary and unforeseen act of the deceased himself, and which would never have happened from any act done or intended to be done by the prisoner. Where the accused struck the deceased a

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single blow on the head with a bamboo yoke, and the injured man died in the hospital principally from the excessive use of opium surreptitiously administered by his friends, *held* the accused could not be held liable for anything more than causing simple hurt; but his friends who administered opium without any excuse may be responsible for causing his death. **L. B. R. (1872-1892) 179.** See also **4 C. 815, 2 A. 522.**

141. Acceleration of death is causing of death.—Expl 1 of s 299 recognizes the rule of common law, (*1 Hale, P. C. 428*), that even if a person is actually dying, any injury which accelerates the death is deemed to be the cause of it, and it makes no difference that the act which shortens life is done from motives of the purest humanity, as, for instance, to release a dying man from intolerable suffering. But if such an act was done with the consent of a person above eighteen, it would still be murder by English law, but under the Code having regard to excep. 5 to s. 300, it would be culpable homicide not amounting to murder. *1 East, P. C. 228.* See *R v. Murton*, **3 F. & F. 492**; *R. v. Martin*, **5 C. & P. 128**; *R v. Hayward*, **21 Cox, 692**; **2 A. 522 at 525**; *R v. Dyson* [1908] **2 K. B. 454 at 457.**

142. Person causing injury causes death if death results from neglect of ordinary treatment of the injury.—Where an injury of a dangerous character has been inflicted, which might possibly not have been fatal, but the sufferer declines to follow proper treatment, or is injudiciously treated, or sinks under an operation, which might possibly have been avoided, the person who inflicted the injury is considered in law to have caused the death which results. Anyone who puts the life of another in danger is responsible for the result.

"If a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of death, yet this is murder or manslaughter in him that gave the stroke or wound, though it were not the immediate cause of his death; yet if it were the immediate cause

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thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causans*." *1 Hale, P. C. 428.*

This is substantially the same as the rule laid down in *Expl. 2, s. 299*. Accordingly, where a man received a cut upon the finger, and the surgeon urged him to allow it to be amputated, and he refused, and then lock-jaw set in, of which he died, evidence was offered that if he had submitted to the operation his life would probably have been saved. *Maule, J.*, held that this was no defence. The real question was whether in the end the wound was the cause of death. *R. v. Holland, 2 M. & Rob. 351; 1 Cr. L. J. 909.* In another case an operation had been performed, under which the patient had sunk. *Erle, J.*, refused to receive evidence to show that no operation was necessary, or that an easier and much less dangerous operation might have been performed. He said, "I am clearly of opinion, and so is my brother *Rolfe*, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and the treatment which they *bona fide* adopt is the immediate cause of death, the person who inflicted the wound is criminally responsible." *R. v. Pym, 1 Cox, 339; R. v. McIntyre, 2 Cox, 379; R. v. Martin, 5 C. & P. 128.* Similarly where a slight injury was caused by the accused and an operation was thought necessary and chloroform was administered and the accused died before the operation, *R. v. Davies, 15 Cox, 174*, and where an accused kicked his wife and the surgeon thought it best to administer brandy as a restorative and the liquid went the wrong way into the lungs and caused death; but under the Penal Code the accused would be liable in the above two cases only for hurt, as it is impossible to bring these cases within *s. 299* even with the aid of *Expl. (2)*. See *10 Bur. L. R. 171*. Where, however, the wound would not have caused death, but is brought on by improper applications—that is to say, not merely by applications which turn out not to have been the most judicious that might have been employed, but by applications ignorantly administered by unqualified persons—this, according to English law, was considered not to be murder, for the death started from a completely different

source, and was not the result of the act done. *1 Hale, P. C. 428*. The original framers of the Code, however, considered that the question of murder or no murder would turn, not upon the cause of the death, but the object of the wound, and gave the instance of a person interested in the death of a young heir giving him a slight wound, knowing that the ignorant and unskilful treatment of those around him would cause it to terminate fatally, and intending such a result. (*Appendix, note M, p. 143*) The subsequent Commissioners agreed with them that such a case, if it could be proved, ought to be treated as murder, and that it would come under the definition of the offence. They considered the case, however, so improbable, that they expressed themselves as 'doubtful of the propriety of putting it as a case within the definition (s. 299), for fear of its leading to a latitude of construction which, under some supposed analogy, might include predicaments quite beyond its scope' (*1st Report, 1846, s. 251, p. 218.*)

The rule of the English common law, that a man who had received an injury from another was not considered to have been killed by him, unless the death followed within a year and a day after the injury, (*1 Hale, P. C. 426, 428*) was probably a rough way of cutting short difficult questions as to whether the injury was the immediate, or only the remote cause of death. No such rule is laid down in the Code. But it is indispensable that death should be connected with the act of violence "not merely by a chain of causes and effects but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances." Thus when the accused wounded the deceased in September and the deceased was detained in the Hospital as an inpatient and in the February following he absconded from the Hospital and his dead body was found much decomposed so as to render it impossible to say from what disease he died, the accused was held liable only for grievous hurt, 1864 W. R. (Cr.) 31.

143. Legal basis of the division of culpable homicide into murder and culpable homicide not murder.—A

glance at s. 300 would indicate that murder may be committed with varying degrees of criminality; but once it is murder the law makes no distinction as to punishment. Thus cutting off a man's neck is killing with the intention of causing death. Cutting off his leg is sufficient in the ordinary course to cause death. The latter is a degree lower in the scale of criminality but that would not be a sufficient reason under s. 367 (5), Cr. P. C., to award transportation to an accused who murdered his victim by severing his thigh with a hatchet. 1900 U. B. R. 288=7 Bur. L. R. 247; 7 Bur. L. R. 250. Though thus there are gradations of murder, we are not concerned with them but it is essential to indicate the legal basis of the distinction of culpable homicide according as it amounts to murder or does not amount to murder. Nothing is commoner than the ordinary mistake unless the act is covered by one of the Exceptions to s. 300, culpable homicide is murder. 1 C. W. N. 545, 1891 P. R. No. 9; 1883 P. R. No. 27; 8 W. R. (Cr). 47 at 51. But Sir Barnes Peacock has explained at length the fallacy of such reasoning. This will be clear from a careful examination of the language employed in ss. 299 and 300.

Where death has been caused under such circumstances that it can be called homicide, it will be murder, or culpable homicide not amounting to murder, according to the intention or knowledge with which the act causing the death was done. **Weir I. 288.** Murder must always be culpable homicide, but not *vice versa*. The difference between them will be best shown by placing ss. 299 and 300 in parallel columns.

Culpable homicide.

299. Whoever causes death by doing an act

(a) With the intention of causing death, or

Murder.

300. Except in the cases hereinafter excepted, culpable homicide is murder,

(1) If the act by which the death is caused is done with the intention of causing death, or

(b) With the intention of causing such bodily injury as is *likely* to cause death, or

(c) With the knowledge that he is *likely* by such act to cause death,
commits the offence of culpable homicide

(2) If it is done with the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the *person to whom the harm is caused*, or

(3) If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient, in the ordinary course of nature*, to cause death, or

(4) If the person committing the act knows that it is *so imminently dangerous that it must, in all probability, cause death*, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

These distinctions were very fully discussed by Sir Barnes Peacock in *B. L. R., Sup. Vol. 443 = 5 W. R. (Cr.) 45*, where he said :

“Culpable homicide is not murder, if the case falls within any of the exceptions mentioned in s 300. The causing of death by doing an act with the intention of causing death is culpable homicide. It is also murder, unless the case falls within one of the exceptions in s 300. Causing death with the intention of causing bodily injury to any person, if the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, in my opinion falls within the words of s. 299, ‘with the intention of causing such bodily injury as is likely to cause death,’ and is culpable homicide. It is also murder, unless the case falls within one of the exceptions. See s 300, cl. 3

"Causing death by doing an act with the knowledge that such act is likely to cause death is culpable homicide, but it is not murder, even if it does not fall within any of the exceptions mentioned in s. 300, unless it falls within cls. 2, 3, or 4 of s. 300; that is to say, unless the act by which the death is caused is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, or unless the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death.

"In speaking of acts, I, of course, include illegal omissions.

"There are many cases falling within the words of s. 299, 'or with the knowledge that he is likely by such act to cause death,' that do not fall within the 2nd, 3rd, or 4th clauses of s. 300; such, for instance, as the offences described in ss. 279, 280, 281, 282, 284, 285, 286, 287, 288, and 289, if the offender knows that his act or illegal omission is likely to cause death, and if, in fact, it does cause death. But, although he may know that the act or use death, it the offender such bodily is thereby to cause death, or such bodily injury as is described in cl. 2 or 3 of s. 300

"As an illustration: suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously, along a narrow, crowded street. He might know that he was likely to kill some person, but he might not intend to kill anyone, or to cause bodily injury to anyone. In such a case, if he should cause death, I apprehend he would be guilty of culpable homicide not amounting to murder, unless it should be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death, or such bodily injury, etc., as to bring the case within the 4th clause of s. 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for ten years, or imprisonment for ten years with fine (see ss. 304 and 59); or, if a European or American, he would be subject to penal servitude instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of s. 304 would not apply to the case. That applies only to cases which would be murder, if not falling within one of the exceptions in s. 300. If a man should drive a buggy furiously, not merely along a crowded street, but

intentionally into the midst of a crowd of persons, it would probably be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury, etc., as in cl. 4, s. 300. (See, as to cases of this sort, *1 East, P. C. 231*.)

"From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street, in which the driver might know that his act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case.

"Suppose a gentleman should cause death by furiously driving up to a railway station. Suppose that it should be proved that he had business in a distant part of the country, say at the opposite terminus, that he was intending to go by a particular train, and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over someone and to cause death, would anyone under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the judge or jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing death was such that he must have known, and did know, that his act must, in all probability, cause death, etc., within the meaning of cl. 4, s. 300.

"If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder and liable to capital punishment."

From this review it appears that, putting aside cases which come under the exceptions to s. 300, culpable homicide must always be murder unless the facts can be brought strictly within cl. 3 of s. 299. It must be found that the accused had actual knowledge that he was likely to cause death, or his case will not come within s. 299. It must be clear that he had not a distinct intention to kill (cl. 1 of s. 300) or to cause vital injury (cls. 2 and 3) or a distinct knowledge that his act would in all probability have such a result (cl. 4) or his case will come within s. 300; 6 N.-W. P. H. C. R. 26.

When a person inflicts a vital injury, *e.g.*, a stab on the chest with a penknife two-and-half inches deep and penetrating the pericardium, this is sufficient in the ordinary course of nature to cause death; and the presumption is that the accused intended to cause such a vital injury and it lies heavily on him to show, if he can, that such was not his intention. 14 Cr. L. J. 115=18 Ind. Ca. 675; 26 B. 558. In another case where the wound was on the back one inch long and had penetrated the diaphragm and also the spleen and proved fatal, it was laid down by Abdur Rahim, J., "The mere fact the wound actually inflicted was sufficient in the ordinary course of nature to cause death was not enough to bring the act within s. 300, but it must further be shown the accused intended to inflict such injury," 1912 M. W. N. 193=13 Cr. L. J. 129=13 Ind. Ca. 817. It is difficult to reconcile these two cases. But they serve to emphasise the position that as laid down by Norman and Campbell, JJ, in 5 W.R. (Cr.) 42, the intention required by the code is not constructive but an actual intention, though this actual intention must necessarily be the result of inference from circumstances but seldom capable of direct proof. Anyhow if the act from which death ensues was so imminently dangerous that the law presumes the accused must have known that it would in all probability cause death or such bodily injury as is likely to cause death, the offence would be within s. 299 if the accused is unable to rebut the presumption, and it would further amount to murder unless the accused can bring it under one of the exceptions to s. 300, Ratanlal 411. 7 W. R. (Cr.) 64 is a curious case where a man cut off the head of his own child to propitiate the deity and in the expectation the child will be restored to him with wealth. This was held to constitute murder.

144. Culpable Homicide is not murder if the act is within cl. (b) of s. 299 but not within cls. (2) or (3) of s. 300.—This is a distinction suggested by the wording of these clauses but not recognised by Sir Barnes Peacock, at all events, in so many words, in the leading case from which copious extracts have been set forth in § 143 above. Melville, J., in 1 B. 342 clearly recognized

the distinction when he says: "The offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death; it is murder if such injury is *sufficient in the ordinary course of nature* to cause death. It is a question of degree of probability. Practically, I think, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or from a stick on a vital part may be likely to cause death, a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death." This view was followed in 7 Sind. L. R. 29=14 Cr. L. J. 459=20 Ind. Ca. 619. In *Gora Chand Gope's* case, though Sir Barnes Peacock did not advert to this fine distinction, Campbell, J., did (B. L. R. Sup., Vol. 443 at 449) see further the remarks of the same judge in 4 W. R. (Cr.) 35, and this view was clearly adopted by the chief court of Lower Burma in 3 L. B. R. 122=3 Cr. L. J. 355, followed in 4 L. B. R. 367=9 Cr. L. J. 364 and 5 L. B. R. 80=10 Cr. L. J. 359=3 Ind. Ca. 710. The Punjab Chief Court in 1911 P. R. (Cr.) 3=1911 P. W. R. (Cr.) 9=1911 P. L. R. 87=12 Cr. L. J. 274=10 Ind. Ca. 852, said that the first part of s. 304 includes only those cases in which murder is reduced to an offence punishable under that section by reason of one or other of the exceptions to s. 300. If Melville, J., is right, this conclusion cannot be defended, though it is supported by one or two observations in Sir Barnes Peacock's judgment. Again the peculiar knowledge of the accused as to the condition of his victim may bring his case within cl. (2) of s. 300 though if the act had been done by another actor with the same intention but without the particular knowledge contemplated, it would only be within cl. (b) of s. 299 and not within either cl. (2) or cl. (3) of s. 300, 4 L. B. R. 132; 3 W. R. (Cr.) 22; 4 W. R. (Cr.) 33. Where a man cut another on the head with a heavy chopper, slicing off a bit of the frontal bone and cutting into the brain and the medical evidence was to the effect that the wound was not certain, although likely, to cause death it was held this would not reduce the offence to one under s. 304 as the natural consequence of an act of the kind in question would be death, 4 L. B. R. 306=9 Cr. L. J. 5; 9 Bur. L. R. 145; 1881 S. J. L. B. 271; 5 W. R. (Cr.) 32; 37 C.

315=11 Cr. L. J. 417=6 Ind. Ca. 921; (*contrast* this view with the reasoning in 4 L. B. R. 367=9 Cr. L. J. 364). But it cannot always be assumed that when a blow is struck on the head, the assailant intended to cause death (cl. 1) or injury sufficient to cause death (cl. 3) or even injury likely to cause death, 14 Bur. L. R. 264; 10 Bur. L. R. 171, though in cases where a stab is inflicted in a vital part with a sharp-pointed weapon and death ensues, the act would be covered by cl. (3), 2 L. B. R. 63.

145. **Culpable Homicide is not murder if act being within cl. (c) of s. 299 is not within cl. (4) of s. 300.**—Where death has resulted from violence and there is no proof of the intention of the accused except what may be gathered from his act, it is necessary to consider what knowledge the law will impute to him in doing the act. (1) If the circumstances attendant on the act will only bear the inference that the accused must have known that his act might possibly, but was unlikely, to cause death or vital injury, then the act being outside the scope of s. 299 would only amount to hurt or grievous hurt. Thus in 5 W. R. (Cr.) 97 the accused received grave provocation from his wife, threw her down, sat upon her and slapped her with his open hand and she died as the result of a ruptured spleen leaving no external marks of violence. The woman was otherwise healthy and the disease of the spleen was at an early stage of the disease and unknown to the prisoner. Mere throwing down so as to leave no external marks could not be said to be an act likely to cause death or vital injury. The prisoner was therefore held liable only for simple hurt; see also 5 W. R. (Cr.) 41; [1911] 2 M. W. N. 188, 14 K. L. R. 316=2 Cr. L. J. 196 and cases of enlarged spleen, in 1 Cr. L. J. 298, 220, 593 622 & 627, 6 Sind L. R. 116=13 Cr. L. J. 750=17 Ind. Ca. 62; 2 A. 766; 2 W. R. (Cr.) 39; 3 W. R. (Cr.) 55, 4 W. R. (Cr.) 23; 8 W. R. (Cr.) 28 & 29; 3 A. 776; 3 Cr. L. J. 148=15 K. L. R. 286; L. B. R. (1872-1892) 463; 1893 P. R. (Cr.) 18. The natural presumption is in favour of health—healthy condition being normal. If the assailed received only such injury as would be designated hurt in a

normal subject, it is unreasonable to hold the assailant liable for consequences that have ensued owing to the abnormal condition of the deceased. This marks a humane departure in the Penal Code from what was then the state of the Law in England, 2 A. 522, 1 A. L. J. 162n; 3 A. 597. Thus where a husband after a trivial domestic quarrel, beat his wife with a light stick and she died, and it was subsequently discovered that her brain was in an anæmic condition, the conviction was altered from one under s. 304 to one under s. 323; 1913 P. W. R. (Cr.) 5=1913 P. L. R. 157. See also 1897 P. R. (Cr.) 11; 1913 P. W. R. (Cr.) 1=1913 P. L. R. 162=14 Cr. L. J. 104=18 Ind. Ca. 664.

(2) If the circumstances attendant on the act would support the inference that the accused must have known the act was likely to cause death or vital injury, then it would be within cl. (c) of s. 299. Where a man violently struck at an object under the belief the object struck was something supernatural but took no steps to satisfy himself it was not a human being and killed a man, his negligence was held to amount to the knowledge sufficient to bring his act within cl. (c) of s. 299, 1898 A. W. N. 163. Similarly where a burglar to evade arrest wildly brandished a dangerous weapon utterly regardless whether his blows will or will not cause death or injury, 1911 P. R. (Cr.) 12=1911 P. W. R. (Cr.) 41=12 Cr. L. J. 591=12 Ind. Ca. 967, and where an accused in exercising a spirit beat a girl to death, then case was on the analogy of 5 W. R. (Cr.) 7 & 3 B. L. R. (A. Cr.) 25 held to fall under s. 304, Ratanlal 603, 4 Bom. L.R. 879; [contra 1 U. B. R. (P. C.) 1.] But in Ratanlal 785 where a husband beat his wife under the *bonâ fide* impression it will drive away the devil she was possessed of, and the injuries inflicted caused her death, it was held the act was covered by ss 67, 88 or 92, I P. C.

A common type of cases coming within cl. (c) of s. 299 is that of those brutal assaults, made without any deadly weapon, but with a violence likely to endanger life, and which do in fact end fatally Weir I. 299 & 301;

315=11 Cr. L. J. 417=6 Ind. Ca. 921; (contrast this view with the reasoning in 4 L. B. R. 367=9 Cr. L. J. 364). But it cannot always be assumed that when a blow is struck on the head, the assailant intended to cause death (cl. 1) or injury sufficient to cause death (cl. 3) or even injury likely to cause death, 14 Bur. L. R. 264; 10 Bur. L. R. 171, though in cases where a stab is inflicted in a vital part with a sharp-pointed weapon and death ensues, the act would be covered by cl. (3), 2 L. B. R. 63.

145. **Culpable Homicide is not murder if act being within cl. (c) of s. 299 is not within cl. (4) of s. 300.**—Where death has resulted from violence and there is no proof of the intention of the accused except what may be gathered from his act, it is necessary to consider what knowledge the law will impute to him in doing the act (1) If the circumstances attendant on the act will only bear the inference that the accused must have known that his act might possibly, but was unlikely, to cause death or vital injury, then the act being outside the scope of s. 299 would only amount to hurt or grievous hurt. Thus in 5 W. R. (Cr.) 97 the accused received grave provocation from his wife, threw her down, sat upon her and slapped her with his open hand and she died as the result of a ruptured spleen leaving no external marks of violence. The woman was otherwise healthy and the disease of the spleen was at an early stage of the disease and unknown to the prisoner. Mere throwing down so as to leave no external marks could not be said to be an act likely to cause death or vital injury. The prisoner was therefore held liable only for simple hurt; see also 5 W. R. (Cr.) 41; [1911] 2 M. W. N. 188, 14 K. L. R. 316=2 Cr. L. J. 196 and cases of enlarged spleen, in 1 Cr. L. J. 298, 220, 593 622 & 627, 6 Sind L. R. 116=13 Cr. L. J. 750=17 Ind. Ca. 62; 2 A. 766; 2 W. R. (Cr.) 39; 3 W. R. (Cr.) 55, 4 W. R. (Cr.) 23; 8 W. R. (Cr.) 28 & 29; 3 A. 776; 3 Cr. L. J. 148=15 K. L. R. 286; L. B. R. (1872-1892) 463; 1893 P. R. (Cr.) 18. The natural presumption is in favour of health—healthy condition being normal. If the assailed received only such injury as would be designated hurt in a

normal subject, it is unreasonable to hold the assailant liable for consequences that have ensued owing to the abnormal condition of the deceased. This marks a humane departure in the Penal Code from what was then the state of the Law in England, 2 A. 522, 1 A. L. J. 162n; 3 A. 597. Thus where a husband after a trivial domestic quarrel, beat his wife with a light stick and she died, and it was subsequently discovered that her brain was in an anæmic condition, the conviction was altered from one under s. 304 to one under s. 323; 1913 P. W. R. (Cr.) 5=1913 P. L. R. 157. See also 1897 P. R. (Cr.) 11; 1913 P. W. R. (Cr.) 1=1913 P. L. R. 162=14 Cr. L. J. 104=18 Ind. Ca. 664.

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A common type of cases coming within cl (c) of s 299 is that of those brutal assaults, made without any deadly weapon, but with a violence likely to endanger life, and which do in fact end fatally. Weir 1. 299 & 301;

1 B. 342; 19 M. 356; 4 L. B. R. 367=9 Cr. L. J. 364; 7 W.R. (Cr.) 54; 1 N. L. R. 134=2 Cr. L. J. 746. Thus assault with an ordinary bamboo stick which is metal-shod, 19 K. L. R. 95=10 Cr. L. J. 166; 4 Bur. L. T. 253=12 Cr. L. J. 524=12 Ind. Ca. 292. Where the accused lay in wait for a man who had enticed away their female relation and beat him on the chest and back but carefully avoided hitting him on the head, and caused his death from the injuries, they were held liable only under s. 304, 1890 P. R. No. 10. Another type is that of dangerous acts, done with the knowledge that they do endanger life, but with no hostile intention, and with the belief that the danger will be escaped or warded off. Such was the case of the snake-charmer, who, to show his own skill and dexterity, placed a poisonous snake on the head of one of his spectators. The boy, not displaying a proper degree of confidence, pushed the snake away, and was bitten and died. 5 C. 351. See 1891 P. R. No. 9; 1898 P. R. No. 5. Frequently such offences will be committed where there is gross negligence in the management of dangerous things, or gross neglect of duty where human safety is concerned. A person in charge of an engine who entrusts its management to a boy, incapable and known by him to be incapable of managing it; *R. v. Lowe*, 3 C. & K. 123; a banksman at a mine, who omits the precaution necessary to prevent the trucks running down the shaft; *R. v. Hughes*, D. & B. 248=26 L. J. (M. C.) 202; the owner of a field through which there is a public path, who allows a savage bull to be at large in the field, 1 *East*, P. C. 264, would severally be guilty of culpable homicide if death occurred.

(3) If on the other hand the circumstances are sufficiently strong to support the inference the accused must have known that in all probability his act would cause death or vital injury, then the act (if done without any excuse which would justify it, 1898 P. R. No. 40) is covered not only by cl. (c) of s. 299 but also by cl. 4 of s. 300, and is therefore murder, unless it is brought within any of the exceptions to s. 300, 10 Bur. L. R. 29. 1 Cr. L. J. 184=1903 L. B. R. 125; 13 Bur. L. R. 199.

See per Straight J., in 3 A. 776 at 778; 6 N.-W. P. H. C. R. 26. Thus where the accused administered *Dhatura* to facilitate robbery and caused the death of the victim, his act was held to be covered by cl. (4) of s. 300, 1911 P. L. R. 32 = 12 Cr. L. J. 125 = 9 Ind. Ca. 731, where 31 A. 148 = 9 Cr. L. J. 383 = 6 A. L. J. 129 = 1 Ind. Ca. 765 is *followed* and 30 A. 568 = 1908 A. W. N. 243 = 4 A. L. J. 402 is *dissented* from as bad law. See also 8 C. P. L. R. (Cr.) 9; 20 A. 143; 5 L. B. R. 79 = 10 Cr. L. J. 363 = 3 Ind. Cas. 721. A cut with a knife in the neck only quarter of an inch from the carotid artery has been held to be an act so imminently dangerous that it must in all probability cause death. 1912 P. R. Cr. 6 = 1912 P. W. R. (Cr.) 24 = 13 Cr. L. J. 197 = 14 Ind. Ca. 197. In 13 Bur. L. R. 330 = 6 Cr. L. J. 389 a blow on the back of another with a formidable weapon was held to bring the act within cl. (4) of s. 300 by raising the necessary presumption as to knowledge.

An act really within cl. (c) of s. 299 may not fall within cl. (4) of s. 300, or may not amount to murder. There is no difficulty as regards those acts of culpable homicide really within cl. (4) of s. 300 but which are not murder by reason the operation of the one or other of the five Exceptions to s. 300. But apart from these Exceptions, the language of sub-clause (4) of s. 300 introduces a new class of culpable homicide not amounting to murder, *viz.*, those acts really covered by cl. (c) of s. 299 but still lying outside the scope of cl. (4) of s. 300 simply and solely by reason of the fact it cannot be said the act was committed *without any excuse for incurring the risk* of causing death or such bodily injury as is likely to cause death. The question then arises what is the real nature of the excuse the existence of which would prevent culpable homicide becoming murder. This excuse cannot on the one hand be of the nature of excuses dealt with under the head of General Exceptions and Private Defence in Chapter IV *supra* because the excuse contemplated by cl. (4) of s. 300 merely prevents culpable homicide from amounting to murder. Clause (4) equally with the other clauses of

1 B. 342; 19 M. 356; 4 L. B. R. 367=9 Cr. L. J. 364; 7 W. R. (Cr.) 54; 1 N. L. R. 134=2 Cr. L. J. 746. Thus assault with an ordinary bamboo stick which is metal-shod, 19 K. L. R. 95=10 Cr. L. J. 166; 4 Bur. L. T. 253=12 Cr. L. J. 524=12 Ind. Ca. 292. Where the accused lay in wait for a man who had enticed away their female relation and beat him on the chest and back but carefully avoided hitting him on the head, and caused his death from the injuries, they were held liable only under s. 304, 1890 P. R. No. 10. Another type is that of dangerous acts, done with the knowledge that they do endanger life, but with no hostile intention, and with the belief that the danger will be escaped or warded off. Such was the case of the snake-charmer, who, to show his own skill and dexterity, placed a poisonous snake on the head of one of his spectators. The boy, not displaying a proper degree of confidence, pushed the snake away, and was bitten and died. 5 C. 351. See 1891 P. R. No. 9; 1898 P. R. No. 5. Frequently such offences will be committed where there is gross negligence in the management of dangerous things, or gross neglect of duty where human safety is concerned. A person in charge of an engine who entrusts its management to a boy, incapable and known by him to be incapable of managing it; *R. v. Lowe*, 3 C. & K. 123; a banksman at a mine, who omits the precaution necessary to prevent the trucks running down the shaft; *R. v. Hughes*, D. & B. 248=26 L. J. (M. C.) 202; the owner of a field through which there is a public path, who allows a savage bull to be at large in the field, 1 *East*, P. C. 264, would severally be guilty of culpable homicide if death occurred.

(3) If on the other hand the circumstances are sufficiently strong to support the inference the accused must have known that in all probability his act would cause death or vital injury, then the act (if done without any excuse which would justify it, 1888 P. R. No. 40) is covered not only by cl. (c) of s. 299 but also by cl. 4 of s. 300, and is therefore murder, unless it is brought within any of the exceptions to s. 300, 10 Bur. L. R. 29. 1 Cr. L. J. 184=1903 L. B. R. 125; 13 Bur. L. R. 199.

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amounting to murder. But if he had the knowledge that in all probability the act must cause death, then it is murder. This again would depend upon circumstances; the blow as regards one person, or under ordinary circumstances, may not in the ordinary course of nature be likely to cause death, may yet be imminently dangerous to another, or under special circumstances. 4 C. 764; 3 A. 776. Very often the act itself is the real test of the knowledge, 1890 P. R. No. 10; 5 N.-W. P. H.C. R. 235; Ratanlal 603; 5 W. R. (Cr.) 7; 14 C. 566; but where the injury caused is moderate and yet death results, it is possible to treat the act as a *bona fide* one done with the consent of the sufferer and the accused may be entitled to an acquittal, Ratanlal 785, or to be dealt with under s. 304A, 1902 U. B. R. (P. C.) 1. On the other hand, knowledge will be presumed if the weapon used is formidable, 5 W. R. (Cr.) 32, or from extraordinary cruelty, 19 M. 356, 20 A. 143. Where three persons acting in concert and armed with *Lathis* attacked a fourth and injured him so severely that he died from the result of the injuries, the Allahabad High Court in 14 Cr. L. J. 615=21 Ind. Ca. 663, held *following* 15 Bom. L. R. 303=14 Cr. L. J. 235=19 Ind. Ca. 331 & 35 A. 329=11 A. L. J. 752=14 Cr. L. J. 609=21 Ind. Ca. 657, the act amounted to murder. See also 11 A. L. J. 926=14 Cr. L. J. 685=21 Ind. Ca. 1005; (where 9 A. L. J. 180=13 Cr. L. J. 265=14 Ind. Ca. 649 is *disapproved* of) 13 Cr. L. J. 159=13 Ind. Ca. 847; 1890 A.W.N. 74.

We have already seen that where death ensues from an act unaccompanied by either intention or knowledge as set forth in s. 299 the offence can only be, if at all, the minor one under s. 304 (A) or s. 323 or s. 325 as the case may be, 10 W. R. (Cr.) 59; 1890 A. W. N. 105; U. B. R. (1897-1901) I. 293; 1888 A. W. N. 236; 1881 A. W. N. 112.

146. First Exception—Provocation.—The most important of these exceptions is the first, which relates to provocation. It is intended to embody the general principles laid down by the English judges, that the provocation must be adequate, that the violence used

must be in proportion to the provocation, and that the act causing death must be done while the want of self-control caused by the provocation continues.

According to the law of England, provocation by words or gestures alone cannot be sufficient to reduce the crime of killing intentionally, or with a deadly weapon, below that of murder *Poster, Cr. L. 290. Welsh, 11 Cox. 336.* Upon this point, however, the framers of the Code say:

"We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of a peculiarly bad heart."

Accordingly, they draw special attention to the fact, that under these sections words and gestures are put upon the same footing as any other provocation. Appendix, Note M., 145.

The later Commissioners assent to this reasoning, remarking, that, "A discreet judge would properly reject the plea of provocation by insulting words in one case, while he would as properly admit it in another, according as the party might be shown to belong to a class sensitive to insults of this sort or otherwise" 1st Report, 846, s. 271, p. 254. The condition of mind in which the particular accused was when the provocation was given is a proper element to be taken into consideration. 2 M. 122, 1 Cr. L. J. (Sh n) 91. An insult to his religion offered to a fasting *Moplah* towards nightfall on a day in the month of *Ramzan* is likely to produce quite a different effect if the same insult had been offered to a *Lubbat*, betel-leaf seller in the streets of Tanjore.

What the Code requires is that the provocation should be grave and sudden, and such as may be considered reasonably capable of depriving of his self-control the man who receives it.

"To give an accused person the benefit of Exception 1, it ought to be shown distinctly, not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause." 1 B. L. R. (A, Cr) 11; 10 W. R. (Cr.) 25; 3 W. B.

(Cr) 33; 14 B. 564; 11 C. 410; 9 W. R. (Cr) 72; Weir 1.307; *Rothwell* 12 Cox. 145. Where on the sudden confession of a wife to her husband of her having committed adultery, the latter killed her on the spot, the offence was reduced from murder to the less grave one. *R. v. Jones*, 72 J. P. 215.

In 2 M. 122, the deceased came up in the middle of an altercation which had already been going on between the prisoners and the son of the deceased. The High Court, in setting aside a conviction for murder, said of the provocation, which, as far as it originated from the deceased, had been merely abuse. "What is required is that it should be of a character to deprive the offender of his self-control; in determining whether it was so, it is admissible to take into account the condition of mind in which the offender was at the time of the provocation. In the present case the abusive language used was of the foulest kind, and was addressed to a man already justly enraged by the conduct of the deceased's son." See also 1900 U. B. R. (1897-1901) 291; 1 W. R. (Cr.) 23; 1866 P. R. No. 12; 1902 R. R. No. 30; 1889 P. R. No. 7. A common source of provocation in this country is jealousy. It has always been recognized that no higher provocation can be given than that of finding a man's wife in actual intercourse with a paramour. Mere suspicion is not sufficient.

A man had well founded reason for supposing that his wife had formed a criminal intimacy with one Fakruddin. One night she left his side stealthily. He took up an axe, followed her, and found her in a public place, talking to Fakruddin. He immediately killed her with the axe. The act was held to be murder. The Court ruled that so far as the facts raised a suspicion of infidelity, such a suspicion was not a sufficient provocation in law, following the language of Rolfe, B., in *R. v. Kelly*, 2 C. & K. 814, where he said "I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspected her to be in a criminal intimacy with another man, is not a sufficient provocation in law." *See also* *R. v. Kelly*, 2 C. & K. 814, where he said "I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspected her to be in a criminal intimacy with another man, is not a sufficient provocation in law." but the meeting took place in a public place, and under circumstances which, while they might arouse the anger of the accused, could not be properly held to have deprived him of self-control to the extent and degree required by law. 8 A. 622. Where, however, a man had actually witnessed criminality between his wife

and her paramour in the evening, and the next morning found his wife eating with him, and giving him food in her house, whereupon the husband seized a bill-hook and killed him, this was held to be sufficient provocation within the meaning of Exception 1. Such conduct, coupled with what he had previously seen, implied that all concealment of their criminal relations, and all regard to his feelings were abandoned, and that they purposed continuing their course of misconduct in his house. 3 M. 33; 18 A. 497; 28 C. 571; 1913 P. R. (Cr.) 3=14 Cr. L. J. 203=19 Ind. Ca. 208; 1885 A. W. N. 197. All this agrees exactly with the language of the English law. "It must not, however, be understood that any trivial provocation which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter."

of human frailty, it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation. 'Barbarity,' says Lord Holt, 'will often make malice.'" 1 East, P. C. 231. Weir, l. 303 & 306; *R. v. Fisher*, 8 C. & P. 182. Having regard to the strong ties of family feeling among Hindoos it has been held the benefit of this exception may be extended to a man who finds a female member of his family such as a married sister, in actual criminal intimacy with the deceased and kills him, 1 Cr. L. J. 501. The same principle was extended to an accused who found his sister and her paramour coming out of the *Hujra* of a mosque and when he questioned them was insulted by the paramour, the deceased, 1905 P. L. R. No. 190=2 Cr. L. J. 705. For other cases see

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It is not enough to show that there was a sufficient provocation, and that the act which caused death was committed in consequence of the provocation. It must be shown that the provocation destroyed self-control, and that the killing took place while that absence of self-control lasted, and may be fairly attributed to it. 7 W. R. (Cr.) 27; 1884 P. R. No. 33; 9 M. L. T. 480= (1911) 2 M. W. N. 275=12 Cr. L. J. 235=10 Ind. Ca. 262; 19 W. R. (Cr.) 35. The question to be determined in every case will be, "was there time for the blood to cool and for reason to resume its seat," *Ratanlal* 122. Killing a man who is found in the act of adultery by the husband is culpable homicide not amounting to murder;

"but had he killed the paramour deliberately and upon revenge after the fact, and sufficient cooling time, it had been undoubtedly murder." *Foster, Cr. L. 296*; 4 B. L. R. (A. Cr.) 6=12 W. R. (Cr.) 68; 20 B. 215; 28 C. 613 at 620; 8 A. 635. *Thomas, 7 C. & P. 817*. It is not a necessary consequence of anger, jealousy or other emotion that the power of self-control should be lost, 14 B. 564; 1878 P. R. No. 10. In 8 A. 622 already stated, the plea of provocation would have failed on this ground, even if the provocation had been adequate. Following the woman in cold blood with an axe showed a deliberate determination to kill her by way of revenge for any infidelity which she might be about to commit. Even if she had been found in the act, and then killed, it would have been impossible to ascribe the act to anything but a settled plan of vengeance, carried out as soon as the expected provocation furnished an occasion for it. So it will be where sufficient time has elapsed to allow the blood to cool, and where the killing arises from the hostile spirit aroused by the provocation, and not from any want of self-control to restrain it. 1890 P. R. No. 7. Two gentlemen had a quarrel at a tavern, and threw bottles at each other's heads. They drew their swords, and if one had then killed the other it would have been only manslaughter. The Company interposed. They sat quietly together for about an hour, and when they were about to separate, the deceased offered his hand to the prisoner, who refused it with an oath, and said he would have his blood. When the deceased was going out with the others, the prisoner called him back. They fought in the same room, without witnesses, and the deceased was killed. This was held to be murder. *R v Oneby, 2 Ld. Raym. 1485*; 1 East, P. C. 253, see per Tindal, C.J., *R. v. Hayward, 6 C. & P. 157*; Weir l. 303. Here, by the lapse of time the law presumes the heat of passion to have subsided and provocation changed into resentment which is based upon a desire for revenge and not upon the absence of self-control caused by passion; 12 W. R. (Cr.) 68; 28 C. 613 at 620; 8 C. L. J. 561=9 Cr. L. J. 32. In some cases the provocation may last a considerable time, 28 C. 571 at 574. Proof of motive or previous illwill is

not necessary to sustain a conviction for murder, if the act is done coolly and barbarously. 7 W. R. (Cr) 60. But absence of motive will be a material element in considering whether a case is really covered by the exceptions.

It is true under s. 86, I.P.C., intoxication is no excuse, Weir I. 301; but there is nothing in law to prevent its being taken into account in considering whether a case is covered by an exception. An act which might not seriously provoke a sober man might provoke a drunken man to an extremity of frenzy and his intoxication may therefore be taken into consideration in estimating the probable effect on his mind of the words or acts of others. 1 Cr. L. J. 473; 1866 P. R. (Cr.) 41.

Exception 1 is further subject to three provisos. "*First.* That the provocation is not sought, or voluntarily provoked, by the offender, as an excuse for killing or doing harm to any person." This seems necessarily involved in the language of the exception itself. If a person by word or act provokes another to strike him in order that he may have a colourable pretext for killing him, the subsequent killing must be ascribed to the stage of mind existing before the blow, not to that which followed upon it, *Hale, P. C. 457*; *1 Hawk, P. C. 96*.

In 8 A. 635, the deceased, who was a widow of a cousin, living in the prisoner's house, went out at night to meet her paramour. The prisoner, evidently suspecting her purpose, armed himself with a chopper, and followed her. He found her in the act of connection with her paramour, and killed her with the chopper. He was convicted of culpable homicide not amounting to murder, and this sentence was changed by the High Court on revision to one of murder. Straight, Officiating C.J., considered that, as the prisoner was not the woman's husband, the fact itself constituted no sufficient provocation. But further, "He neither called to her to come back, nor remonstrated with her nor sought to induce her to return, but silently pursued her, and marked her down at the spot where he killed her. In other words, he went deliberately in search of the provocation, which is now sought to be made the mitigation of his offence."

"*Secondly.* That the provocation is not given by anything done in obedience to the law, or by a public

servant in the lawful exercise of the powers of such public servant." It will be observed how different this proviso is from s. 99. In the latter the right of private defence is excluded as against the acts of a public servant, though not strictly justifiable by law. Under the proviso, his acts may furnish provocation unless they are strictly lawful. Accordingly, where a soldier was convicted of murder, for killing a sergeant who had arrested him for some misdemeanour, and no evidence was offered to show that the sergeant had any authority to arrest him, it was held by all the judges that the provocation reduced the offence to manslaughter. *Wither's case, 1 East, P. C. 295.* See this subject discussed, *ante*, Ch. III, § 73, pp. 206-215.

And so the Commissioners say (1st Report, 1845, s. 277, p. 256.) "We apprehend that grave provocation given by anything done under *cover* of obedience to law, or under *cover* of its authority, or by a public servant, or in defence, in *excess* of what is strictly warranted by the law, in point of violence, or as regards the means used, or the manner of using them and the like, would be admissible in extenuation of homicide under this clause. For example, take the case of *Wat Tyler* referred to in the note to this chapter. Here was a public officer, a tax-gatherer, who came 'to exercise his lawful powers' in that capacity, but doing so in a manner unwarranted and highly offensive, Tyler was excited to 'violent passion,' and in his rage killed him on the spot. The Commissioners upon this say, 'so far, indeed, should we be from ranking a man who acted like Tyler with murderers, that we conceive that a judge would exercise a sound discretion in sentencing such a man to the lowest punishment fixed by the law for manslaughter'". Appendix M, p. 141.

"*Thirdly.* That the provocation is not given by anything done in the lawful exercise of the right of private defence." The framers of this proviso seem to have overlooked the fact, that two persons may each be exercising the right of private defence against the other. In the illustration (b) to s. 98, L is lawfully exercising his right of private defence against A, because he takes him for a housebreaker; and A is lawfully exercising the same right against L, because he is attacked when he is not a housebreaker. Practically the oversight is not likely to lead to any confusion.

not necessary to sustain a conviction for murder, if the act is done coolly and barbarously. 7 W. R. (Cr) 60. But absence of motive will be a material element in considering whether a case is really covered by the exceptions.

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It is not clear what is meant by the Explanation at the end of Exception 1, which states that whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. 13 W. R. (Cr.) 33. The law upon the point is laid down in *Foster Cr. L. 255* as follows :

"In every case where the point turneth upon the question, whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating; the matter of fact, *viz.*, whether the facts alleged by way of justification, excuse, or alleviation are true, is the proper and only province of the jury. But whether, upon a supposition of the truth of facts, such homicide be justified, excused, or alleviated must be submitted to the judgment of the Court; for the construction the law putteth upon facts stated and agreed, or found by a jury, is in this as in all other cases undoubtedly the proper province of the Court. In cases of doubt and real difficulty, it is commonly recommended to the jury to state facts and circumstances in a special verdict. But where the law is clear, the jury, under the direction of the Court in point of law, matters of fact being still left to their determination, may, and, if they are well advised, always will find a general verdict, conformably to such direction. *Ad questionem juris non respondeant juratores.*"

It is probable that the Explanation means nothing different from this. There can be no doubt that it is a pure question of law whether, the facts being found, a prisoner is justified or excused under the chapter of General Exceptions, and there seems no reason why the question whether his guilt is alleviated under Exception I should follow a different rule. Possibly it may mean that the question, whether the provocation had deprived him of self-control, was a pure question of fact, which no doubt it is. The importance of a right understanding upon this point will be generally felt where the case comes before the High Court by way of review. In 1 B. L. R. (A. Cr.) 11=10 W. R. (Cr.) 26. Glover, J. while clearly of opinion that no provocation had been made out upon the facts of the case, considered that provocation was a question of fact, and that as the judge and assessors had found on the evidence that the prisoner was not guilty of murder, the High Court could not interfere, no question of law being involved. In an exactly similar case, in 8 A. 635, the High Court

of Allahabad treated the sufficiency of the facts found to constitute grave and sudden provocation as a mere question of law, and altered the conviction to one of murder. But this view is wrong as it ignores, the Explanation appended to the first Exception. A belief in having been the victim of witchcraft during a period extending over three or four months was held in *Weir*, I. 305, not to entitle the accused to the benefit of Exception 1. See also 6 W. R. (Cr.) 82; *Weir* I. 308 & 1 L. B. R. 46, 14 C. P. L. R. 188 & *Ratanlal* 766, as to other instances where the plea of grave and sudden provocation had been negatived. To sustain the plea successfully the provocation must have been both grave and sudden and the killing must have taken place while the absence of self-control resulting therefrom and fairly attributable to it, lasted.

147. Exceeding the limits of Self-defence—Exception 2 reduces below murder all cases in which death has been caused by an excessive use of the right of self-defence, provided the act has been done in good faith, without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. It is not every excess of the right of self-defence that will reduce the crime from being one of murder. The limitations implied in the Exception are serious and in no way enlarge the English law on the subject. Thus shooting a trespasser upon one's farm will undoubtedly be murder. See *Moir's* case, stated in *Price*, 7 C. & P. 178 & 5 W. R. (Cr.) 33.

If the deceased had attempted to pull the nose of the accused or to give him a good boxing on the ear and the accused killed him with a view to escape the boxing, the argument is very often heard on his behalf—that he had a right of body-defence to the extent of inflicting injury short of death or grievous hurt, the killing was therefore an act in excess of this right, the accused was consequently entitled to the benefit of this exception and the act could not therefore amount to murder—The fallacy involved in this mode of reasoning consists in ignoring the words of the exception '*without any intention of doing more harm than is necessary for the purpose of such*

defence. Every act of killing while exercising a right of defence is not covered by this exception and need not necessarily be reduced to a lesser offence than murder. It is not necessary to shoot a man dead if he is stealing a few cocoanuts from your garden especially when the thief is discovered while on the top of the tree, 13. Cr. L. J. 782=17 Ind. Ca. 414. But cases of this description have to be carefully distinguished from cases where a man's liberty is in peril under such circumstances no man can be expected to modulate the strength of his blow. Thus, when the deceased tried to seize the accused knowing he was wanted by the police, and the accused gave two blows with an axe on the head and shoulder of his captor, and killed him, it was rightly held in 12 Cr. L. J. 81=9 Ind. Ca. 452 that the accused was entitled to the benefit of this exception. See 1889 P. R. No. 1. But, where an accused, with a view to detect thieves stealing his toddy mixed up a deadly poison with the toddy in the pots, and had them tied on to the trees, so that anyone surreptitiously climbing to steal the toddy might easily be detected, it was held such act would amount to murder. 1 U. B. R. (1902-1903) P. C. 5; 1 U. B. R. (1897-1901) P. C. 241. Considering the number and difficulty of the questions which arise in regard to the right and the limits of self-defence, this Exception is most important.

No doubt the *onus* is on the accused to set up the plea of self-defence, 8 C. W. N. 714=1 Cr. L. J. 708, but instances are not rare where he had omitted to do so, but the evidence disclosed a scuffle of some kind in which the accused had to contend against several men and the appellate court of its own motion had drawn the inference the accused acted in self-defence. See, e. g., 8 M. L. T. 462=12 Cr. L. J. 18=8 Ind. Ca. 1088; 16 C. L. J. 440=13 Cr. L. J. 905=17 Ind. Ca. 1031. It has to be remembered that the right is one of defence and not of chastisement. Thus pursuing a thief and killing him after the house-trespass had ceased, 10 W. R. (Cr.) 9, or cutting off the head of a burglar who, while detected in the act of entering a house, was making frantic efforts to escape, 5 W.

R. (Cr.) 73=1 Ind. Jur. (N. S.) 253. were held to be nothing short of murder. But if the burglar was still in the act of entering into the house, it would be different, 6 W. R. (Cr.) 50; 1 Cr. L. J. 285. See ss 102 & 105 *supra* and 10 W. R. (Cr.) 9 as to commencement of the night. Where the accused found a feeble old woman stealing his crop and beat her so violently that she died from the effect of the attack, he was adjudged guilty of murder, 5 W. R. (Cr.) 33. It must be remembered the defence must be against an imminent danger to body or property. A mere statement by the deceased that by incantations he had caused the death of four of accused's children and by similar process he would get accused devoured by a tiger was held to give rise to no right of defence, 4 B. L. R., Appx. 101=13 W. R. (Cr.) 55. But where a cry of thief was being unjustly raised against the accused and he turned round and shot dead one of his pursuers, it was adjudged that his offence was only culpable homicide and not murder, as he had a right of body-defence against his pursuers and he could have lawfully inflicted any injury short of death, 1880 P. R. No. 1. In deciding whether the accused exceeded the right of private defence, it must be remembered that a man when attacked by another cannot be expected to judge too nicely or modulate the amount of force that he will use, 13 C. W. N. 1180=10 Cr. L. J. 391=3 Ind. Ca. 867. See § 75 *supra* at p 218. But when a man is attacked by another who is unarmed, he would not be justified in stabbing him through the lungs with a large knife though his offence would be less than murder by reason of this exception, 14 K. L. R. 24=1 Cr. L. J. 491. It would be very difficult to get a court to believe that such a vital injury was necessary especially where the object of the assailant was nothing more than to give a good beating. Again, while he accused was in the act of stabbing a third party, the deceased to prevent his doing so hit him on the head and the accused inflicted a fatal blow on the deceased. It was held, there was no scope for the operation of this exception as the deceased hit the appellant in the exercise of the right of private defence as laid down in s 97, I P. C., 4 Bur. L. T. 221=12 Cr. L. J. 477=12 Ind. Ca. 85.

148. Bona fide Act in excess of the Powers of a Public Servant.—Exception 3 contains a provision for the protection of public servants and those who aid them, when acting for the advancement of public justice, when they exceed the power given them by law, and cause death by doing an act, believed in good faith to be lawful and necessary for the due discharge of their duty as such public servant, and without ill-will towards the person whose death is caused. For instance, a reward had been offered for the capture of an outlawed murderer. Some village servants, who believed that they would be punished if they did not effect his capture, tracked him down, and at once killed him. They made no effort to take him alive, as they apparently could have done. This act was held to come within the Exception, and so to be only culpable homicide not amounting to murder. 5 N.-W. P. H. C. R. 130. On the other hand, the Exception does not apply where a public servant, employed in a public duty, does an act wholly outside such duty, in order to carry out some private purpose of his own.

A head constable engaged in investigating a case of theft proceeded to search the tents of some gypsies. Finding nothing he proceeded to extort money from them, and to effect his object unlawfully ordered some of the gypsies to be bound and carried away. This led to a disturbance and threats of violence by the gypsies, upon which the head-constable fired a gun into the crowd, and killed one of them. It was held that he was guilty of murder. The Court said: "Himself having provoked the action of the gypsies by his illegal and improper procedure, the respondent stands in no better and no worse position than any private person, and is not entitled to the superior protection which is thrown around a public servant lawfully acting in the discharge of his duty. It does not appear to us that any question of self-defence arises, for upon the facts it is clear that any apprehension of death or grievous hurt which the respondent might have had, could have at once been determined by the release of 3 A 253 and the withdrawal an extreme step was necessary for the preservation of public peace, the Madras High Court held in 21 M 249 that this act was not done *in good faith* as that expression is defined in the Penal Code, and the taking of life can only be justified by the necessity for

protecting person or property against forms of violent crime, and they were not entitled to the benefit of this exception. So, where a gaoler wilfully, and against the will of the prisoner confined the latter in a cell where another prisoner infected with small-pox lodged, with the result the healthy prisoner took ill and died, the gaoler was adjudged guilty of murder under English law, *Castell v. Bambridge*, 2 Strange, 854, Foster, 322, and probably the result would be the same under the Penal Code having regard to the limitations involved in the application of this Exception.

149. Sudden Fight.—The fourth exception seems ex-

1 W. R. (Cr.) 33; 1866 P. R. No. 12. The quarrel and the fight must be so far continuous, that the latter takes place while the heat of passion engendered by the former still continues, and this may be even although such an interval elapses as is required for obtaining weapons. 1 Hale, P. C. 453, 1 Hawk, P. C. 97, 5 C. 31. Such a case, however, could hardly happen except where the persons concerned had weapons at hand, as everyone had until comparatively recent times. Nor is a quarrel sufficient, where it appears from the whole circumstances of the case, that he who kills the other was master of his temper at the time, and still less where the quarrel was voluntarily brought about by the one who takes advantage of it to kill his opponent 1 Hawk P. C. 96, 97. The last clause of the Exception, as to taking undue advantage, and acting in a cruel and unusual manner, seems, according to the English decisions, rather to apply to the beginning than to the end of the proceeding, and to be taken as furnishing evidence that the injury was inflicted deliberately, and not under the influence of passion. *Mawgridge's case*, Kelyng 49, is stated as follows, in *Foster's C. Law*, 295, in reference to this question. "Mawgridge, upon words of anger, threw a bottle with great force at Mr Cope, and immediately drew his sword. Mr. Cope returned a bottle at the head of Mawgridge and wounded him, whereupon Mawgridge stabbed Cope. This was ruled to be murder; for Mawgridge, in throwing the bottle, showed an intent to do some great mischief; and his drawing immediately showed that he intended to

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held entitled to the benefit of this Exception, 24 W. R. (Cr.) 48. See also 1864, W. R. (Cr.) 36; 7 W. R. (Cr.) 70 [106]; 1885 S. J. L. B. 371; 1881 A. N. W. 156. But such benefit may be lost if undue advantage is taken, 9 Bur. L. R. 45; 1884 S. J. L. B. 271, as fighting under an advantage is always murder. Thus where the fight is not sudden but pre-arranged it would certainly be murder. *R. v. Cuddy*, 1 C. & K. 210; 5 C. 31; 1 W. R. (Cr.) 33.

Even in days when duelling was a matter of daily occurrence, and when deaths resulting from it passed without notice, the English law was inflexible in holding that killing in a duel was murder, both in the principal and his second. *1 Hale, P. C. 443; 1 Hawk, P. C. 97*. Duelling, of course, does not come within Exception 4, and is not protected at all, unless it comes within the next Exception.

150. Homicide by Consent. Exception 5.—This exception introduces into the Code a departure from the English Law.—But it is essential, to get the benefit of this Exception, to prove something more than that the deceased voluntarily took the risk of death. Thus, where the accused had told the deceased that he would stab him if he came into his house, and yet the deceased voluntarily entered the compound of the accused's house, and rushed at the accused, knowing that he was armed with a knife, and in the course of the struggle the accused fatally stabbed the deceased, the act was held not covered by this Exception, 5 L. B. R. 160=11 Cr. L. J. 345=5 Ind. Ca. 988. To get the benefit of this Exception it is not sufficient merely to show that the person whose death was caused voluntarily took the risk of death.

The original Commissioners, writing in 1837 of a similar provision s 298, in their Code, say: (Appendix, Note M, p. 145). "Our reasons for not punishing it so severely as murder are these:—In the first place the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who at the entreaty of a wounded comrade puts that comrade out of pain; the friend who supplies laudanum to a person suffering the torment of a lingering disease;

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the blow was struck before he had time to cool down, 1 *Cr. L. J. 888*. But if two men fight and one uses a deadly weapon, the other being unarmed, the former will be considered to have taken undue advantage so as to be disentitled to the benefit of this Exception. 1 *Cr. L. J. 1128=2 L. B. R. 320*. But where the accused while smarting under a blow from a stick and possibly apprehensive of further violence, finding a knife at hand, took it up, and in the *melee* inflicted the fatal wound he was

held entitled to the benefit of this Exception, 24 W. R. (Cr.) 48. See also 1864, W. R. (Cr.) 36; 7 W. R. (Cr.) 70 [106]; 1885 S. J. L. B. 371; 1881 A. N. W. 156. But such benefit may be lost if undue advantage is taken, 9 Bar. L. R. 45; 1884 S. J. L. B. 271, as fighting under an advantage is always murder. Thus where the fight is not sudden but pre-arranged it would certainly be murder. *R. v. Cuddy*, 1 C. & K. 210; 5 C. 31; 1 W. R. (Cr.) 33.

Even in days when duelling was a matter of daily occurrence, and when deaths resulting from it passed without notice, the English law was inflexible in holding that killing in a duel was murder, both in the principal and his second. *1 Hale, P. C. 443*, *1 Hawk, P. C. 97*. Duelling, of course, does not come within Exception 4, and is not protected at all, unless it comes within the next Exception.

150. Homicide by Consent. Exception 5.—This exception introduces into the Code a departure from the English Law.—But it is essential, to get the benefit of this Exception, to prove something more than that the deceased voluntarily took the risk of death. Thus, where the accused had told the deceased that he would stab him if he came into his house, and yet the deceased voluntarily entered the compound of the accused's house, and rushed at the accused, knowing that he was armed with a knife, and in the course of the struggle the accused fatally stabbed the deceased, the act was held not covered by this Exception, 5 L. B. R. 160=11 Cr. L. J. 345=5 Ind. Ca. 988. To get the benefit of this Exception it is not sufficient merely to show that the person whose death was caused voluntarily took the risk of death.

The original Commissioners, writing in 1837 of a similar provision s 298, in their Code, say (Appendix, Note M., p. 145). "Our reasons for not punishing it so severely as murder are these:—In the first place the motives which prompt men to the commission of this offence are generally far more respectable than those which prompt men to the commission of murder. Sometimes it is the effect of a strong sense of religious duty sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who at the entreaty of a wounded comrade puts that comrade out of pain; the friend who supplies laudanum to a person suffering the torment of a lingering disease;

the freedman who in ancient times held out the sword that his master might fall on it; the high-born native of India who stabs the females of his family at their own entreaty, in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law, as assassins. Again, this crime is by no means productive of so much evil to the community, as one evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society, etc."

See a very curious case of the murder of a wife at her own request by her husband, in 6 W. R. (Cr.) 57.

It is singular that Macaulay, who wrote this passage, legislating for a country where Warren Hastings had shot a Member of his own Council in a duel, living in an age when men like Canning, Castlereagh, and Wellington fought duels, and being perfectly familiar with the English Law, should not have thought of noticing the effect of this clause on the penalties of duelling, either by admitting that it did, or by explaining why it did not, reduce the killing of a man in a duel from murder to something less. The words of the clause undoubtedly include the case. A man who voluntarily stands up to be shot at twelve paces, consents to take the risk of death, a risk which no act of his can lessen or avert.

The restrictions appended to the clause in the draft of 1837, and the reasons above cited, are just as applicable to duelling as to any of the other cases suggested. When, however, the Code was about to assume its present form, several of the officials to whom it was submitted referred to cl. 298 as applying to a fatal duel, and the Commissioners of 1846 in their first Report (ss. 287—290) accept and approve of this view, and of the policy of so changing the law. They also point out "that in the draft of the Code first printed, a duel was given as an illustration of "voluntary culpable homicide by consent". I think, therefore, there can be no doubt that Exception 5, which is merely the original s. 298 without its limitations, does reduce the offence of killing an antagonist in a fair and open duel from murder to culpable homicide not amounting to murder.

An analogous, but by no means identical, question has arisen several times in Bengal, and has given rise to conflicting decisions, viz., whether Exception 5 applies to the case of bands of men-*lathials* who go out with a premeditated determination to meet and fight each other, and armed with more or less deadly weapons. In the first of these cases 5 C 31, a dispute as to a piece of land had arisen between Abdool Lashkar and Abdool Khoondkar. Lashkar came with a party of fifty or sixty men armed with spears and *lathies* to plough the land. They were met by a similar party of Khoondkar's men. A fight took place in the course of which Assuruddin, one of the Khoondkar party, met his death. The sessions judge found that the evidence clearly established that Assuruddin was present at the riot as a professional *lathial* under the leadership of one Naziruddin; and that the deceased, and the men with whom he was siding, being also professional spearmen, brought on the fight intentionally and that they entered into it willingly and with pre-consent, being well aware of the risk they ran by so doing. He therefore found that the case came within Exception 5. On appeal by the prisoners, the findings of the sessions judge were accepted, but the High Court considered that he had been mistaken in his law, and that the case was really one of murder. Ainslie, J., said (p 34). "I cannot concur in the view taken by the judge, that when persons of full age voluntarily engage in a fight with deadly weapons, they take the risk of death with their own consent, and that, as a consequence, culpable homicide occurring in such a fight is not murder. If this view be correct, the fourth exception would be superfluous. If culpable homicide in a premeditated fight with deadly weapons is not murder, *a fortiori* unpremeditated culpable homicide in a sudden fight in the heat of passion upon a sudden quarrel is not murder. It seems to me that the fourth exception clearly indicates that culpable homicide in a fight is murder, unless the fight is unpremeditated, and is such as is therein described, sudden, in the heat of passion, and upon a sudden quarrel. A fight is not *per se* a palliating circumstance; only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent. I do not think the fifth exception has any application to such a case. I understand that Exception to apply to cases when a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result; but it does not refer to the running of a risk of death from something which a man intends to avert, if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated." Broughton, J., was of the same opinion, and instanced a *suffee* as a case coming within the fifth exception.

As regards the difficulty founded on the fourth exception, it will be observed that it and the fifth relate to

the freedman who in ancient times held out the sword that his master might fall on it; the high-born native of India who stabs the females of his family at their own entreaty, in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable, and even in Christian societies would not be regarded by the public, and ought not to be treated by the law, as assassins. Again, this crime is by no means productive of so much evil to the community, as one evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide by consent. It does not produce general insecurity. It does not spread terror through society, etc."

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homicide in a sudden fight in the heat of passion upon a sudden quarrel is not murder. It seems to me that the fourth exception clearly indicates that culpable homicide in a fight is murder, unless the fight is unpremeditated, and is such as is therein described, sudden, in the heat of passion, and upon a sudden quarrel. A fight is not *per se* a palliating circumstance, only an unpremeditated fight can be such. Where persons engage in a fight under circumstances which warrant the inference that culpable homicide is premeditated, they are responsible for the consequences to their full extent. I do not think the fifth exception has any application to such a case. I understand that Exception to apply to cases when a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be likely to be the result; but it does not refer to the running of a risk of death from something which a man intends to avert, if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated." Broughton, J., was of the same opinion, and instanced a *suttee* as a case coming within the fifth exception.

As regards the difficulty founded on the fourth exception, it will be observed that it and the fifth relate to

completely distinct matters. The fourth exception affirms the law of England as to sudden fights. Exception 5 alters the law of England as to deliberate and premeditated acts causing death. It may be a question what the draftsman meant; but if he did mean what the sessions judge thought he meant, he certainly would have framed distinct clauses to convey his intention.

In the next year an exactly opposite decision was given upon facts of a precisely similar character, in **6 C. 154**. In that case, White, J., referred to a former unreported decision of his own in 1877, in which he said: "A man who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary, who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life; and as he voluntarily puts himself in that position, he must be taken to consent to incur that risk. If this reason is correct as regards a pair of combatants fighting by premeditation, it equally applies to the members of two riotous assemblies, who agree to fight together, and of whom some on each side are, to the knowledge of all the members, armed with deadly weapons." He therefore declined to agree with the previous case, and reversed the conviction for murder.

These decisions were again considered by a Full Bench in **18 C. 484** which also seems to have been precisely similar in its facts to those in **5 C. 31** and **6 C. 154**. The judges agreed in thinking that duelling, or fights of a similar character, between two combatants meeting each other with deadly weapons, came within the Exception. They also agreed that the same rule would apply to larger numbers, if the facts made out "that the deceased did, within the meaning of the Exception, consent to suffer death, or to take the risk of it, at the hands of any person who might be a member of the hostile party." They did not support the construction put upon the section in **5 C. 31**. Nor did they dispute that, upon the facts found by White, J., in the two cases in which he took part, the decisions were correct. What they all laid down was, that the question, whether, in any particular case of conflict between two bodies of armed men, the deceased had consented to take the risk of death, was not a matter of law, to be necessarily inferred from the fact that he formed part of an armed body meeting a similar armed body, but

was a question of fact, depending on the circumstances of his particular case. Pigot, J., whose judgment was adopted by Petheram, C J, and Macpherson, J., said (p. 489)

"I think the Exception should be considered in applying it, first, with reference to the act consented to or authorized; and next, with reference to the person or persons authorized. And I think that, as to each of these, some degree of particularity, at least, should appear upon the facts proved, before the Exception can be said to apply. I cannot read it as referring to anything short of suffering the infliction of death, or running the risk of having death inflicted, under some definite circumstances—not merely of time, but of the mode of inflicting it—specifically consented to, as, for instance, in the case of *suttee*, or of duelling, which were, no doubt, chiefly in the minds of the framers of the Code. Nor can I understand that it contemplates a consent to the acts of persons not known or ascertained at the time of the consent being given. I do not doubt that the consent may be inferred from circumstances, and does not absolutely need to be established by actual proof of their consent."

It seems that there is a little confusion in this judgment, from not distinguishing sufficiently between consenting to death and taking the risk of death. A man consents to death when the infliction of it is a friendly proceeding, which he authorizes. He takes the risk of death when it is a hostile proceeding, which he neither consents to nor authorizes, but which he foresees as the possible termination of a conflict on which he is determined to enter. A person who consents to death, as in the case of *suttee*, or taking poison when attacked by hydrophobia, no doubt consents to it under distinct limitations of time, mode, and agent. The person who inflicts the death is restricted by the terms of the authority. In a formal duel each combatant takes the risk of a contest, strictly limited by rules as to weapons, duration of the combat, etc. But in the case of two bodies of armed men there is no consent to death, and no authority to inflict it. Each takes the chance of whatever may happen. The only question will be—What does he take the chance of? If a party go out with their fists, or with ordinary sticks, they do not expect to take the risk of being attacked with guns or spears. But if a party armed with guns, spears, and *latties* goes out to meet another party similarly armed,

each member of the party takes the risk of the general result of the fight. It is impossible to distinguish between one member and another, and to require proof that a man who was only armed with a *latti* took the risk of being speared or shot. It is necessary to show that the deceased was a member of a party which went out to seek a contest which might end fatally, and expecting to meet a party similarly prepared. It is also necessary to show that he shared in the common purpose of his party. It is difficult to see what further evidence could be given. It could hardly be alleged on behalf of such an individual who met with his death, that he took the risk of killing, but did not take the risk of being killed.

It has been held, that where death supervenes upon emasculation, voluntarily submitted to by an adult, the operator is not guilty of murder, but only of culpable homicide, 5 W. R. (Cr.) 7.

In 3 B. L. R. A. (Cr.) 25=12 W. R. (Cr.) 7, a very curious case, the accused, who professed to be snake-charmers, induced the deceased to suffer themselves to be bitten by a poisonous snake, the fangs of which had been but imperfectly extracted, under the belief that they would be protected from harm. Norman and Jackson, JJ., doubted whether the accused had not committed murder. But, on the supposition that the prisoners believed, though erroneously, that they had the power of restoring to health persons who might be bitten they were held to have acted in the belief that the deceased gave their consent "with a full knowledge of the fact, in the belief of the existence of power which the prisoners asserted and believed themselves to possess," and that their offence fell, therefore, under this Exception. For a similar case, where there was no such express consent, see 5 C. 351.

The consent which is necessary to reduce the offence of culpable homicide under Exception 5 is such as has already been defined by s. 90, as to which see the remarks on that section, *ante*, Ch. III, § 70, pp. 195—197.

151. Classification of the various forms of Culpable Homicide not Murder.— A person who causes death with an intention within cl (b) of s 299 but not within cls (2) or (3) of s. 300 or with a knowledge that can only be brought within the last clause of s. 299, but not within cl (4) of s. 300, or in a manner which falls within any of the four clauses of s. 300, but which also comes within any of the exceptions to that section, is said to commit culpable homicide not amounting to murder. **3 A. 776 at 778; 1891 P. R. No. 9.** In the latter case, *viz.* cases covered by the exceptions, the prosecution must prove facts which bring the accused within the clauses of ss 299 and 300, the accused must prove all facts necessary to bring him within the exceptions. This was always the law in England, *Foster, Cr L 255 & 290* and is expressly laid down by s. 105 of the Evidence Act and by the Cr P C, s 221, *illus (a), (b), 4 C. 124; 4 W. R. (Cr.) 35; 8 C. W. N. 714.* Section 304 divides acts of culpable homicide when not amounting to murder into two groups for purposes of punishment. If the act is only within cl (c) of s. 299, but not within cl (4) of s. 300, or being within cl (4) of s. 300, is also covered by one or other of the five Exceptions to that section, then the offence is treated as less grave than it would be if the act happened to be culpable homicide not amounting to murder by reason of the fact though the act was within cl. (b) of s 299 was found not to fall within cls (2) or (3) of s. 300 or being really within cls. (1) or (2) or (3) of s. 300, the accused is saved from liability to be dealt with under s 302 by reason of the fact he has succeeded in bringing his act within one or other of the five Exceptions mentioned in s. 300; **1887 P. R. No. 32; 1 B. 342; 3 L. B. R. 122=3 Cr. L. J. 355, contra 1911 P. R. (Cr.) 3=1911 P. W. R. (Cr.) 9=1911 P. L. R. 87=12 Cr. L. J. 274=10 Ind. Cas. 852.** Or in other words, where the class of intention specified in s. 299 or s. 300 is negatived, but the law imputes knowledge to the accused the offence is considered less grave (being punishable even with a fine) than if the act had been done with one or other of the various kinds of intention set forth in ss. 299 and 300 where the sentence should include some imprisonment. This distinction

ought to be borne in mind as the law attaches different punishments according as the act falls within the first part or the concluding part of s. 304, Ratanlal 530 & 735; 6 B. L. R. Appx. 86=15 W. R. (Cr.) 17; 6 B. L. R. Appx. 87n=12 W. R. (Cr.) 35; 1887 P. R. No. 32; 1883 P. R. No. 27. It must be remembered that cl. (4) has operation only when cls. (1), (2) and (3) of s. 300 fail to suit the circumstances of any particular case, 1887 P. R. No. 62; 3 L. B. R. 122; 12 Bur. L. R. 171; 13 Bur. L. R. 199. The law has also taken care not to fix any minimum punishment which is left entirely to the discretion of the judge. Thus where a man killed another so that his act was covered by cl. (1) of s. 300, but the accused proved that he discovered the deceased in the act of improper intimacy with his wife and thus established facts necessary to bring his act within Exception (1) to that section, the Bombay High Court thought that a sentence of six months' imprisonment was enough to meet the ends of justice, Ratanlal 932, though the act was really of the graver kind of culpable homicide not amounting to murder. See 1869 P. R. No. 31; 1890 P. R. No. 8; 1904 P. R. No. 4; 1 U. B. R. (1892-1896) 213; 1899 P. R. No. 8; 1900 P. R. No. 27. Where the accused had exceeded his right of defence of property and killed one of the aggressors, the Calcutta High Court thought one year's rigorous imprisonment would be sufficient punishment, 1 W. R. (Cr.) 34; see also 6 W. R. (Cr. 89; 12 W. R. (Cr.) 15; 1868 P. R. No. 13, 1902 P. R. No. 29. Similarly death caused in the heat of passion has been leniently dealt with in 1866 P. R. No. 105; 1893 P. R. No. 5; 1902 P. R. No. 30.

152. Evidence of Death.—As regards the evidence in cases of culpable homicide, the first thing, of course, is to prove the death. Lord Hale says: "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead." 2 Hale P. C. 290. See 7 Bom. L. R. 985=3 Cr. L. J 85. He mentions two cases: one within his own knowledge, where A was missing, and B was supposed to have murdered him and consumed his body in an oven. B was convicted and executed, and a year after

A returned, having been sent off to sea against his will by B. In another case an uncle who had charge of his niece, to whom he was heir at law, was correcting her for some offence, and she was heard to say, "Good uncle do not kill me." The child disappeared, and the uncle being charged with murdering her, produced another child who was proved not to be his niece. The uncle was convicted of murder, and executed; the fact was that the real child, being beaten, had run away, and when it came of age, returned and claimed its land and was proved to be the rightful claimant. And, accordingly, where a woman was indicted for the murder of her bastard child, and it appeared that she had been seen with the child at six p m., and arrived at another place without it about eight p m. and the body of a child was found in the river, near which she must have passed, but it could not be identified as her child, and the evidence was rather the other way, it was held that she was entitled to an acquittal, the evidence rendered it probable that the child found was not hers, and with respect to that which really was her child, the prisoner could not by law be called upon, either to account for it, or to say where it really was, unless there was evidence to show that it was actually dead, *R v Hopkins*, 8 C. & P. 591. Similarly in *Ratanlal* 687, when the prisoner admitted that he had thrown a girl into a canal but her body could not be found, the Bombay High Court thought it safer to alter the conviction to one under s 307. And in *Maud Kersey*, 21 Cox. 690, when the only evidence against the prisoner charged with child-murder was her own confession and the dead body was not forthcoming, the jury acquitted her of murder, but convicted her of concealment of birth. So where a corpse was found, and identified as that of a man who was missing from his village, and evidence was given to show that the prisoners had beaten to death some the sessions missing man was set aside. Assuming that someone had been killed, there was nothing to show that the person killed was the man whose corpse was found 4 W. R. (Cr.) 29.

which the police officer is to proceed on receiving such information. In a remarkable case tried in Scotland in 1893, where the question was whether the deceased had died by the accidental discharge of his own gun, or whether he had been killed by Mr. Monson, the case ultimately resolved itself into a contest between gunsmiths as to the mode in which shot would spread on leaving the gun. Generally the questions which arise are of a medical character. A mass of information upon medical and surgical matters bearing upon homicide will be found in the works on Indian Medical Jurisprudence, by Gribble and Chevers, and in the larger work on the general subject by Taylor. The whole subject of what constitutes knowledge and intention, and the evidence by which it may be established, has also been discussed in Chap. I, §§ 9 and 10.

153. Burthen of Proof.—As remarked by their Lordships of the Privy Council in the course of the argument in the *Pandi murder case*, Courts in India are notoriously lax in distinguishing between evidence and conjecture. The mere fact that a death takes place in a house cannot raise any presumption of guilt against the head of the house. Where the deceased was killed in a house occupied by her father and his mistress, and the judge convicted the father on the ground that it was more probable the father killed the girl rather than the other inmate of the house, the conviction was set aside in *Ratanlal* 686, holding the presumption was unwarranted, the father was under no duty to say it was the mistress who was responsible and no inference could be drawn against him because he does not choose to explain how the death occurred. In the *Camilla shooting case*

11 C. W. N. 1085

however, strongly

sessions judge who had said, "If a gun is fired and a man is killed, and if a certain person is found immediately afterwards on the spot from which the gun was fired with a gun in his hand, the burden of proof that the person was there with a perfectly innocent intention clearly falls on that person. Otherwise the reasonable inference is that he was the person who fired the fatal

shot." This was regarded as an erroneous statement of the law, there being no such burden cast on the accused. The circumstantial evidence loses its weight if there was another person answering the same description. In the absence of proof that the two were acting in concert and that s. 34 would apply, 13 Cr. L. J. 159=13 Ind. Ca. 847; 1912 P. W. R. (Cr.) 32=13 Cr. L. J. 718=16 Ind. Ca. 526; 14 Cr. L. J. 593=21 Ind. Ca. 465; 1 L. B. R. 233; 9 Bom. L. R. 153=5 Cr. L. J. 168 neither would be liable for murder, 36 C. 659=13 C. W. N. 680=10 Cr. L. J. 186=2 Ind. Ca. 841; 5 Sind. L. R. 247=13 Cr. L. J. 538=15 Ind. Ca. 810; 1907 P. L. R. 211=7 Cr. L. J. 321; 1909 P. W. R. (Cr.) 8=10 Cr. L. J. 321=3 Ind. Ca. 622. See, however, 1910 P. W. R. (Cr.) 43=11 Cr. L. J. 717=8 Ind. Ca. 815. Even when several persons are acting so as to come within the purview of s. 34, I. P. C., the dealing of one fatal stroke by one of the assailants would not in itself support the inference that the common intention of all is murder. This would be obvious when there are numerous injuries. But if there was only one fatal blow, it would be equally consistent with the view the common intention of all was only to give a beating. The cases in 23 W. R. (Cr.) 11, 24 W. R. (Cr.) 5, 19 M. 483, 29 A. 282=1907 A. W. N. 51=4 A. L. J. 207=5 Cr. L. J. 130 & 7 Cr. L. J. 205, illustrate three classes of cases of joint assault with fatal results. In the *first* all are liable for murder. In the *second* the man who inflicted the mortal blow is alone liable for murder. And in the *third* none could be held responsible for the fatal blow—per Rafique, A. J. C. in 14 Cr. L. J. 241=19 Ind. Ca. 497=16 O. C. 19. As regards the duty of the prosecution, see the remarks of Wilson, J., in 8 C. 121, at 124-125 and also 14 A. 521, 10 C. 140. In 8 C. W. N. 22=1 Cr. L. J. 10, the accused admitted the deceased boy was at his house, immediately before his death, that he fell from the roof, and his respiration stopped, that he subsequently took the body and threw it into the tank where it was found, it was also proved that the accused produced ornaments worn by the boy at the time he was missed. The sessions judge was of opinion this was enough to make the prisoner liable for murder.

but the High Court had to hold there was no evidence that he caused death, especially as the medical evidence showed that the deceased might have been either intentionally or accidentally strangled. See 13 Cr. L. J. 249=14 Ind. Cas. 601, where 13 M. 426 at 432 is *distinguished*.

But even in the absence of direct evidence a conviction may rest on strong circumstances alone. Thus where the sole inmates of a house were a man and his two wives, and it was found the senior wife was habitually ill-treated by her husband and half-starved, and she was found suffering from an injury on the head from the effects of which she died without making any statements against her husband and the medical evidence showed that the injury might have been caused by a fall from a height of six or seven feet or by striking the head against some hard substance or by a blow with a blunt heavy weapon but not probably by an ordinary fall out of bed on to a hard floor, the court drew the presumption that the injury was caused by the husband with the knowledge required by s. 299, and he was therefore liable under the second part of s. 304; 1913 P. W. R. (Cr.) 3=1913 P. L. R. 150=14 Cr. L. J. 283=19 Ind. Ca. 715.

In England, as soon as the fact of killing was proved against the prisoner, the law assumed such malice as made the killing murder, and it lay upon the defence to prove facts which would extenuate the charge, unless such facts were apparent on the case for the prosecution. 1 Hawk, P. C. 98, Foster, Cr. L. 253, 290. In India, however, killing is often not enough to constitute culpable homicide. The prosecution must make out, either by direct evidence, or by inference from the facts of the case, that the accused had direct knowledge or intention as is required by ss. 299 or 300. These are questions of fact. If such knowledge or intention as makes out an offence within the terms of ss. 299 or 300 is found by the court, or appears upon the face of the evidence, and is not disputed, the inference that the crime so defined has been committed is a matter of law. If the court

upon these facts finds the prisoner guilty of a lesser offence, the sentence may be set aside on revision. But the sentence cannot be so set aside if the necessary ingredients of the offence have been expressly negatived, or if the court, by finding the prisoner guilty of culpable homicide only, has impliedly negatived the special knowledge or intention which would raise the offence to murder, there being no other finding which contradicts this implied negative. 4 W.R. (Cr.) 32 & 35; 5 W.R. (Cr.) 2 & 45, 8 W. R. (Cr.) 47. The mere finding that there was no intention to cause death is not sufficient to reduce a charge below murder, if the facts found bring the case within cls 2, 3 or 4 of s 300, 4 W. R. (Cr.) 33. The absence of premeditation will not however reduce the crime to culpable homicide not amounting to murder, if otherwise it is within s. 300, 3 W. R. (Cr.) 40.

154. That Act was done under orders of a superior is not ordinarily a defence.—The instructions of a superior officer cannot justify an inferior in doing an act, which is so plainly and necessarily dangerous to life as to be upon its face illegal (*ante*, § 38 at p. 99.) But in matters such as the management of trains, where the danger or safety of an act depends on a number of circumstances, many of which must be unknown to the person acting, the fact that he is obeying superior orders is very material as showing that he had no reason to believe that his conduct was dangerous.

In *R. v. Turner* 4 F. & F. 105, the engine driver and fireman of a train were indicted for manslaughter arising out of a collision. According to the general rules a red flag showed that the train must stop instantly. On Ascot race day, when an unusual number of trains

them by five minutes, and had stopped at Egham. The defendants did not know that it would do so, and if it had not stopped there would have been no collision. Willes, J., directed the jury that their duty as well as they in them, and it

tion they could upon them, and acted honestly in the belief that they were carrying them out, they were not criminally responsible for the result. As for the fireman, there was no case at all against him. He was bound by general rules to obey the engine-driver, and had nothing to do with the management of the train.

Where a constable fired at a mob under the orders of his Station-house Officer and killed some persons, and it was found that firing was altogether unnecessary to disperse such an assembly, the command of the Station-house Officer was held not to protect his subordinate, for he and his superior had both the same opportunity of observing what the danger was and judging what action the necessities of the case required, 21 M. 249.

155. That person killed was guilty of contributory negligence is no defence.—Where an action is brought for damages arising from a negligent or wrongful act, it is a sufficient answer that the complainant contributed to the harm by his own negligence, without which he would not have suffered from the wrongful act of the defendant. *Radley v. London & North-Western Ry Co.*, 1 A. C. 754, p. 759. But contributory negligence is no answer to a criminal charge. See \S at p 146 *supra* & 6 A. 248. *Per* Pollock, C B—*R v. Suindall*, 2 C. & K. 230; *per* Rolfe, B—*R v. Longbottom*, 3 Cox, 439 *per* Lush, J., *R v. Jones*, 11 Cox 544; (where he refused to follow a contrary opinion attributed to Willes, J., in *R v. Birchall*, 4 F. & F. 1087;) see *R v. Kew*, 12 Cox, 355; *R v. Dant*, 10 Cox, 102. *R v. Hutchinson*, 9 Cox, 555; *R v. Walker*, 1 C. & P. 320; *R v. Williamson*, 1 Cox 97, 6 M. H. C. R., App. 31 at 33. The reason for the difference is, that in a civil action the claim is for damages arising from the wrongful act of the defendant, to which it is a sufficient answer, subject to certain limitations which need not be discussed here, that the plaintiff had no one to blame but himself. A criminal proceeding is founded on the injury to the public from the culpable negligence of the accused, and this is not lessened, though the punishment may be affected, by the fact that the injured person was also in fault.

Thus where a man consigned fireworks to be carried by railroad declaring them to be iron-locks and a cooly brought about his own death by negligently handling the parcel, the liability of the consignor under s. 304A was held to be in no way affected by the contributory negligence of the deceased, 1905 P. R. No. 22=1905 P. L. R. 112=2 Cr. L. J. 207. But contributory negligence though not *per se* a defence to a charge may still become relevant when the question to be considered would be whether the result was not a too remote consequence of accused's negligence. See the English Cases, *R. v. Elliott*, 16 Cox 710; *R. v. Finney*, 12 Cox 625; *R. v. Ledger*, 2 F. & F. 857.

156. Killing a person other than the one really meant.—S. 301, I.P.C., reproduces what *Hale* calls the doctrine of *transfer of malice*. In *R. v. Latimer*, L. R. 17 Q. B. D. 359, the accused in striking a man struck and wounded a woman beside him. The Court for Crown Cases Reserved held him liable. See 3 C. 623; *R. v. Hunt*, 1 Moo. C. C. 93; *R. v. Pembliton*, L. R. 2 C. C. 118=43 L. J. (M. C.) 91. In *Agnes Gore's Case*, 9 Co. 81=77 Eng. Rep. (K. B.) 853, the prisoner mixed poison to a medicine sent by an apothecary with a view to kill her husband. The husband not liking the taste did not take it, but the apothecary swallowed the contents of the bottle to vindicate his honour and died from the effects of the poison. The prisoner was found guilty of having murdered the apothecary. See *Saunders's case*, 1 Hale P. C. 436 and *R. v. Michael*, 9 C. & P. 356; 8 W. R. (Cr.) 78; 12 W. R. (Cr. L.) 2; *Morley's Dig.* (N. S.) 125. These cases were all elaborately discussed recently by the Madras High Court in 22 M. L. J. 333=1912 M. W. N. 136=11 M. L. T. 127=13 Cr. L. J. 145=13 Ind. Ca. 833, where prisoner gave poisoned *Halwa* to a man to cause his death; he threw it away but somebody else who picked it up and ate was killed. This was held to be murder by Benson and Abdur Rahim, JJ. (*Sundara Iyer, J., dissenting*). In an English case, the prisoner scolded her son and he was impertinent to her. This incensed her and to frighten him, she took up a poker, but as the child ran towards the door she threw it at

him, but it hit a third person just entering the room and killed him. Park, J, told the Jury "No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a blow is aimed at an individual unlawfully,—and this was undoubtedly unlawful, as an improper mode of correction,—and strikes another and kills him, it is manslaughter and there is no doubt if the child at whom the blow was aimed had been struck and died, it would have been manslaughter, and so it is under the present circumstances." *R v Conner*, 7 C. & P. 438. Exception 1 to s 300 contains a similar provision in regard to culpable homicide committed under provocation; if the blow was given under the influence of great provocation, it will not be murder, even though it falls upon a person who had not given the provocation. *Brown's case*, 1 East, P. C 245. And so it would be, if in the course of a sudden fight, a blow which was aimed at one of the combatants fell by mistake upon a third party, who had come up to separate them.

157. Killing by rash and negligent acts.—Rash and negligent acts (*i e*, acts in themselves lawful, but done rashly or negligently) which endanger human life, or the personal safety of others, are punishable under s. 336, even though no harm follows, and are additionally punishable under ss 337 and 338 if they cause hurt or grievous hurt. These sections are confined in their operation to acts done without any criminal intent. Personal injury intentionally caused is neither a rash nor a negligent act. 1904 U. E. R. (P.C.) 6=1 Cr. L. J. 557; 1905 U. B. R. 15=2 Cr. L. J. 475, see 3 L. B. R. 194=4 Cr. L. J. 201, where throwing a bottle into a house either for hurting or for frightening the inmates was held not to be within s. 336 but only under s 351, I. P. C. See also 1902 L. B. R. 259. In order to determine whether an act is done rashly or negligently, no distinction ought to be drawn between the act itself and the instrument with which it is done. Thus drawing a car in a state of disrepair through the streets was held to be covered by s. 336, even though there was nothing objectionable in the manner of drawing, *Weir* 1. 337. In another case on

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the same page, an engine driver taking an engine and letting off steam along a public thoroughfare, was held liable under s. 336, even though he might have believed that no danger would in fact be caused. Intentional throwing stone at a man's house is within this section. 1898 P. J. L. B. 426, though not a mere throwing of stone on the roof of a man's house. 1879 S. J. L. B. 91. When a person allows his cart to proceed unattended along a road and a boy sleeping on the way was run over, he was held liable under s. 337 or 338 and the contributory negligence of the boy is no defence, 1905 P. R. 22=1905 P. L. R. 112=2 Cr. L. J. 207; Ratanlal 198 & 396; but a person who has taken out a licence to conduct hook-swinging during a festival was held not liable under s. 336, though in his absence the coolies he had hired allowed certain devotees to swing by hooks inserted in the flesh, 5 C. W. N. 376. In 28 A. 464=3 A. L. J. 332=1906 A. W. N. 91=3 Cr. L. J. 363, the mere fact that the accused went out shooting at a season when people are likely to be about in the fields and that a single pellet struck a man was held insufficient to support an inference of rashness or negligence. Similarly in 6 M. H. C. R. Appx. 31 the accused was being driven between 7 and 8 P.M. on a dark night at an ordinary pice in the middle of the road and in spite of the shouts of the coachman and syce, a deaf old man was knocked down run over and killed. The conviction was annulled on the ground though there was no light, there was no rashness or negligence on the part of the accused. But in 36 C. 302=13 C. W. N. 362=9 C. L. J. 204=9 Cr. L. J. 393, soldiers practising at target by the side of a public road and firing without the least circumspection with regard to the safety of others were held liable under s. 301A. To the argument that there were two soldiers out at shooting and the missile fired by one only had taken effect and it was doubtful which of the two was the principal offender, their Lordships said both were principals having regard to s. 114, I. P. C. See *R. v. Salmon*, L. R. 6 Q. B. D. 79; *R. v. Swindall*, 2 C. & K. 230. An accused fired a gun in a jungle but in the direction of a footpath and injured the complainant.

The Madras High Court following 7 M. H. C. R. 119 held the act was within s. 338, 13 Cr. L. J. 703=16 Ind. Ca. 511. Again performing an operation for cataract not being an act if done rashly or negligently to endanger human life or the personal safety of others the operator cannot be held liable under s. 338 if the patient lost sight of the eye operated on, 1908 A. W. N. 51=5 A. L. J. 155=7 Cr. L. J. 306. Throwing pieces of brick at the back of a house when the owners were all in the front portion not being an act endangering human life or personal safety of others was held by a Full Bench in 5 L. B. R. 100=10 Cr. L. J. 552=4 Ind. Ca. 293 not to be an offence under s. 336 but only one of ordinary mischief. Until 1870 such acts when resulting in death were not specially punishable if they caused death. The omission was the more important because, under the terms of the Penal Code, they did not constitute the offence of culpable homicide. In England they would be punishable as manslaughter. By Act XXVII of 1870, s. 12, the present section, 304A, was added to the Code, which creates a distinct offence. Many of the cases where railway accidents, resulting in loss of life, occur from neglect of duty or carelessness in drivers, pointsmen, or signalmen, which in England are punishable as manslaughter, would in India be punishable under s. 304 A. A driver who deliberately passed a danger signal would in general have committed culpable homicide if a fatal accident followed. So would a signalman or a pointsman who left his post when a train was likely to pass. But if the driver through carelessness did not see the signal, or if the pointsman or signalman left his post in violation of express general orders, at a time when no train ought to have been on its way, and during his absence a train which no one could have anticipated arrived, it would probably be impossible to establish the knowledge that death was likely to occur, without which there could not be a conviction under cl. 3 of s. 299. The first authoritative exposition of the law under this section, which will also govern the less important sections, 336, 337, and 338, was given by Holloway, J., in 7 M. H. C. R. 119.

"In this case the prisoner killed his own mother by beating and kicking her. The sessions judge finds that the death resulted from a brutal beating and kicking, but he acquits of culpable homicide, because the violence was not such as the prisoner must have known to be likely to cause death. This is, it is manifest, no ground for acquitting of culpable homicide not amounting to murder, with such knowledge the act would be murder under cl 2 of s. 300. The question for the judge was whether the act was done with the knowledge of causing bodily injury which was likely to cause death. The judge finds the brutal beating and kicking and dragging by the hair of the head of an old woman of sixty by a powerful man, who so acted without the smallest provocation. The causal connection between the brutal assault and the death is found to be undoubted, but the sessions judge has convicted the prisoner under the new section of causing death by a rash act. This section is, in our opinion, wholly inapplicable to the facts of this case. Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they may not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. See 1898 A. W. N. 163 in § 145 *supra* 1893 P. J. L. B. 326.]

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which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act, or series of acts, themselves intended, which are the direct producers of death. (13 Cr. L. J. 193 = 14 Ind. Ca. 193) S. 301 A. applies only to acts not criminal in themselves but all the same punishable by reason of the fact death has ensued. (1911 P.W.R. (Cr.) 26 = 12 Cr. L. J. 483 = 12 Ind. Ca. 93; 2 Bom. L. R. 613; 1892 P. R. No. 15; 14 Bom. L. R. 897, 13 Cr. L. J. 793 = 17 Ind. Ca. 532, 13 C. 565 at 569. Similarly s. 301A will not apply where death results not from the rash or negligent mode of doing an innocent act but from some result supervening upon the act which could not have been anticipated 3 Bom. L. R. 393. The rash and negligent act must be *causa causans*. It is not enough it may have been the *causa qua non*, (per Jenkins, C.J., 4 Bom. L. R. 679. See also *Lepper*, 2 F. & F. 857; *R. v. Pocock*, 5 Cox 172 *R. v. Timmins*, 7 C. & P. 499; 32 C. 73 = 8 C. W. N. 645 = 1 Cr. L. J. 634; *R. v. Hutchinson*, 9 Cox 553 *R. v. Waters*, 6 C. & P. 323, *Hilton's case*, 2 Lewin 213.) To say that, because in the opinion of the operator, the sufferer could have borne a little more without death following, the act amounts merely to rashness because he has carried the experiment too far, results from an obvious and dangerous misconception. As this is neither a case of rashness nor of negligence, it becomes unnecessary to consider whether in any case a conviction under

this section can properly follow, where the rashness, or negligence, amounts to culpable homicide. It is clear, however, that if the words '*not amounting to culpable homicide*' are part of the definition, the offence defined by this section consists of the rash or negligent act not falling under s. 299 and fulfilling the positive requirement.

See the remarks of Stephen, J., in *R. v. Finnely*, 12 Cox. 625. *R. v. ...* between negligence which would be basis of an action in Torts and negligence which is made penal is dwelt on in *Noakes*, 4 F. & F. 920.

This decision was cited and followed by the Calcutta High Court, in 4 C. 764, where a child-wife, about eight or nine years old, died instantly from a kick on the back with a bare foot, which ruptured the coat of the stomach. The Court said that s. 304A does not apply to any case in which there has been the voluntary commission of an offence against the person. The conviction was accordingly changed to one of culpable homicide under s. 304. The judgment of Holloway, J., has been approved by the Chief Court of the Punjab, and reproduced in a circular addressed by it to all courts. In 3 A. 776, a man had struck his wife a heavy blow on her side with a stick, and she having a diseased spleen, died instantly. The judge convicted the husband under s. 304A, but the High Court quashed the conviction, and substituted one for grievous hurt under s. 325. Straight, J., answered the doubt suggested by Holloway, J., by saying,

"It is to be observed that s. 304A is directed at offences outside the range of ss. 299 and 300, and obviously contemplates those cases into which neither intention nor knowledge of the kind already mentioned enters. For the rash or negligent act which is declared to be a crime, is one '*not amounting to culpable homicide*,' and it must therefore be taken that intentionally or knowingly inflicted violence, directly and wilfully caused is excluded."

We also defined rash and negligent acts, where a man with a weapon and kills a child sleeping in the room, his act would be covered by cl. (c) of s. 299 and therefore it is

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"If a man, in a fit of passion, strikes a child sleeping in the room, with a weapon and kills a child sleeping in the room, his act would be covered by cl. (c) of s. 299 and therefore it is

neither a rash nor a negligent act within s. 304A, 1911 P. R. Cr. 12=1911 P. W. R. 41=12 Cr. L. J. 591=12 Ind. Ca. 967. Similarly where a man threw a stick at the deceased with such force that it caused a punctured wound on his head which ultimately caused his death, the case would not come under s. 304A as the injury was intentionally caused, **Ratanlal 673**. S. 304A is intended to cover offences which are outside the range of ss. 299 & 300 on the one hand and of the various forms of assault and hurt on the other. It is distinguishable from these offences as neither intention nor knowledge is an element in the crime. Where such intention or knowledge exists in however minor a degree such as for example in assault, the offence is altogether outside the scope of s. 304A: 1913 P. W. R. (Cr.) 7=1913 P. L. R. 259; 14 Bom. L. R. 887=1 Bom. Cr. C. 183; 39 C. 855. Similar decisions were given in other cases, where the acts causing death ranged from a mere assault to culpable homicide not amounting to murder 1 M. 224; 12 M. 56; 5 N.-W. P. H. C. R. 38 & 235; 5 C. 351. **Weir I. 326**; 1881 A. W. N. 103. On the other hand, the section has been held applicable to the negligent management by a railway official of trucks on an incline, by means of which they got out of control, and killed a cooly. 6 A. 248; to an engine-driver who failed to sound his whistle before starting the engine and injured a man who was painting a wagon on the line causing his death, **Ratanlal 721**; to a shikari who seeing something move in a jungle fired and shot his comrade, 1885 S. J. L. B. 308; to a man who struck another carrying a child and the blow fell on the child and killed it, **Ratanlal 398**, 1888 P. R. No. 28; (but in 3 C. 623; such an act was held to be grievous hurt); to a cart-driver who was witnessing some *tamasha* on one side of the road unmindful of the crowd on the other side and drove over a child and killed it, **Weir I. 327**; to the act of an accused who quarrelled with a man standing at the brink of a well with the result the deceased lost his balance and fell into the well and was drowned, 1899 P. R. No. 33. to the act of an accused who sent fire-works to be carried by a Ry Company declaring them to be iron-locks with the result a cooly was killed by explosion

1905 P. R. No. 22=1905 P. L. R. 112=2 Cr. L. J. 207; to the act of a Police man who went out to patrol hearing that certain thieves were prowling about, fired at a man crouching under a tree and killed him and the man injured proved to be a *Halkara*, 1881 A. W. N. 156; Ratanlal 699; 1 Cr. L. J. 901 *Knight's case*, 1 Lew. 168; to the conduct of a lessee of a ferry in using an unsafe boat, which sank without meeting with an accident, and so caused the death of a number of passengers; 16 A. 472; to a death caused by a native physician in executing a dangerous operation without any knowledge of the consequences which would follow, 14 C. 566. (But see 5 W.R. (Cr.) 7 & 5 C. 351); to the conduct of a woman who killed her husband and her mother-in-law by mixing some powder the character of which she was ignorant of but which turned out to be aconite supplied to her by her paramour as a love-potion which would have the effect of producing kind treatment of her by her relations, 39 C. 855=16 C. W. N. 1055=15 C. L. J. 512= 13 Cr. L. J. 195=14 Ind. Ca. 195, 1887 P.R. No. 60, 1869 P. R. No. 8, 1884 P. R. No. 35; 4 Bom. L. R. 425; 31 A. 290=6 A. L. J. 203=9 Cr. L. J. 522=2 Ind. Ca. 214; to the act of a husband, who, by having connection with his wife, a completely immature child of eleven years and three months, ruptured the vagina and caused her death 18 C. 49. In this case there were counts under s. 304A and s. 338, upon either of which, under the directions of Wilson, J., the jury might have convicted. They found a verdict under s. 338. In a similar case in 12 C. P. L. R. 11 the accused was convicted under s. 325. In consequence of this and similar cases, the age of consent by a girl to sexual intercourse was raised from ten to twelve by Act X of 1891. See § 171 *infra*.

The cases specially referred to above would clearly indicate the scope of s. 304A. It is not all rash or negligent acts that are covered by the provisions of the Penal Law. Nor can an intentional act amounting to wrong doing be ever brought under s. 304A as rash or negligent act, 14 C. P. L. R. (Cr.) 126; U.B. R. (1897—1901) 1. 314. Where a rash or negligent act is made penal, it is punishable by reason of the fact certain harmful

results have ensured and these results are not such as could not have been foreseen and if foreseen prevented. This rule would also exclude fortuitous consequences which can only be said to be a remote result of the act. *Burton's case* in 1 Str. 481 well illustrates the above principles. A person came to town in a chaise and before he got out wantonly fired his pistol in the streets and accidentally hit a woman who was killed thereby. If the woman had not been hit the accused would not be liable merely because he fired in the street and being in a crowded place like London, he ought to have foreseen that somebody might be hit by such wanton firing and the consequence could not be said to be too remote. See *Hull's case*, Kel, 540; *R. v. Dalloway*, 2 Cox 273. The case in [1911] M. W. N. 170=12 Cr. L. J. 495=12 Ind. Ca. 215 would illustrate on the other hand the distinction between harm resulting from a rash or negligent act and an accident. There the second accused, a servant of the ferry-contractor, was told to row across a stream a boat overladen at the directions of his employer. Midway the stream the accused lost his pole but there was nothing to indicate any negligence on his part. He however did his best, but in spite of his endeavours several passengers were drowned. It was held by Abdur Rahim and Sundara Iyer, JJ., that he was not liable under s. 304A as there was no rash or negligent act on his part though *prima facie* his employer may be liable for having asked him to row an overladen boat across a strong current. See also 11 W. R. (Cr.) 3. If the scope of s. 304A is properly understood, it would be clear that the section is intended to meet only cases where death ensues from rashness or negligence in the doing of an act, the culpability in doing which arises solely from the unforeseen consequence that has resulted therefrom, L. B. R. (1872-1892) 89. Thus causing death by intentional throwing of stone cannot be dealt with under s. 304A.

As to details, or other injurious consequences, following upon mistaken medical practices Lord Hale says:
 "If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent disease, and, contrary to the expectation of the physician, it

kills him, this is no homicide, and the like of a chirurgeon. And I hold their opinion to be erroneous that think, if he be no licensed chirurgeon or physician that occasioneth this mischance, that then it is felony, for physicks and salves were before licensed physicians and chirurgeons. *1 Hale P. C. 429.*

This opinion of Lord Hale's was followed by Blackstone, and is the basis of the English law on the subject. *Per Hullock, B. R v Van Butchell, 3 C. & P. 629.* In a case against *St John Long*, an unlicensed practitioner, who professed to perform cures by rubbing in a very irritating liquid, which caused a patient's death, Bayley, B., said

"To my mind it matters not whether a man has received a medical education or not; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be guilty of manslaughter." *R v. St. John Long, 4 C. & P. 423, at p. 440.* For other cases see Roscoe, Cr. Ev., pp. 628 to 631.

And so in a case where a woman was supposed to have died from an excessive dose of a medicine containing prussic acid, Cockburn, C.J., said: "If a man takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care, and if he does it with negligence, he is guilty of manslaughter." *R. v Bull, 2 F. & F. 201.* These rulings seem exactly adapted to the conduct contemplated by ss. 304A, 336, 337, and 338, and not to exact a standard of excellence above what may be required from the ordinary native doctor. In *14 C. 566*, above referred to, the prisoner was a *Kobiraj*, and he operated upon the deceased, an old and feeble man, for internal piles, by cutting them out with a common clasp knife, after pulling them down with a hook. The man bled to death. It was proved that the operation which he performed was so imminently dangerous that educated surgeons scarcely ever attempt it. It appeared that he had twice before performed similar operations with success, and he seems to have performed this one with

results have ensued and these results are not such as could not have been foreseen and if foreseen prevented. This rule would also exclude fortuitous consequences which can only be said to be a remote result of the act. *Burton's case* in 1 Str. 481 well illustrates the above principles. A person came to town in a chaise and before he got out wantonly fired his pistol in the streets and accidentally hit a woman who was killed thereby. If the woman had not been hit the accused would not be liable merely because he fired in the street and being in a crowded place like London, he ought to have foreseen that somebody might be hit by such wanton firing and the consequence could not be said to be too remote. See *Hull's case*, Kel, 540; *R. v. Dalloway*, 2 Cox 273. The case in [1911] M. W. N. 170=12 Cr. L. J. 495=12 Ind. Ca. 215 would illustrate on the other hand the distinction between harm resulting from a rash or negligent act and an accident. There the second accused, a servant of the ferry-contractor, was told to row across a stream a boat overladen at the directions of his employer. Midway the stream the accused lost his pole but there was nothing to indicate any negligence on his part. He however did his best, but in spite of his endeavours several passengers were drowned. It was held by Abdur Rahim and Sundara Iyer, JJ., that he was not liable under s. 304A as there was no rash or negligent act on his part though *prima facie* his employer may be liable for having asked him to row an overladen boat across a strong current. See also 11 W. R. (Cr.) 3. If the scope of s. 304A is properly understood, it would be clear that the section is intended to meet only cases where death ensues from rashness or negligence in the doing of an act, the culpability in doing which arises solely from the unforeseen consequence that has resulted therefrom, L. B. R. (1872-1892) 89. Thus causing death by intentional throwing of stone cannot be dealt with under s. 304A.

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158. Suicide.—Suicide is the only offence for which it is impossible to punish the principal offender. He is already beyond the reach of human law, those who instigate him, or help him in the act, remain. According to English law they would be either principals or accessories before the fact to murder. Even where two persons agreed to commit suicide together, if the means employed only took effect upon one, the survivor was held guilty of murder, under English Law. *R. v. Alison*, 8 C. & P., 418. Under the Code he would be liable under ss. 306 & 309, I P. C., *R. v. Stormonth*, 61 J. P. 729; *R. v. Abbott*, 67 J. P. 151, *Jessop*, 16 Cox. 204; *Dyson, R. & R.* 523. Suicide is doing of a voluntary act or omission such as a hunger-strike, for the purpose of destroying one's life, being conscious of that probable consequence and having at the time sufficient mind to will the destruction of life, *Clift v. Schwabe*, L. T. 342=3 C. B. 437. Under the Penal Code, a person who takes an active part in the suicide of another, as by actually shooting him, or administering poison to him, would commit culpable homicide not amounting to murder under Exception 5, if the person, being over eighteen years of age, gave such a consent as is defined by s 90. If he was younger than eighteen, or if his consent did not come within s. 90, he would be guilty of murder. If, however, he did not actually cause the death, but abetted it within the meaning of s 107, he would be punishable under ss 305 or 306, according as the person actually committing suicide was or was not capable of consent. In a case of *suttee*, some of the prisoners actually set fire to the pile, while one did not co-operate in causing the death of the widow, but took an active part in causing her to return to the pile, when she had left it, after being partially burnt. The Bengal High Court held that the former prisoners were guilty of culpable homicide, but the latter only of abetment of suicide.

They said: "Abetment of suicide is confined to the case of persons, who aid and abet the commission of suicide by the hand of the person himself who commits the suicide. When another person, at the request of or with the consent of the suicide has killed that person, he is guilty of homicide by consent, which is

one of the forms of culpable homicide." [27 Nov., 1863]; 1 R. J. & P. 174. See 3 N.-W. P. H. C. R. 316.

159. Attempts to commit murder, culpable homicide not murder and suicide.—Attempts to commit culpable homicide and suicide are punishable under ss. 307, 308, and 309. The last requires very few words. It will be observed that its language exactly follows that of s. 511; the offence created by it could not be punished under s. 511, because, from the nature of things, a completed suicide cannot be dealt with as an offence. Whatever will constitute an attempt to commit an offence under s. 511 will come within s. 309, if the object of the attempt is suicide. [See *post*, Chap. XIV.] Thus a person who emasculated himself, 1878 P. R. No. 22; a woman who ran to fall into a well but was prevented by somebody catching hold of her, 8 M. 5; and a woman who pounded herself with the same, R. J. & P. 174.

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result in death, and in the other two the act of the accused had not progressed beyond the stage of preparation. Again the intention must be clear. When a man jumped into a well to avoid and escape from the police, and when rescued came out of the well of his own accord, an intention to commit suicide cannot be inferred, 14 Bom. L. R. 146=1 Bom. Cr. C. 87=13 Cr. L. J. 246=14 Ind. Ca. 598. The wording of ss. 307 and 308 is completely different; the marginal note which is not part of the Code, speaks of '*attempt to murder*' and '*attempt to commit culpable homicide*,' but no such words are found in the text. What is made punishable by the sections is where a person does any act with such intention, or knowledge, and under such circumstances, that if he by that act caused death, he would be guilty either of murder or of culpable homicide not amounting to murder. This seems exactly equivalent to saying that a man is punishable who does an act capable of causing death, with such intention or knowledge that the death, if caused, would be culpable homicide, of the higher or less degree. See Ratanlal 964. It is not sufficient, as in s. 511, to do an act towards the commission of the offence.

There are several cases upon the construction of s. 307 In the Leading case, in 4 B. H. C. R. (Cr. Ca.) 17, the prisoner presented a rifle at his officer, but it was struck up before he had drawn the trigger, and the rifle was found to be loaded but not capped. It was held that he could not be convicted under s. 307, although when the act was done the prisoner believed the gun was capped.

Couch, C J , said " It appears to me, looking at the terms of this section, as well as at the illustrations to it, that it is necessary, in order to constitute an offence under it, that there must be an act done under
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"The illustrations given bear out this view. One is that of a man firing a loaded gun; and another is that of a man placing food mixed with poison on another's table. Both these acts are capable of causing death; but in the present case, although the act was done with the intention of causing death, and was likely in the belief of the prisoner to cause death, yet in point of fact it could not have caused death, and it, therefore, does not come within that section." 4 B. H. C. R. (Cr. Ca.) 17.

On the other hand, in this very same case it was held that the prisoner was properly convicted of an attempt to commit murder under s. 511, since "the presenting of the gun, under the circumstances, was an act of such an approximate nature as to bring the prisoner within the words of s. 511." *Ibid*, p. 23. In 14 A. 38 a man tried to discharge a blunderbuss at another. He pulled the trigger and the cap exploded, but the piece missed fire. It was found loaded after he was seized. Upon these facts, and in accordance, as he supposed, with the Bombay case, the judge found the prisoner not guilty under s. 307; and convicted him under s. 511. The Allahabad High Court held that the conviction under s. 511 was wrong, and directed a conviction to be recorded under s. 307. The decision is, of course, quite in accordance with that in Bombay. It is quite certain that upon the same facts the Bombay High Court would have found, that snapping a blunderbuss fully loaded and capped was an act capable of causing death to a man at whom it was

one of the forms of culpable homicide." [27 Nov., 1863]; 1 R. J. & P. 174. See 3 N.-W. P. H. C. R. 316.

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aimed, and that this capacity was not affected by the circumstance that it missed fire; the case would therefore come within s. 307, and a conviction under s. 511 would be bad. The judgment, however, is of importance, because in it Straight, J., completely differed from the Bombay High Court on one point, and seems to have differed from it on another point. First, he thought it necessary to decide, and he did decide, that under no circumstances could an attempt to commit murder come under s. 511. This conclusion he arrived at from the words of s. 511.

He said: "Now it appears to me that the attempts which are limited by s. 511 are attempts to commit offences which by the Code itself are punishable either with 'transportation or imprisonment.' It cannot properly be said that the offence of murder is punishable with either of those things. In my opinion, if murder, as mentioned in ss. 299 and 300, was intended to be included, the Legislature would before the word 'transportation' have inserted the word 'death.' But again, the section goes on and says that, certain things being done, the person who does these acts shall, 'where no provision is made for the punishment of such attempt,' be punished in a particular way. It seems, therefore, to me, that when the framers of s. 511 drew it up in the terms that they have drawn it up, they specially meant to exclude those attempts to commit offences which, in the various preceding sections of the Code, were specifically and deliberately provided for with punishments enacted in the sections themselves. I have therefore for these reasons come to the conclusion that s. 307 is exhaustive, and that no court has any right to resort to the provisions of ss. 299 and 300, read with s. 511, for the purpose of convicting a person of the offence of attempted murder, which, according to the view of the Court, does not come within the provision of s. 307 of the Indian Penal Code."

Upon this part of the judgment it may be remarked, as to the first reason, that murder is punishable with transportation as well as death. This is the case as regards every offence punishable with death, except in the single instance of murder by a person under transportation for life, which under s. 303 is only punishable, and in fact can only be punished, with death. Cases of murder therefore do come within the letter of s. 511. It seems obvious too that those words in s. 511 are not intended to exclude the very few cases where the penalty of death is added to that of transportation, but

to exclude the numerous cases which are only punishable with fine. Further, that part of the learned judge's reasoning would not apply to s. 308, which is in *pari materia* with s. 307, and worded in the same way, and can hardly admit of different treatment. As to the second reason, it is of course clear that any attempt, coming under s. 511, which is specifically provided for elsewhere, must be dealt with under the express provision. For instance, an attempt to wage war against the King must be dealt with under s. 121. It is also quite clear that any attempt to commit culpable homicide which falls under ss. 307 or 308, must be dealt with under them and not under s. 511. What the Bombay case decided was, that an act done towards the commission of an attempt to murder, which was not an act by which murder could be effected, came under s. 511 because it did not come within s. 307. That being so, it fell within the wording of s. 511, as being a case "where no express provision is made by this Code for the punishment of *such* attempt." According to Mr Justice Straight, such a case would go wholly unpunished.

The same judgment appears to express doubt as to the propriety of the Bombay ruling that the act done in that case, *viz.*, trying to discharge an uncapped rifle, supposed to be capped, did not come within s. 307. "If he did all that he could do, and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because his own act, volition, and purpose having been given effect to in their full effect, a fact unknown to him and at variance with his own belief, intervened to prevent the consequences of that act, which he expected to ensue, ensuing." This is well illustrated in **7 Bom. L.R. 985 = 3 Cr. L. J. 85**. There the accused intending to kill his victim gave large doses of opium in milk but unknown to him, the intended victim was a confirmed opium-eater and thus he escaped serious harm. But it may be submitted that the question is, not whether the accused would escape criminal responsibility—it was decided that he was liable under s. 511,—but whether he would be criminally

responsible under the very special words of s. 307. If that section only applies where the prisoner has done an act, which, if carried to its utmost possible limits, without any interference from without, could cause death, and if his act could not have caused death, then his belief that it could have caused death is outside the question. Suppose, for instance, that *Cassidy* had put his rifle all ready loaded and capped for the purpose of committing the murder, and that in the excitement of the moment he had snatched up a comrade's rifle, which was unloaded, and the lock of which had been taken to pieces for repairs, that he had levelled it at his officer and pulled the trigger; it is plain that he had intended to do an act with such an intention that if by that act he had caused death he would have been guilty of murder; but that is not enough. The section requires that he should have done the act. He intended to discharge his own loaded rifle. He presented and tried to discharge a weapon which was as harmless as a broomstick. A similar point arose in 1904 P.R. (Cr.) 30=1 Cr. L. J. 1078. The accused pursued the complainant with an axe on his shoulders and on approaching the complainant, actually raised the axe when he was disarmed by some others but mere running after the complainant with an axe and raising the axe could not possibly cause death. The conviction under s. 307 was therefore set aside, the question whether it could be altered to one under s. 302 with s. 511 being left open. The only act which can fall within the purview of s. 307 is an act which by itself must ordinarily be capable of causing death in the natural and ordinary course of events. Striking a wife on her neck with an axe and causing an incised wound not being such an act, the conviction was altered to one under s. 324, in 15 Bom. L. R. 991=2 Bom. Cr. Ca. 159. See also 1903 A. W. N. 43, 1881 A. W. N. 172.

In 20 A. 143, a Hindu widow, who wished to live with her lover, against the wishes of her family, prepared the family meal of which her father, mother, and brother partook. They at once exhibited all the symptoms of poisoning by *datura*, which she confessed she had mixed in their food. It was probable her object was not to kill

them, but to escape with her lover. The Court held that it must be assumed that she knew that *datura* was capable of causing death, and that she was properly convicted under s. 307. Cf. 1882 P. R. No. 24 where the accused asked a doctor to supply her with medicine for poisoning her son-in-law. This was held not sufficient to sustain a conviction under s. 307; so where a man merely brought a sword, 1882 P. R. (Cr.) 45. In this last case the prisoner's act was held to amount to an assault as the bringing might cause the complainant to apprehend that the accused was about to use criminal force to him. Again where *datura* was administered to facilitate robbery with the result one of the persons died and another became seriously ill, the accused was convicted as regards the former of grievous hurt and in respect of the latter under s. 328, 1908 A. W. N. 243. In 5 L. B. R. 79=10 Cr. L. J. 363=3 Ind. Ca. 721. the accused was proved to have put into food some powder which gave the physiological reaction of *atropine*. There was no evidence, however, as to the quantity of poison found or its probable effects on any one who might have eaten it. Without such evidence it was found impossible to hold the accused intended to cause more than hurt. The conviction was therefore altered to one under ss. 328 & 511.

In Weir I. 328, the accused enticed into her house a boy, aged nine years, used violence to him, and removed several jewels from his person, and being unable to remove his anklets and ear-rings, tied his wrists and neck with a rope, put a cloth into his mouth, took him into a room and placed him sitting in a jar which was only twenty-two inches deep all night and put a mill-stone on the mouth of it; through three holes in the mill-stone there was a stinted supply of air. She did not give him any food at night and before dawn lifted the mill-stone once and looked at the boy but replaced the mill-stone. The boy untied the rope and owing to the omission of the accused to watch the jar and the room, got out in the morning and ran home. The conviction under s. 307 was affirmed by Muthuswamy Iyer and Shepherd, JJ., who held that where an act done with the intention of causing death is physically capable of causing death but

responsible under the very special words of s. 307. If that section only applies where the prisoner has done an act, which, if carried to its utmost possible limits, without any interference from without, could cause death, and if his act could not have caused death, then his belief that it could have caused death is outside the question. Suppose, for instance, that *Cassidy* had put his rifle all ready loaded and capped for the purpose of committing the murder, and that in the excitement of the moment he had snatched up a comrade's rifle, which was unloaded, and the lock of which had been taken to pieces for repairs; that he had levelled it at his officer and pulled the trigger; it is plain that he had intended to do an act with such an intention that if by that act he had caused death he would have been guilty of murder; but that is not enough. The section requires that he should have done the act. He intended to discharge his own loaded rifle. He presented and tried to discharge a weapon which was as harmless as a broomstick. A similar point arose in 1904 P.R. (Cr.) 30=1 Cr. L. J. 1078. The accused pursued the complainant with an axe on his shoulders and on approaching the complainant, actually raised the axe when he was disarmed by some others but mere running after the complainant with an axe and raising the axe could not possibly cause death. The conviction under s. 307 was therefore set aside, the question whether it could be altered to one under s. 302 with s. 511 being left open. The only act which can fall within the purview of s. 307 is an act which by itself must ordinarily be capable of causing death in the natural and ordinary course of events. Striking a wife on her neck with an axe and causing an incised wound not being such an act, the conviction was altered to one under s. 324, in 15 Bom. L. R. 991=2 Bom. Cr. Ca. 159. See also 1903 A. W. N. 43, 1881 A. W. N. 172.

In 20 A. 143, a Hindu widow, who wished to live with her lover, against the wishes of her family, prepared the family meal of which her father, mother, and brother partook. They at once exhibited all the symptoms of poisoning by *datura*, which she confessed she had mixed in their food. It was probable her object was not to kill

them, but to escape with her lover. The Court held that it must be assumed that she knew that *datura* was capable of causing death, and that she was properly convicted under s 307 Cf 1882 P. R. No. 24 where the accused asked a doctor to supply her with medicine for poisoning her son-in-law. This was held not sufficient to sustain a conviction under s. 307; so where a man merely brought a sword, 1882 P. R. (Cr.) 45. In this last case the prisoner's act was held to amount to an assault as the bringing might cause the complainant to apprehend that the accused was about to use criminal force to him. Again where *datura* was administered to facilitate robbery with the result one of the persons died and another became seriously ill, the accused was convicted as regards the former of grievous hurt and in respect of the latter under s 328, 1908 A. W. N. 243. In 5 L. B. R. 79=10 Cr. L. J. 363=3 Ind. Ca. 721. the accused was proved to have put into food some powder which gave the physiological reaction of *atropine*. There was no evidence, however, as to the quantity of poison found or its probable effects on any one who might have eaten it. Without such evidence it was found impossible to hold the accused intended to cause more than hurt. The conviction was therefore altered to one under ss. 328 & 511.

In Weir I. 328, the accused enticed into her house a boy, aged nine years, used violence to him, and removed several jewels from his person, and being unable to remove his anklets and ear-rings, tied his wrists and neck with a rope, put a cloth into his mouth, took him into a room and placed him sitting in a jar which was only twenty-two inches deep all night and put a mill-stone on the mouth of it; through three holes in the mill-stone there was a stinted supply of air. She did not give him any food at night and before dawn lifted the mill-stone once and looked at the boy but replaced the mill-stone. The boy untied the rope and owing to the omission of the accused to watch the jar and the room, got out in the morning and ran home. The conviction under s. 307 was affirmed by Muthuswamy Iyer and Shepherd, JJ., who held that where an act done with the intention of causing death is physically capable of causing death but

death does not ensue owing to causes independent of the act, the essentials for liability under s. 307 have been made out. But the Brahmin widow who wrapped up her illegitimate child in a cloth with a pot turned over its head was more fortunate as her acts were held not sufficient evidence that she intended to kill the child. 8 B. H. C. R. (Cr. Ca.) 164. To justify a conviction under this s. 307 it is not necessary that bodily injury caused should be one ordinarily capable of causing death. No doubt the nature of the injury may be an index as to the intention of the accused but intention may equally well be inferred from other circumstances and very often without any reference at all to actual wounds, 4 L. B. R. 311 (F. B.)=9 Cr. L. J. 11, *overruling* 1889 S. J. L. B. 466. See the observations of Pains, J., in *Ratanlal* 558. Where however a medical man wounded a person with a knife in the neck only one-fourth inch from the carotid artery, it was patent even if he had no intention to murder, he intended to cause such bodily injury as he knew to be likely to cause death. 13 Cr. L. J. 197=14 Ind. Ca. 197. Where a young man accustomed to shooting fired at a person at a distance only of six paces the fact that the back of the chair on which the victim was seated intercepted the bullet and prevented a fatal result was held not to have the effect of reducing the offence from one under s. 307 to one under s. 324, 10 Cr. L. J. 57=9 C. L. J. 422=2 Ind. Ca. 593. In 1910 P.W.R. (Cr.) 1=11 Cr. L.J. 171=5 Ind. Ca. 602, firing two shots successively at another was held clearly to indicate murderous intent. Where an act is *prima facie* an offence under s. 307, a magistrate would not be justified in dealing with it himself as a minor offence. 5 M. L. T. 257=11 Cr. L.J. 196=4 Ind. Ca. 1134. In 11 Cr. L.J. 48=5 Ind. Ca. 138, a woman threw the child of her sister-in-law in the heat of a quarrel into a pond four feet deep and was held liable under s. 307, though the child was immediately picked up by a bystander.

Very little help can be obtained from the English cases, as they all turn on the special words of the statute. By two different statutes it was made an offence to attempt, by drawing a trigger or in any other

manner, to discharge any loaded firearms at anyone. Upon these statutes it was held that a firearm properly loaded but not primed, was not a loaded firearm within the Act *R. v. Lau, Russ. & Ry.* 377; *R. v. James*, 1 C. & K. 530. The present statute, 24 & 25 Vict., c. 100, s. 19 provides that a firearm properly loaded in the barrel, shall be deemed to be loaded, although the attempt to discharge it may fail from want of priming or from any other cause. In *R. v. Brown*, 10 Q. B. D. 381, the indictment was held to have failed, because on the authority of two cases, the prisoner who had not drawn the trigger, had not attempted to discharge it "in any other manner." In the later case, *R. v. Duckworth*, [1892] 2 Q. B. 83, those decisions were overruled, and it was decided that a conviction for attempting to discharge a loaded firearm by drawing a trigger or in any other manner, (24 & 25 Vict., c. 100, s. 18, was valid, where the prisoner had drawn a loaded revolver from his pocket, pointed it at his mother, and fumbled with his finger at the trigger, though he was unable to discharge it, because his wrists were held by the bystanders and the pistol was taken from him. See also *Linnakre*, [1906], 2 K. B. 99.=75 L. J. (Q. B.) 385=94 L. T. 856=54 W. R. 494=22 T. L. R. 495=21 Cox. 196; *Ring*, 6 L. J. (M. C.) 716 *Williams* [1893] 2 Q. B. 320. The decision in *R. v. Duckworth* would probably be an authority that if a man presented at another a firearm ready for immediate use, with the intent on of discharging it, he might be convicted under ss. 307 or 308, though the weapon was knocked up, or taken from him, before he could attempt to draw the trigger. The Panjab Chief Court when the question arose in 1904 P. R. (Cr). 30 took however a different view as stated above.

15 B 194 is a curious case. There the prisoner struck his father-in-law three blows with a stick on the head, intending to kill him, and believing he had killed him, he then set fire to the hut in which the man lay senseless, intending apparently to get rid of the evidence of his guilt, or to make the death appear to be accidental. It was proved that the man died not of the blow but

If he had cut the man's head off, and thrown it away to prevent the corpse being identified, apparently the same decision would have been given. The prisoner would have had a very clear defence if the intended murder had been committed by someone else, and if he had burnt the supposed corpse to screen the supposed murderer. But if a man intending to kill another does two successive acts, the latter of which must necessarily kill him, can he be held free from the guilt of murder because it was effected by the second act instead of the first; and because the second act was intended for a purpose subsidiary to the first? He intended to murder the man, and he did murder him, and by an act which must necessarily have murdered him, if he had not been murdered already. For an earlier case similar to this, see 6 W. R. (Cr.) 55.

II CAUSING MISCARRIAGE, INJURIES TO UNBORN CHILDREN, EXPOSURE OF INFANTS, AND CONCEALMENT OF BIRTH.

160. Miscarriage and Offences against Unborn Children.—Under s. 312 it is an offence voluntarily to cause a woman with child to miscarry, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, and the offence is liable to additional punishment if the woman was quick with child. The Explanation points out that a woman who causes herself to miscarry is within the section. One who supplies drugs to the woman for the purpose of bringing about miscarriage does not cause such though he would be liable as an abettor for having aided, 10 Cr. L. J. 19=19 K. L. R. 40. This offence can only be committed where the woman is either with child or quick with child, and therefore the woman must have been pregnant at the time. *R. v. Scudder*, 3 C. & P. 625; 15 W. R. (Cr.) 4. The words "with child" mean no more than pregnant. It is not necessary to show that there was anything in the womb which could be called a child, or even that the embryo has assumed a foetal form. 9 M. 369. "Quick with child" means that the process of quickening has taken place. *R. v. Wycherley*, 8 C. & P. 262;

Goldsmith's case, 3 Camp. 76: *R v. Philips*, 3 Camp. 77. According to Taylor, (6th Ed) II, 89, "Quickening is the name applied to peculiar sensations experienced by a woman about this stage of pregnancy. The symptoms are popularly ascribed to the first perception of the movements of the *fetus*, which occur when the *uterus* begins to rise out of the *pelvis*; and to these movements, as well as probably to a change of the position in the *uterus*, the sensation is perhaps really due." The process of quickening is not an indication that the *fetus* has acquired life in any different sense from that which it had before. It merely shows that a particular stage of the pregnancy has been reached, which stage generally produces a particular sensation in the mother. The term "quickening" describes the sensation, and not the stage, and, therefore, as Taylor says, "No evidence but that of the woman herself can establish the fact of quickening." "Cases every now and then occur in which healthy women do not experience the sensation of quickening during the whole course of pregnancy, and the movements of the child may be at no time perceptible to the examiner." "The discovery of the movements of a child by an examiner is a proof that the usual period of quickening is past, but their non-discovery at the time of the examination is no proof whatever that the woman has not quickened, since the movements are by no means constant, and may be accidentally suspended at several successive examinations." Practically, I suppose, that in the absence of evidence to the contrary, a woman would be considered to be quick with child if it was shown that she was bearing a living child after the extreme period for quickening had passed, and especially if the fact of movements was proved. Taylor says "Taking the general experience of accoucheurs, quickening happens from the tenth to the twenty-fifth week of pregnancy, but the greater number of instances occur between the twelfth and sixteenth week" II, p. 39. Where the evidence showed that the child was full grown at the time the offence took place, Glover, J., said: "I think it improper to convict under s 312 of the Penal Code, which supposes an expulsion of the child before the period of gestation is completed. But the evidence

is perfectly clear as to the intention and acts of the parties, and they may both be properly convicted of an attempt to cause miscarriage under ss. 312 and 511." 19 W. R. (Cr.) 32. The section, however, says nothing about expulsion before the full period of gestation, and it is submitted that the words "miscarriage," and "causing a woman to miscarry," are satisfied by any process by which a premature and artificial expulsion of an infant is effected, by means which are not intended and calculated to bring it into the world in a healthy state.

The offence created by s. 312 is actually causing a woman to miscarry. If she is pregnant, and the means used do not succeed, the accused could only be convicted under s. 511 of an attempt. A more difficult question would arise if the attempt failed because the woman was never pregnant. In England a woman was indicted under s. 58 of 24 & 25 Vict., c. 100, for doing certain acts with intent to procure her own miscarriage. The section only applies to a "woman being with child." It turned out that she had never been pregnant, and it was held that she could not be convicted under the section, but might be convicted of conspiring with those who assisted her to procure her own miscarriage. *R. v. Whitchurch*, 24 Q. B. D. 420. There, however, the same section, made such acts punishable in others, whether the woman was with child or not. She was, therefore, conspiring with them to do an act which in them was illegal. This, under the Code, would be an abetment of their act under s. 107. But an unsuccessful attempt to procure a miscarriage is not punishable except as an attempt. Can it be punishable under s. 511, when it is an attempt to do that which is physically and legally impossible? It was at one time held in England that a man could not be convicted of an attempt to pick an empty pocket *R. v. Collins*, L. & C. 471 = 33 L. J. (M. C.) 177. This decision, after being long discredited, has at last been overruled. *R. v. Brown*, 24 Q. B. D. 357; and see *R. v. Williams* [1893], 1 Q. B. 320. It may fairly be argued that a man who intends to do a criminal act, and tries his best to do it, cannot be held not to have attempted it, because a circumstance of which he was ignorant made

it impossible for him to succeed. If in the attempt he caused hurt, grievous hurt, or death to the woman, he could not plead her consent either under s. 87 or under s. 300. Exception 5, as the consent was given to an act which, was an offence independently of the harm it would cause to the woman who gave the consent (s. 91). Accordingly, where a man gave his wife a drug to cause abortion, they believing that she was pregnant when she was not, and she died from taking it, he was convicted of manslaughter. *R. v Gaylor*, D. & B. 288.

Under s. 313, causing a miscarriage is additionally punishable, if it is done without the woman's consent, whether the woman is quick with child or not. If an act done with the intent to cause the miscarriage of a woman with child causes her death, it is also specially punishable, the punishment varying according as the act was done with or without the woman's consent (s. 314). The Explanation states that it is not essential to this offence that the offender should know that the act was likely to cause death 10 W. R. (Cr.) 59. Even if the accused administered a perfectly harmless substance with intent to cause the miscarriage of a woman, he will be within the section. It is not necessary the substance should be deleterious in its nature, *R. v Coe*, 6 C. & P. 403. But then there must be proof that it was the administering of the substance that caused the death. If, however, the death was caused by an act likely to cause death, it would be at the least culpable homicide not amounting to murder, and might even be murder if the act was of an eminently dangerous character. This section, however, will only apply where the act done by the offender, or for which he is jointly responsible (see s. 34, *ante* § 81, at page 239) is the act which causes the death. It is not sufficient that he has done an act whereby some one else is enabled to cause death. In a case in England a man was indicted for murder of a woman. It appeared that she, being pregnant, requested him to procure her an abortion, and threatened to destroy herself if he refused, and that he, in consequence, procured for her a poisonous drug. He knew the purpose for which she wanted it, and gave it to her for

that purpose; but he was unwilling that she should use it, and he was not present when it was taken. The woman died from the effects of the poison. The Court held that the conviction could not be sustained, saying that "it would be consistent with the facts of the case that he hoped and expected that she would change her mind, and would not use the drug" *R. v. Freticell, L. & C. 161=31 L. J. (M. C.) 145*. Under similar circumstances, no charge would be maintainable under s. 314, or under ss. 312, 313, or 315. But the prisoner would be guilty of abetting her to commit the offence specified in s. 312. (See s. 107, *cl. 3, Expl. 2.*) And he would be guilty in the same manner if he supplied her with a drug calculated to procure a miscarriage, with the intention that it should be so used, although neither the woman herself, nor any other person than the defendant may have intended to use it for that purpose. *R. v. Hillman, L. & C. 343=33 L. J. (M. C.) 60; (s. 108, Expls. 2, 3.)*

Sections 315 and 316 are intended for the protection of unborn children. If a man, intending to prevent the birth of a living child, does any act, either through the medium of a miscarriage or otherwise, which prevents the child from being born alive, or causes it to die after its birth, and if such act is not done in good faith, for the purpose of saving the life of the mother, he commits an offence under s. 315. If, however, without any special intention to injure the child, he injures the mother in such a way that she died, he would be guilty of culpable homicide; then if his act causes the death of her quick unborn child, he commits an offence under s. 316. A man who assaults a pregnant woman with such violence that her death is a likely result, or sets fire to a house in which she happens to be, would be punishable under this section, if the mother survived, but gave birth to a dead child in consequence of her injuries, or of the fright.

161. Exposure of Children.—Section 317 renders punishable the act of anyone who, being the parent, or having the care of a child under the age of twelve, exposes it or leaves it in any place with the intention of wholly abandoning it.

In *R. v. Beejoo Bee*, 1st Mad. Sess., 1869, the following facts arose. A, the mother of a newly-born child being herself too ill to move, sent B to expose it. It was held by Scotland, C.J., that A could not be liable under this section as she had not actually exposed the child, nor B, as she was not the mother. Also that neither A nor B could be indicted for abetting the other, since as neither could have committed the offence there could be no abetment by the other. But in a case of secret disposal by employing an agent the mother would be held liable for the abetment of an offence under s 318 read with s 109 *Qui Facit per alium Facit per se*. But the offence under s 317 is capable of being committed only by one of the parents or a person in *loco parentis*. **Ratanlal 775.** Of course, a person who has the custody of a child merely for the purpose of exposing it, cannot be indicted as a person "having the care of such child." Where the mother of a child packed it up carefully in a hamper, and sent it off by train to the address of its father, where it was safely delivered, it was held that this came within the words of the section. The offence is penal to "abandon or leave a child under two years, whereby the child is likely to be endangered." *R v Falkingham*, L. R. 1 C. C. 222=39 L. J. (M. C.) 47. And so, where a mother who was living apart from her husband left the child at his door, and he refused to take it in, saying, "it must bide there for what he knew, and then the mother ought to be taken up for the murder of it," he was convicted under the same statute *R v. White*, L. R., 1 C. C., 311=40 L. J. (M. C.) 134. In England the subject is regulated by the *Prevention of Cruelty to Children Act*, 1894, s 7 & 58 Vic c 41.

In 18 A. 364 it was held that a mother who handed over her infant to a blind woman, saying she would return for it immediately and never returned, could not be convicted under this section. She had not exposed the child, and the second clause could not without straining the words be applied to leaving the child in charge of a person who was unfit to take care of it. The word 'place' seems to be the essence of the offence, and is

not a reasonable description of a woman's arms. The section is not meant to apply where children are left under the care of others, 16 W. R. (Cr.) 12; 1872 P. R. No. 33; 1878 P. R. No. 5; 1879 P. R. No. 4.

The offence is completed by the abandonment of a child of tender years by a person who was bound to take care of it. It is not necessary that any harm should happen to the child, or be likely to happen to it, or be expected to happen to it. Even if the child was placed deliberately where it would be, and in fact was, found and looked after, these circumstances only operate in mitigation of punishment. 24 M. 662; 1886 P. R. No. 23; 1870 P. R. No. 18; 1872 P. R. No. 33; 1879 P. R. No. 4. The gist of the offence under s. 317 is bare exposure. It is not necessary that it must be attended with likelihood of endangering the health or life of the child, provided the act of exposure is accompanied by an intention of wholly abandoning the child, *Weir* 1. 331. An Explanation follows that this section is not intended to prevent the trial of the offender for murder or culpable homicide, as the case may be, if the child die in consequence of the exposure. Of course, no such offence would be committed, even if the child die, unless the death was a likely result of the exposure. This would depend much upon the age of the child, and the circumstances of time and place under which it was abandoned. Where the death did not come within the terms of s. 299 or s. 300, it could hardly fail to come under s. 304A. In all such cases, it is right to charge the prisoner under s. 317 as well, but if there is a conviction for the more serious offence, the minor is merged in it. There cannot be a conviction under both charges. 2 A. 349. On the other hand, the charge of causing death cannot be sustained unless it is a result directly traceable to the abandonment. A newly-born child was left warmly wrapped up in a place where it was almost certain to be found, and where, in fact, it was found at once. Those who found the infant appear to have done everything in their power for it, but the child refused to take the cow's milk which was offered it, and died from want of sustenance. It was held that the prisoner, though guilty under s. 317,

could not be convicted of murder. 10 W. R. (Cr.) 52. Probably he could have been convicted under s 304A, if it had then become law. In 1893 A. W. N. 100 a married woman left her illegitimate child ten days old in her husband's house and went away. Four days later the child died, though it was fed with cow's milk. It was held the mother was not liable to be dealt with under this section. But in 1903 A. W. N. 43, a mother who left her child near a public road in the vicinity of a village was held liable though the child was soon discovered and properly taken care of.

162. Concealment of birth by secret disposal of dead body.—Section 318 is intended, indirectly, to protect children, by rendering it an offence intentionally to conceal, or endeavour to conceal the birth of a child, by secretly burying or otherwise disposing of its dead body, whether it die before, or after, or during its birth. The section is designed to meet the case of illegitimate children, which is probably the only case in which such a concealment would be attempted. A woman is not bound to announce that she is going to have a child; and if the child lives, she is quite at liberty to keep its existence secret. But if it is born dead, or dies after its birth, the dead body must not be concealed by getting rid of it privately. Where the body of a child was found on the floor of an attic wrapped in bedsheets, which had been removed from the room below, the head decapitated and a knife lying near it and the body was in the middle of the room it was held in *Goode*, 6 Cox. 318, that there was no evidence of an endeavour to conceal. This view was followed in [1911] 2 M. W. N. 379=12 Cr. L. J. 562=12 Ind. Ca. 650, where the dead body of a child was left on a public road near a number of houses which was held not to amount to secret disposal of the body within the meaning of s 318. Similarly placing the body on a *Batora* (dung-heap) quite close to a public road was held not to amount to a secret disposal, 1913 P. W.R. (Cr.) 26; 1904 P.R. (Cr.) 7. Further, the concealment must be from the whole world and not from any particular individual, *Morris*, 2 Cox. 489; 8 C. P. L. R. (Cr.) 5. It is sufficient if the body is temporarily

concealed with the intention of removing it elsewhere when opportunity occurred, 13 C.P.L. R. 188; *Farnham*, 1 Cox. 349, *Gogarthy*, 7 Cox. 107. But to constitute the offence under the section it must be the secret disposal of a dead body. Where, a woman disposed of her child while alive in a corner of a field, where it died from exposure and the child was afterwards found in the corner, it was held she could not be convicted of secretly disposing the dead body of a child, *Jane May*, 10 Cox. 448. What was done by the accused must be enough to amount to a secret disposal. Where the prisoner was detected while carrying a bundle containing the body of her dead child across a yard in the direction of a privy, *Gurney, B.*, directed an acquittal, holding that the act was *in fieri* and not completed, *Snell*, 2 Moo. & R. 44. The section is substantially the same as the English statute, 24 & 25 Vict., c. 100, s. 60, the decisions on which will no doubt be followed in India.

The child must be a child, and not a *fætus*, *R. v. Hewett*, 4 F. & F. 1101; *Weir* 1. 333. Erle, J., in charging the jury, told them that "this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity, and if she had miscarried at a time when the *fætus* was but a few months old, and therefore could have no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins, but it may perhaps be safely assumed that, under seven months, the great probability is that the child would not be born alive." *R. v. Berriman*, 6 Cox. 388, followed in 4 M. H. C. R. Appx. 63. Instances are recorded of children born in the sixth month having survived and grown up. They may be born alive at any period between the sixth and seventh months, or even, in some instances, earlier than the sixth; but this is rare, and if born living, they

commonly die soon after birth (Taylor, Med. Jur. II., pp. 247—249.) Weir I. 334; 1 Bom. L. R. 555; 1903 U. B. R. (P. C.) 27 Ratanlal 727; 2 C. P. L. R. 153. In a later case, *Colmer*, 9 Cox. 506, it was laid down that a *fetus* not bigger than a man's finger but having the shape of a child was a child within the meaning of the corresponding English statute, though it was not likely to live See 5 C. P. L. R. 21.

The act which is criminal is the secretly disposing of the body after it is dead. Some act intended for this purpose must be shown. *R. v Turner*, 8 C. & P. 755. The mere fact a woman was delivered of a child and she allowed two others to take away its body were held insufficient to sustain an indictment for concealing its birth, *Emma Bate*, 11 Cox. 686. There must be an intent to conceal the birth coupled with a disposal of the body. Mere denial of birth is not punishable in itself. In *Turner's* case, the prisoner had gone to the privy where she was delivered of a child which fell and got suffocated in the soil. This was held insufficient to constitute disposal, notwithstanding her denial of the birth of the child. If a woman, whether intentionally or otherwise, gives birth to a child in a secret place, and leaves it there, if the child is born alive, she has committed an offence under s. 317, but if it is born dead she has committed no offence under s. 318 *R v Turner*, 8 C P. 755; Ratanlal 607, 1 N. L. R. 89=2 Cr. L. J. 667, *dissenting from* 5 C. P. L. R. 29. Secrecy is the essence of the offence, and if the dead body is left in a public place, where it will be found by people who are not looking for it, this is not an offence. The crime consists in disposing of the dead body, with a view to conceal its birth, not in disposing of it so as to conceal the fact that it was born of its mother. *R v Clark*, 15 Cox. 171; *Steph. Dig. Crim. L.*, art 235. The offence is complete when the expulsion of either a dead or living child is concealed by any means, Ratanlal 961, 1905 U. B. R. (P. C.) 27=3 Cr. L. J. 432. Placing a child in an open box in the prisoner's bedroom was not such a secret disposal, *Sleep*, 9 Cox. 559; *Jane George*, 11 Cox. 41; *Clark*, 4 F. & F. 1040. Nor the placing the dead body between a bed and a

mattress, *Sarah Goldthorpe*, 2 Moody C. C. 244=Car. & M. 335, *Jane Perry*, 6 Cox. 531=Dears C. C. 471 or on the bed covered with a petticoat, *Rosenberg*, 70 J. P. 264. But secret burial is undoubtedly covered by the section even though some persons had been previously informed of the birth, *Frances Douglas*, 1 Moody C. C. 480=6 C. & K. 644; *R. v. Bird*, 2 C. & K. 817. Where however the dead body was found in a bed among the feathers and the evidence did not show who placed it there the mother was acquitted on a charge of endeavouring to conceal birth on proving a surgeon attended at the time of her confinement and that she had prepared clothes for the child, *Sarah Higley*, 4 C. & P. 366. But where a woman threw the child down a privy, *Elizabeth Cornwall*, R. & R. 336, *Anne Coxhead*, 1 C. & K. 623, where the mother placed a living child in a place of concealment and on subsequently revisiting the place found it dead and left it there, *Hughes*, 4 Cox. 447, where she threw the body over a wall four and half feet high into a field used for grazing cattle, *R. v. Skelton*, 3 C. & K. 119, where she threw it into a pit, 15 K. L. R. 377=3 Cr. L. J. 317, she was held liable. It is not necessary to show that the child was concealed in the place where it was found, if the place was one where it would probably not be found. The dead body of a child was taken into a yard at the back of a public-house, and thrown over a wall four and a-half feet high into a field at the other side of the wall. The yard was not a public thoroughfare, and the field was one used for grazing cattle, in which no one had any business except those who had to do with the cattle, and they would not be likely to approach the spot where the child lay. Brett, J., left to the jury the following question "Did the wall and the position of the child in the field, and the mode in which the field and the yard were used, conceal the body from all the world, unless from a person who by searching for the child might find it, or by going out of the way in the field, or by looking over the wall, might accidentally discover it. If they found an answer in the affirmative, they might find that there was a secret disposition of the body, but if they found an answer in the negative, they could not find that there was a secret disposition." This direction was held

to be right, and the conviction was affirmed. Bovill, C.J., said: "What is a secret disposition must depend upon the circumstances of each particular case. The most complete exposure of the body might be a concealment. As, for instance, if the body were placed in the middle of a moor in the winter, or on the top of a mountain, or in any other secluded place where the body would not be likely to be found." *R. v. Brown*, L. R., 1 C. C. 244=39 L. J. (M. C.) 94. It will be observed that the offence may be committed either by the mother, or by anyone else, who does it with the intent specified in the section.

In England it is held essential to a conviction to show, not only that a woman has been delivered of a child which has not been accounted for, but that a dead body has been found, which can be identified as that of the child to whom it belongs. If a dead body has been found, it is not necessary to show that, even if the child did die, it may have been buried elsewhere with all necessary publicity, or otherwise disposed of in a manner which is not within s. 318. *R. v. Williams*, 11 Cox. 684.

Unless there is clear evidence of murder against a person secretly disposing of the dead body of a child found to have been killed after its birth, such person should not be charged and tried for murder but only for an offence under s. 318, *Weir* l. 334, 15 K. L. R. 337=3 Cr. L. J. 317.

III VOLUNTARY HURT

163. Hurt.—The authors of the Code say: "Many of the offences which fall under the head of hurt will also fall under the head of assault. A stab or blow which fractures a limb, the flinging of boiling water over a person are assaults and are also acts which cause bodily hurt. But bodily hurt may be caused by many acts which are not assaults. A person, for example, who mixes a deleterious potion, and places it on the table of another; a person who conceals a scythe in the grass

mattress, *Sarah Goldthorpe*, 2 Moody C. C. 244=Car. & M. 335, *Jane Perry*, 6 Cox. 531=Dears C. C. 471 or on the bed covered with a petticoat, *Rosenberg*, 70 J. P. 264. But secret burial is undoubtedly covered by the section even though some persons had been previously informed of the birth, *Frances Douglas*, 1 Moody C. C. 480=6 C. & K. 644; *R. v. Bird*, 2 C. & K. 817. Where however the dead body was found in a bed among the feathers and the evidence did not show who placed it there the mother was acquitted on a charge of endeavouring to conceal birth on proving a surgeon attended at the time of her confinement and that she had prepared clothes for the child, *Sarah Higley*, 4 C. & P. 366. But where a woman threw the child down a privy, *Elizabeth Cornicall*, R. & R. 336, *Anne Coxhead*, 1 C. & K. 623, where the mother placed a living child in a place of concealment and on subsequently revisiting the place found it dead and left it there, *Hughes*, 4 Cox. 447, where she threw the body over a wall four and half feet high into a field used for grazing cattle, *R. v. Skelton*, 3 C. & K. 119, where she threw it into a pit, 15 K. L. R. 377=3 Cr. L. J. 317, she was held liable. It is not necessary to show that the child was concealed in the place where it was found, if the place was one where it would probably not be found. The dead body of a child was taken into a yard at the back of a public-house, and thrown over a wall four and a-half feet high into a field at the other side of the wall. The yard was not a public thoroughfare, and the field was one used for grazing cattle, in which no one had any business except those who had to do with the cattle, and they would not be likely to approach the spot where the child lay. Brett, J., left to the jury the following question: "Did the wall and the position of the child in the field, and the mode in which the field and the yard were used, conceal the body from all the world, unless from a person who by searching for the child might find it, or by going out of the way in the field, or by looking over the wall, might accidentally discover it. If they found an answer in the affirmative, they might find that there was a secret disposition of the body, but if they found an answer in the negative, they could not find that there was a secret disposition." This direction was held

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on which another is in the habit of walking; a person who digs a pit in a public path, intending that another way fall into it, may cause serious hurt, and may be justly punished for causing such hurt; but they cannot, without extreme violence to language, be said to have committed assault. We propose to designate all pain, disease and infirmity, by the name of hurt." *Note M.* Under sections 349 to 358 dealing with assault it is not necessary to show that any suffering or injurious consequences followed from the act done. The definition in s. 319 involves the idea of pain caused by one person to another. 1878 P. R. (Cr.) 22. Thus pulling a woman by the hair is held to be hurt. Communicating venereal disease will also amount, to causing hurt as defined in s. 319, though the Statutory law in England has been interpreted in a different way in the leading case of *R. v. Clarence*. L. R. 22 Q. B. D. 23. See 11 B. 59, where this aspect of the question was not put forward. We have already seen that even where death results, if that consequence was neither intended nor known to be likely, the act would only be hurt or grievous hurt. See *Ratanlal* 63, 67 & 673, 18 W. R. (Cr.) 29; 1883 S. J. L. B. 170, 8 W. R. (Cr.) 29; 5 W. R. (Cr.) 97; (1892-1896) U. B. R. 217; 2 A. 522; 5 C. P. L. R. 69; 3 A. 597; 1 Cr. L. J. 220, 627 & 903; 1913 P. W. R. (Cr.) 5=1913 P. L. R. 157, 3 Cr. L. J. 148=15 K. L. R. 286; 1907 P. L. R. 211=7 Cr. L. J. 321; 1913 P. W. R. (Cr.) 1=1913 P. L. R. 162=1913 P. W. R. (Cr.) 1=14 Cr. L. J. 104=18 Ind. Ca. 664; 29 A. 282=1907 A. W. N. 51=4 A. L. J. 207=5 Cr. L. J. 130; 1892 A. W. N. 105; 2 W. R. (Cr.) 39 & 48; 6 W. R. (Cr.) 16; 19 M. 483. 7 Cr. L. J. 205; 30 A. 568=1908 A. W. N. 243=8 Cr. L. J. 383=4 M. L. T. 402; 14 K. L. R. 316=2 Cr. L. J. 196; 15 K. L. R. 311=3 Cr. L. J. 181; 1907 A. W. N. 51=5 Cr. L. J. 130; 19 K. L. R. 95=10 Cr. L. J. 166, 36 C. 659=13 C. W. N. 680=10 Cr. L. J. 186=2 Ind. Ca. 841, [1911] 2 M. W. N. 188, and other cases dealt with in § 145 above. Again in deciding whether a particular act ending in death is a homicide or a homicide is hurt or grievous disclose some specific coming within one or more of the eight kinds enumerated

in s. 320. Thus, when a man gave in the course of a scuffle a blow or a push which almost immediately caused death, the suddenness of death is no evidence that the hurt was grievous. If there is no evidence to show what kind of hurt was caused, or how precisely the death was brought about, it would not satisfy the requirements of s. 320, and the accused can be convicted only of simple hurt, 23 W.R. (Cr.) 65; 6 Sind L. R. 116 = 13 Cr. L. J. 750 = 17 Ind. Ca. 62; 14 K. L. R. 61 = 1 Cr. L. J. 593. Grievous hurt, is defined by s. 320. A person is not punishable for causing hurt or grievous hurt, unless he causes it voluntarily, that is, with the intention of causing it, or with the knowledge that he is likely to cause it. A man who strikes a woman with a child in her arms, and strikes her on that part of her person which is close to the head of the child, in a manner likely to cause grievous hurt to anyone on whom the blow falls, must know that he is likely to cause such hurt to the child, and is properly punished if that result follows. 3 C. 623. But if the child was not really in the woman's arms, probably the offence would be one under s. 304A, *Ratanlal* 398. A person who intends to cause one of the eight sorts of grievous hurt, and who causes a different one, is still punishable for causing grievous hurt (Explanation, s. 322) If a person intends to cause simple hurt, but uses means which are, and which he ought to have known were, likely to cause grievous hurt, and grievous hurt follows, he will be punishable under s. 325. If nothing more than simple hurt follows, he will only be punishable under s. 323. If, however, he only intends simple hurt, and uses means which have no reasonable chance of causing anything more serious, and, in fact, grievous hurt follows—as, for instance, if he breaks the skin by a slight blow, and an attack of erysipelas ensues, which results in three weeks' illness—he is still only punishable under s. 323, as he, neither intended, nor knew that he was likely, to cause anything more (Explanation, s. 322).

The word "voluntarily" is used in ss. 321 and 322, in a sense very much narrower than the definition in s. 39, I. P. C., so as to exclude a case of causing hurt or

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The question often arises when the force which converts an *unlawful assembly* into *rioting* is employed in causing hurt whether the accused could be given a double sentence both under sections 147 and 323, I.P.C. This question was discussed in § 100 at page 325 *supra*. On an examination of the authorities on the point, though it does not yield any clear result, the following conclusions may be deducible.

(1) Persons who actually cause hurt can be convicted and separately sentenced under both sections as either offence is capable of being committed without the other. 40 C. 511=14 Cr. L.J. 66=18 Ind. Ca. 402; 19 C. 105, 7 A. 757 & 414; 16 C. 725 & 442 (F. B.) [which latter *overrules* the earlier rulings of the Calcutta High Court in 17 W. R. (Cr.) 50 & 11 C. 349]; 10 A. 146; 10 B. 493; 17 B. 260 (F.B.) The Punjab Chief Court has taken a different view, see 1901 P. R. (Cr.) 4=1901 P. L. R. 52; 1911 P. L. R. 161=12 Cr. L. J. 236=18 Ind. Ca. 278; 1907 P. W. R. (Cr.) 106=6 Cr. L. J. 446=1907 P. W. R. (Cr.) 38

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C. 718.

(3) If one of the rioters strikes and causes grievous hurt but it is not shown the common intention of all was to cause grievous hurt those that did not strike cannot be held liable under s. 325, 9 A. L. J. 180=13 Cr. L. J. 265=14 Ind. Ca. 649; 40 C. 511=14 Cr. L. J. 66=18 Ind. Ca. 402

Where an act, which would be culpable homicide were death to ensue, only causes grievous hurt, the offender will always be punishable under s 325. Because, in order to come under s 299 the criminal must have known that he was likely to cause death, and any injury which is likely to cause death is grievous hurt (s. 320, cl. 8); therefore, he must not only have caused grievous hurt, but known that he was likely to cause it. But the converse does not follow, and if a person intending to cause grievous hurt actually causes death, it is not necessary that he should be guilty of culpable homicide, because many species of grievous hurt are not likely to cause death. If, therefore, it could be shown that the offender intended merely to break a finger, and did break it, but an attack of heart disease was brought on, of which the sufferer died, here the knowledge necessary to constitute culpable homicide would be wanting, and a conviction could only be had under s 325. 2 A. 766; 3 A. 776. And similarly, if the act was only intended and likely, to cause hurt, but from some unforeseen cause is followed by death, the accused can only be punished under s 323. 2 A. 522, (where Straight, J., gives a summary of the celebrated *Fuller* case), 3 A. 597.

These offences again are subject to a mitigated punishment by ss 334 and 335, where the hurt, or grievous hurt, was caused on grave and sudden provocation, if the offender neither intends nor knows himself to be likely to cause such hurt to any person other than the person

grievous hurt by an act which the doer has only reason to believe to be likely to cause hurt or grievous hurt. See 12 C. W. N. 530=7 Cr. L. J. 362. It will be observed that the only thing which has to be considered under each definition is the state of the prisoner's mind at the moment the act is committed. If he then intended, or knew that he was likely, to cause grievous hurt, the suddenness of the intention will be immaterial. A voluntary act is not to be confounded with a premeditated act. In a case where a prisoner was indicted for a common assault, and also for maliciously inflicting grievous bodily harm, the jury found that he was "guilty of an aggravated assault, but without premeditation, and that it was done under the influence of passion". The Court held that this was a sufficient verdict of guilty upon the more serious charge. They said: "We think this assault was intentional in the understanding of the law, though committed without premeditation and under the influence of passion". *R. v. Sparrow*, Bell 298=30 L. J. (M. C.) 43.

The question often arises when the force which converts an *unlawful assembly* into *rioting* is employed in causing hurt whether the accused could be given a double sentence both under sections 147 and 323, I.P.C. This question was discussed in § 100 at page 325 *supra*. On an examination of the authorities on the point, though it does not yield any clear result, the following conclusions may be deducible

(1) Persons who actually cause hurt can be convicted and separately sentenced under both sections as either offence is capable of being committed without the other. 40 C. 511=14 Cr. L. J. 66=18 Ind. Ca. 402; 19 C. 105, 7 A. 757 & 414; 16 C. 725 & 442 (F. B.) [which latter overrules the earlier rulings of the Calcutta High Court in 17 W. R. (Cr.) 50 & 11 C. 349]; 10 A. 146; 10 B. 493; 17 B. 260 (F.B.) The Punjab Chief Court has taken a different view, see 1901 P. R. (Cr.) 4=1901 P. L. R. 52; 1911 P. L. R. 161=12 Cr. L. J. 236=18 Ind. Ca. 278; 1907 P. W. R. (Cr.) 106=6 Cr. L. J. 446=1907 P. W. R. (Cr.) 38

... instructively
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17 l. 2s.); (F.B.), 6
C. 718.

(3) If one of the rioters strikes and causes grievous hurt but it is not shown the common intention of all was to cause grievous hurt those that did not strike cannot be held liable under s. 325, 9 A. L. J. 180=13 Cr. L. J. 265=14 Ind. Ca. 649; 40 C. 511=14 Cr. L. J. 66=18 Ind. Ca. 402.

Where an act, which would be culpable homicide were death to ensue, only causes grievous hurt, the offender will always be punishable under s 325. Because, in order to come under s 299 the criminal must have known that he was likely to cause death, and any injury which is likely to cause death is grievous hurt (s. 320, cl. 8), therefore, he must not only have caused grievous hurt, but known that he was likely to cause it. But the converse does not follow, and if a person intending to cause grievous hurt actually causes death, it is not necessary that he should be guilty of culpable homicide, because many species of grievous hurt are not likely to cause death. If, therefore, it could be shown that the offender intended merely to break a finger, and did break it, but an attack of heart disease was brought on, of which the sufferer died, here the knowledge necessary to constitute culpable homicide would be wanting, and a conviction could only be had under s 325. 2 A. 766; 3 A. 776. And similarly, if the act was only intended and likely, to cause hurt, but from some unforeseen cause is followed by death, the accused can only be punished under s. 323. 2 A. 522, (where *Straight, J.* gives a summary of the celebrated *Fuller* case), 3 A. 597.

These offences again are subject to a mitigated punishment by ss. 334 and 335, where the hurt, or grievous hurt, was caused on grave and sudden provocation, if the offender neither intends nor knows himself to be likely to cause such hurt to any person other than the person

who gave the provocation. The meaning of this, of course, is that if a person who has received provocation assails the person who has given the provocation, he is only liable to a light punishment. But if, while out of temper in consequence of the provocation, he were to attack an innocent person, or to run *amuck* generally, like a Malay, the previous provocation would be no excuse. One should not have thought it necessary to point this out, but for the fact in 1 B. H. C. R. 17 the magistrate seems to have put precisely the opposite construction upon the section.

Various modifications of these offences are provided for in ss. 324—333. The few remarks arising on these sections raise no general principle, and will be found appended to the sections themselves in Part I.

IV. WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT.

164. Wrongful Restraint and Wrongful Confinement.—Ss. 339—348, I. P. C., deal with cases where a man's freedom of motion is interfered with wholly or in part. Where a man is kept out of a place where he has a right to be, it is the offence of wrongful restraint defined in s. 339 and made punishable by s. 341. But if he is kept within limits thwarting his desire to go outside those limits, it is the offence of wrongful confinement defined in s. 340 and punishable by s. 342. Sections 343—348 are aggravated forms of wrongful confinement.

Any obstruction to one's freedom of movement is made punishable by s. 341, but the section is confined in its operation to obstructions voluntarily continued by the accused throughout the time it lasts, 9 Bom. L.R. 30 = 5 Cr. L. J. 97; 4 Bom. L.R. 81. Thus, when the complainant was taken to the Police Station registered as a suspect and passed on in charge of Policemen from one Police-beat to another, this wilful restriction of his freedom of motion constituted an offence under s. 341. Wei I. 339; the same result will follow from preventing

men going in a particular direction in their carts, 10 W. R. (Cr.) 35 or unlawfully detaining a person till he gave bail, 10 W. R. (Cr.) 20. But the obstruction offered need not be physical in the sense of accused offering bodily resistance. Thus removing a ladder and thus keeping a person on the roof of a house, Weir I. 340; locking out the occupants of a room, 1910 M. W. N. 727=9 M. L. T. 603=11 Cr. L. J. 708=8 Ind. Ca. 757 have been held sufficient, but a verbal remonstrance in itself cannot constitute obstruction, Weir I. 339, 4 M. L. T. 141=8 Cr. L. J. 212. Where the accused invited the complainant to his house in order to be ready to give evidence in a judicial proceeding and used no physical coercion or threat to detain him in the house, but the complainant remained in the house from a general dislike or dread of giving offence to the accused, the mere silence of the accused in not expressly permitting him to go away was held not to constitute an offence under ss 341 or 342. Otherwise no person of any social standing would be safe from criminal charges based on the weakness or folly of other people, Ratanlal 89. Again there could be no restraint where there was no desire for motion, 1894 P. R. No. 36; nor would the mere locking up of a house constitute the offence, if done under a *bona fide* claim of right, Ratanlal 451; 24 C. 885; 1910 P. R. No. 22=11 Cr. L. J. 495=7 Ind. Ca. 493; 1914 P. L. R. (Cr.) 34=1914 P. W. R. 5. The prevention of the building of a party wall between two adjoining backyards is no offence under s 341. Weir I. 339; so also erecting a wall to keep out trespassers, 1886 P. R. No. 25; 5 M. L. T. 85=2 Ind. Ca. 613; 5 C. W. N. 215. asking Pariahs to stand near a temple, so that complainant had to abandon a procession for fear of pollution, 7 M. L. T. 366=1910 M. W. N. 72=11 Cr. L. J. 263=5 Ind. Ca. 851, stopping a cart in which complainant was travelling on the pretext the cartman had engaged himself to another, 12 M. C. C. R. 208=10 Cr. L. J. 266; placing an obstruction on a road, for men and cattle, so as to prevent cattle from passing while leaving ample room for men, Weir I. 340; 12 C. 505; 15 Bom. L. R. 103=2 Bom. (Cr. Ca.) 26=14 Cr. L. J. 177=19 Ind. Ca. 177.

To constitute the offence, the physical act of the accused must be the proximate cause of the constraint on the complainant. Thus when the accused merely took away the licenses from some boatmen with the result the authorities did not permit them to ply their boats beyond a certain stage in the channel, the accused was held to have committed no offence under this section, 5 M. L. T. 207=11 Cr. L. J. 192=4 Ind. Ca. 1117. Where a plague pass-port clerk wrongly refused to issue a pass-port and the statute made it illegal on the part of the complainant to enter a town without obtaining a pass-port the former cannot be held liable for an offence under s. 341 as he offers no physical obstruction to the complainant's entry. 2 M. L. T. 159=5 Cr. L. J. 357.

On a conviction for wrongful restraint caused by putting up an obstruction like a wall or a fence or a ditch, the Magistrate has no power by his order of conviction to direct the removal of the obstruction. Where the obstruction is not covered by Ch. X or by s. 522, Cr. P. C., the party will have to seek his appropriate remedy in the civil court, 31 C. 691=1 Cr. L. J. 453, *overruling* 5 C. W. N. 432.

Wrongful confinement as defined in s. 340 is only a particular species of wrongful restraint, or it may be regarded as total deprivation of freedom of movement while the offence defined by s. 339 is only partial constraint of motion. Though actual physical restraint is not essential there should be immediate fear of such restraint if the person confined attempted to go; but a mere threat of future harm if he departs is insufficient, 4 Bom. L. R. 79. Detention by moral force would be within the section, *Weir* 1. 341. Where a man shuts himself up being afraid that his enemy would attack him if he went out, the latter cannot be held liable. The same would be the result where an escape is open to the person confined if he wished to avail himself of it.

Where a Superintendent of Police illegally wrote a letter to a person directing him to present himself before a Magistrate, and sent two constables to accompany

him, and prevent him from speaking with anyone, this was held to constitute a wrongful imprisonment at Civil law, and, of course, would have been a wrongful confinement under s. 342. The Court said.—

"It is manifestly not necessary to constitute imprisonment that there should be a continuous application of superior physical force. In the felicitous language of Mr. Justice Coleridge it is one part of the definition of freedom to be able to go whithersoever one pleases, but imprisonment is something more than the loss of this power: it includes the notion of restraint within some limits defined by will or power exterior to our own (*Bird v. Jones*, 7 Q. B. 742.). It is quite clear, therefore, that the retaining of a person in a particular place, or the compelling him to go in a particular direction, by force of an exterior will, overpowering or suppressing in any way his own voluntary action, is an imprisonment on the part of him who exercises that exterior will" 2 M. H. C. R. 396. Wrongfully detaining a person disobeying an order in writing under s. 160, Cr. P. C., was construed to be an offence under this section, even though the person confined could be detained by the Police on some other charge, *Weir* II. 121. Similarly re-arrest of an accused discharged by the magistrate for the same offence, 19 W. R. (Cr.) 27, or detention by a jail-doctor in a cell within the prison with a view to administer enemy against his will to a convict undergoing imprisonment, 30 C. 95 = 6 C. W. N. 511; or the detention of a witness to prevent his being tampered with, 13 B. 376.

And, so, it has been held, that a Police officer who detains a person for one single hour, except upon some reasonable ground justified by all the circumstances of the case, is guilty of wrongful confinement, and that he is not protected by s. 61, Cr. P. C., 6 W. R. (Cr.) 88. It is no defence to a charge under this section that the defendant acted *bona fide*, and without malice, and in the belief that the circumstances justified his act. 13 B. 376. Police officers naturally think the law empowers them to detain any man they have arrested for twenty-four hours. This idea is absolutely unfounded. He has to account for every hour of detention and the law is imperative that under no circumstances shall the period of unauthorised detention exceed twenty-four hours, 7 W. R. (Cr.) 3; U. B. R. (1892-1896) II. 221. A mistaken exercise of power will not in all cases necessarily expose the Policeman to the penalty provided for in s. 342. Thus when an injured party went to the Police-station to lodge information and the Constable

entertaining some reasonable suspicion, detained him while he consulted his superior officer, it was held no criminal offence had been committed though the Constable might be liable in an action for false imprisonment, 24 W. R. (Cr.) 51. See 14 Bur. L. R. 258; *Griſſin v. Coleman*, 4 H. & N. 265=28 L. J. (Ex.) 134; all cases of arrest and detention are outside the section. 10 B. 506; 30 M. 179=16 M. L. J. 530=2 M. L. T. 28=5 Cr. L. J. 102. Authority to arrest implies authority to detain. *Ratanlal* 220. If the arrest and detention are illegal, presence or absence of malice becomes immaterial, 9 B. H. C. R. 346.

A person who puts in motion a ministerial officer who confines another will be guilty or not of the wrongful confinement, according as the confinement was his act, or that of the officer. If he states his case to the officer, who thereupon arrests the complainant, this may be a wrongful confinement by the officer, but will not be such by the informant, even though the latter signs the charge-sheet *Gringham v. Willey*, 4 H. & N. 296=28 L. J. (Ex.) 243. If the Police officer absolutely refuses to take the person into custody, unless the informant desires him to do so, then the informant will be guilty of the wrongful confinement, if any such there is. But when the person states his case to a judicial officer who, thereupon, acting on his own judgment, commits the accused to prison, the informant may be guilty of a malicious charge under s. 211, but not of wrongful confinement. (*Austin v. Dowling*, L. R., 5 C. P. 534.) Where a Village Magistrate and *Kurum* officially ordered certain persons who had resisted the detention of animals caught trespassing to be arrested, they and the constables who obeyed them were held to have been rightly convicted of wrongful confinement. 5 M. H. C. R. Appx. 24; 13 K. L. R. 332=1 Cr. L. J. 146; 4 L. B. R. 253=8 Cr. L. J. 68.

A British subject, or a person domiciled in a British colony, who, while acting as an agent of the foreign state, commits a wrongful act, which is punishable under s. 342, 19 B. 72, 12 B. 377.

V. CRIMINAL FORCE AND ASSAULT.

165. Criminal Force and Assault.—Force is defined with almost metaphysical subtlety by s. 349. Criminal force is defined by s. 350 as being (1) the intentional use of force to any person, (2) without that person's consent, (3) in order to the committing of any offence, or (4) with the intention to cause, or with a knowledge that he will be likely to cause, by use of such force, injury, fear, or annoyance to the person to whom the force is used. The definition while excluding anything the doer does by means of another person is wide enough to include force of almost every description of which a person is the ultimate object, 1889 P. R. No. 4; see *Ross v. Kempthorne* [1910] 27 T. L. R. 132.

(1) The word *intentional* excludes all involuntary, accidental, or merely negligent acts. An attendant at a bath, who, from pure carelessness, turned on the wrong tap, and thereby scalded the person in the bath (s. 350, *Illus. h*), would be liable to heavy damages, but would not have committed the offence of using criminal force.

(2) Consent in this, as in all other sections of the Code, must be taken as defined by s. 90, which has already been discussed (*ante*, ch. III, § 70, at p. 195). There is a difference between doing an act without the consent of a person, and against his will. The latter implies mental opposition to an act which is anticipated before it takes place. If a man suddenly receives an unexpected blow, he is struck without his consent, but not against his will, which he has no opportunity of exercising. Where it is an element of an offence that the act should have been done without the consent of the person affected by it, some evidence must be offered that the act was done to him against his will or without his consent. *R. v. Fletcher*, L. R., 1 C. C. 39 = 35 L. J. (M. C.) 130. In the majority of cases this will be inferred from the character of the act.

(3) Where the force used to a person is an essential element in the offence intended to be committed, if the latter offence is only an offence by reason of the want of

consent, the whole charge will fail, unless want of consent is proved. For instance, under s. 354, there can be no intention to outrage, nor probability of outraging, the modesty of a woman who consents to the act. Such consent, therefore, equally negatives the criminal force under s. 350, and the crime supposed to be intended under s. 354. Force is also an element in the crime of adultery; but there the completed act is an offence, independently of the force used. The consent of the woman would be an answer to an indictment for criminal force, but not to a charge of adultery (s. 91).

(4) Where the use of force is not a step to the commission of another offence, mere want of consent is not enough. The act must be intended to cause injury, fear, or annoyance to the person to whom the force is used. Otherwise, a friendly squeeze of the hand, or slap upon the back would be criminal. Such an act, if done by a Pariah to a Brahman, with an intention to produce ceremonial pollution on the latter, probably would come within the section. As Baron Parke said: "The act must be of an adverse nature. A touch, in order to draw the plaintiff's attention, or in pushing through a crowd in the ordinary manner, is not sufficient." *Rawlings v. Till*, 3 M. & W. 28; *Coward v. Baddeley*, 4 H. & N. 481=28 L. J. (Ex.) 260. This will make a considerable difference between the law of India and that of England as to indecent assaults. By English law, (21 & 25 Vict., c. 100, s. 52) an indecent assault on a female is a distinct offence. Any touching without consent is an assault, and, by a later statute, (13 & 14 Vict., c. 45, s. 2) no consent, if given by a young person under the age of thirteen, is any answer to the charge. Under Indian law, no consent given by a person under twelve years of age is of any avail (s. 90); and no doubt the principle laid down in *R. v. Lock*, L. R., 2 C. C. R. 10, would also be applied, that where children had submitted to indecent treatment, being ignorant of the character of the act done, this could not be considered a consent. On the other hand, many children under the age of twelve are perfectly aware of the nature of such acts, and willing to submit to them. In such a

case, although this willingness could not supply the element of consent, it would negative the idea that such an act would cause either fear or annoyance. In some cases it might undoubtedly cause physical injury. It would also negative the possibility of the act intended being a crime under s. 351. Apparently, then, it would not be an offence at all, unless the prisoner were actually trying to have sexual intercourse with a girl under twelve years of age. In that case, his attempt, if successful, would be rape under s. 375, and therefore, if unsuccessful, would be punishable under s. 511. Similarly, there is no section of the Code which makes it an offence for one male to commit acts of more indecency with another male, as in England under 48 & 49 Vict., c. 69, s. 11. Such an act, if it amounted either to attempting or abetting an offence under s. 377, would be criminally punishable. But otherwise, if consented to with full knowledge by the other party, it would be no offence at all, and the infancy of the consenting party would make no difference.

An assault is a threat or using criminal force to another, accompanied by a real or apparent capacity to carry out the threat at once (s. 351). A mere menace of a future injury is not an assault; but words of menace may give such a character to the gestures or preparations of the speaker, as to show an intention to use immediate violence. Conversely, the words may negative such an immediate intention, and may reduce it to a mere threat of future or contingent harm. (See Expl., s. 351), 1 B. H. C. R. 205; 30 C. 97, but throwing a bottle among the inmates of a house with intent to hurt them or frighten them would certainly be an assault, 1 L. B. R. 259; 3 L. B. R. 194=4 Cr. L. J. 201. Where the finding was, when a Constable was assaulted the accused surrounded him in a threatening manner this was held insufficient to sustain a conviction for assault, 8 M. L. T. 118=11 Cr. L. J. 483=7 Ind. Ca. 416. But raising a *lathi* when the accused's act of trespass was resisted was held enough to constitute an assault, 12 A. L. J. 154. The essence of the offence is the effect reasonably produced upon the mind of the person

threatened. It is not an assault to threaten another with violence, which obviously cannot be carried out, as by brandishing a stick at a distance. On the other hand, it is not necessary to show that the defendant had any intention of carrying out his threat, or even, apparently, that he had the means of carrying it out, provided the person threatened might fairly have supposed that he had the means. In one case, *Paiko, B.*, said: "My idea is that it is an assault to present a pistol at all, whether loaded or unloaded. If you threw the powder out of the pan, or took the percussion cap off, and said to the party, 'This is an empty pistol, then that would be no assault; for there the party must see that it was not possible that he should be injured. But if a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent.'" *R. v. St. George*, 9 C. & P. 483, at 490. Other judges have held that presenting an unloaded pistol was not an assault; *Blake v. Barnard*, 9 C. & P. 626; *R. v. James*, 1 C. & K. 530; but, whatever the English law may be, Baron Parke's ruling seems in direct accordance with the language of s. 351. Suppose a person begins to unloose the muzzle of a ferocious dog (*Illus. b*), and terrifies a woman or a child into a fit; would it be any answer that the muzzle was locked, and that the defendant had not got the key, or had got the wrong key, or that the lock was rusty and would not answer to its key?

The punishment for assault or criminal force varies by ss. 352 and 358, according as the offence is, or is not, committed, under the influence of grave and sudden provocation. This is defined in the same manner as in culpable homicide, and was considered under that head (*ante* § 146.) Various cases in which assault and criminal violence assume aggravated forms are provided for in ss. 351—357. The only one of these which requires special notice, *viz.*, s. 351, has been already discussed. Where a person is charged with an attempt to commit a rape, but the Court is not satisfied that the accused was determined to gratify his passions at all events and in

spite of all resistance, he should be convicted under that section, and not under s. 511. 5 B. 403. See 1910 P. W. R. 42=11 Cr. L. J. 611=8 Ind. Ca. 257, where on the facts the Court held an attempt to commit rape would be the appropriate conviction; but where the evidence proved that the accused took off a girl's clothes, threw her on to the ground and then sat down beside her, his conduct was held to amount to an offence under s. 354 and not to an attempt at rape, 1912 P. W. R. (Cr.) 16=1912 P. L. R. 116=13 Cr. L. J. 469=15 Ind. Ca. 309. An assault is also included very often in a charge of the graver offence of criminal intimidation under s. 503, 27 C. 532; 12 Cr. L. J. 242=10 Ind. Ca. 771.

The fact that a result, unforeseen and incapable of being foreseen, has followed upon an assault or upon the use of criminal force, does not alter its character or the punishment due to it. For instance, where the accused gave the deceased a push, which caused him to fall, and in the fall he broke his toe, and subsequently died of *tetanus*, it was held that no offence, but that of criminal force had been committed, 1 M. 224. Again public servants are given special protection so long as they are acting as agents of law, (1893—1900) L. B. R. 192; but they forfeit such special protection as is afforded by the heavier sentence in ss. 333, 353, etc., if they are not at the time acting in strict accordance with their legal duty, 28 A. 431=1906 A. W. N. 93=3 Cr. L. J. 363=3 A. L. J. 327; See 17 M. L. J. 323=6 Cr. L. J. 105; 12 Cr. L. J. 112=9 Ind. Ca. 669, and other rulings collected together in Part I under s. 353. The expression '*in the discharge of his duty as such public servant*' means duty imposed by law and will not cover acts done in good faith under colour of his office. Thus when a Tahsildar deputed his peon by a written order to procure camels for a settlement-sahib and the peon was assaulted when he attempted to seize the camel, it was held there was no law that imposed on revenue-officials a duty to seize camels, and hence a conviction under s. 353 was unsustainable, 14 Cr. L. J. 512=20 Ind. Ca. 932. A result to the contrary seems to have been arrived at in 1913 P. L. R.

183=14 Cr. L.J. 141=18 Ind. Ca. 893, but the decision can be supported only if any local law in the Panjab authorised seizure of camels for transport.

PART VI. KIDNAPPING, ABDUCTION, SLAVERY AND FORCED LABOUR

166. Kidnapping.—In order to make out the offence of kidnapping from lawful guardianship under s. 361, it is necessary to show (1) that a minor of either sex, under fourteen years of age, if a male, or under sixteen, if a female, or of unsound mind, (2) who was at the time in the keeping of a lawful guardian, (3) has been taken or enticed out of such keeping, (4) without the consent of such guardian.

(1) The age or mental incapacity of the person taken is a matter of fact, as to which the accused may either have no opinion, or may have an erroneous opinion. It was decided in *R. v. Prince*, L.R. 2 C. C. 154 which has already been fully discussed, in Ch. III, § 50, at p. 130, that even a *bonâ fide* belief, reasonably entertained, that a girl was over sixteen, was no defence (see also *R. v. Oliver*, 10 Cox, 402; *R. v. Mycock*, 12 Cox, 28; *Booth* 12 Cox, 231). The decision was given upon the English statute, 24 & 25 Vict., c. 100, s. 55, which is substantially the same as s. 361, except that it contains the word “unlawfully,”—“Whoever shall unlawfully take,” etc. This, as Bramwell, B, said (p. 173), merely means, Whoever shall take without lawful cause. The word “unlawfully” is not found in s. 361, as every definition of an offence in the Code is subject to the Chapter of General Exceptions. I doubt, however, whether the same decision would be given if a man took a woman above sixteen, where the illegality consisted in her being of unsound mind, if it could be shown that he did not know, and had no reason to suppose, that she had not the ordinary mental capacity. The judges who affirmed the conviction in *Prince’s* case, considered that the taking of a girl in the possession of another, against his will, was so obviously wrong that the person who did the act must suffer the consequences, if the girl turned out to be

younger than he supposed. But sanity is the normal state of human beings, and the taking of a woman of mature years, who is not married, and who consents to being taken, is not wrong in any legal sense of the word, and violates the rights of nobody. Under s. 497, it is not an offence to have intercourse with a married woman, unless the accused knows, or has reason to believe, that she is married. *A fortiori*, one would imagine that the offence of taking away a woman of unsound mind would involve a knowledge or reasonable suspicion that her mind was unsound.

(2) The person taken must have a *lawful* guardian, and at the time of the alleged offence must be in the keeping of that guardian. The offence cannot be committed if the minor is not in the custody of a lawful guardian whatever the intention or belief of the taker may be, 1880 P. R. No. 7; 1887 P. R. No. 27. The Explanation states that the words "lawful guardian" include any person lawfully entrusted with the care or custody of such minor or other person. These terms would include not only the parents or relations in whose house the minor lives and is brought up, but any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right—for instance, the keeper of a school, or the master or mistress in whose service the child is placed. Such *de facto* guardianship is sufficient to sustain a prosecution under s. 361 and as against a stranger the *de facto* guardian is also entitled to apply for restoration under s. 491, Cr. P. C. [1911] 1 M. W. N. 36=8 M. L. T. 300. It would also cover those cases which frequently lead to litigation, where a child has been taken under the care and protection of persons who had no legal right to it, when the parents have been unable or unwilling to provide for it. In such cases it was always the practice of the Chancery Courts, and, since the amalgamation of the two jurisdictions, it is the practice of the Common Law Courts, even upon a *habeas corpus*, to consider solely what is for the interest of the child, and to refuse to give it up to the parent, even though he can be charged with no misconduct, if it is for the benefit of the

child that it should remain where it is, *R. v. Gynghall* [1893] 2 Q. B. 232. The same rule has been lately adopted by the Bombay High Court, and appears to be in accordance with the *Guardian and Wards Act*, VIII of 1890, ss. 7, 12, 17; 16 B. 307. There can be no doubt that a person who had come to occupy such a position towards a child would be considered its lawful guardian under s. 361. So the husband of a girl of fifteen is her natural guardian; 17 C. 298; 1906 P. W. R. (Cr.) 14=4 Cr. L. J. 361, and under the English stat. 4 & 5 Philip and Mary, c. 8, s. 3, the father of an illegitimate child was held to be a person who had by lawful ways or means the keeping of the child. 1 *Hawk*, P. C. 128; 1 *East*, P. C. 457. According to English law, the relationship of such a father to his natural child is only recognized for the purpose of making an order upon him for its support during infancy, under the *Bastardy Act*. Under Hindu law, the relationship is recognized, and imposes upon the father distinct obligations for its maintenance. Mayne, *Hindu Law*, 8th Edn., §§ 211—217 & § 450. In England the exact extent of the rights of the mother of an illegitimate child appears to be unsettled. See *per* Lord Herschell, *Barnard v. Hugh*, [1891] A. C., at p. 398; *Nash* 10 Q. B. D. 454. As regards European parents in India, see s. 17 of the *Guardian and Wards Act*. There seems to be no doubt, however, that she is its natural and proper guardian during the period of nurture, and that a person to whom she entrusted the child on her death-bed would be its lawful guardian within the Explanation in s. 361. Garth, C.J., said: "We think that the somewhat liberal explanation of the words 'lawful guardian' under s. 361 is intended to obviate the difficulty which would otherwise arise, if the prosecution were required to prove strictly, in cases of this kind, that the person from whose care or custody a minor had been ab- . . . strictly within the meaning . . . the legal acceptance of that v . . . 1 Hyde 99. A *de facto* guardian of a minor whose guardianship is not against the wishes of the *de jure* guardian is a lawful guardian within the meaning of s. 361, 12 Cr. L. J. 239=10 Ind. Ca. 281. In 1911 P. R. No. 7=1911

P. L. R. 154=1911 P. W. R. 31=12 Cr. L. J. 211=10 Ind. Ca. 97, the husband sold his minor wife to a barber, and, while she was living in the latter's house, a Police Sub-inspector took her away, and it was held the barber was the *lawful* guardian of the girl for the purpose of s. 361 and to hold otherwise would be to deny the protection of law to the girl altogether. The court at the same time held that this case was quite different from the one in 2 N. W. P. H. C. R. 286 and the decision would have been different if the barber himself had obtained possession by an offence under s. 361. In this last case, an orphan girl, under fourteen, attached herself first to one person and then to another, and finally became betrothed to the son of the latter, from whom she was enticed away by the prisoner, it was held that he had committed no offence, as the person from whom he had taken the girl was in no sense her guardian, or lawfully entrusted with her care.

Neither under English nor under Hindu law can a mother remove her child from the custody of its father, who is its lawful guardian, unless under such special circumstances as might render such a step necessary for the safety of the child. *R. v. Greenhill*, 4 Ad. & E. 624; 8 C. 969; 35 C. 381. Under Muhammedan law, the mother is entitled, even as against the father, to the custody of her sons up to seven years, and of her daughters up to puberty, according to the *Sunni* School of law, and up to seven years, according to the *Shiah* School. MacN. M. L. 267—269, 2 Hyde 63; 2 W. R. (Civ.) 76; 2 A. 71; 8 A. 322; 11 C. 649; 1864 W. R. (Civ.) 131; 11 W. R. (Civ.) 297; 5 B. L. R. 557; 13 W. R. (Civ.) 454; 20 W. R. (Civ.) 411. [This right of custody of the person does not, *per se*, confer the right of a guardian over the property of the child. 29 C. 473.] And so if the father takes away from the mother, he may be liable under s. 361. Even a divorced wife is entitled to the custody of her children 6 Bom. L. R. 536, 12 Bom. L. R. 891. A husband becomes the guardian of his wife only after she attains puberty, 32 C. 444=3 Cr. L. J. 328; 5 B. L. R. 557; 13 B. L. R. 160; 11 C. 649; 5 N.-W. P. H. C. R. 196; until then he is not obliged even to maintain her, 24

W.R.(Cr.) 44. But a *bona fide* belief that the husband is entitled to the lawful custody of his wife may save his act under s. 361; it was so held in 1864 **W. R. (Cr.) 12** where the accused's husband was a non-Moslem. Where a Muhammedan married girl under sixteen who had attained puberty was taken away from her mother's house, her father being dead, the plea that she had become *sui juris* and there was therefore no kidnapping from any lawful guardianship was over-ruled, her mother being regarded as her lawful guardian within the meaning of s. 361, 1905 P. R. No. 60=1905 P. L. R. 74=3 Cr. L. J. 296.

The minor whether married or unmarried (1879 P. R. No. 12) must be, at the time of the taking, in the keeping of its guardian. It need not be in the physical possession of the guardian, but it must be under a continuous control, which is for the first time terminated by the act complained of. If a girl goes out into the street, or into a field by herself, with the intention of returning, or goes on a visit, 4 **W. R. (Cr.) 7**, 3 **W. R. (Cr.) 15**; 1 **Sind. LR. 104**=8 **Cr. L. J. 361**; 24 **M. 284**, either with or without the knowledge of the guardian, she is still in the legal possession of her parent.—*Per Brett, J.*, in *R. v. Prince*, **L.R.**, 2 **C. C.R.** at 163; *R. v. Booth*, 12 **Cox. 231**; *R. v. Mycock*, 12 **Cox. 28**; 7 **W. R. (Cr.) 62** (98); 6 **Cr. L. J. 30**. And when the accused meeting such a girl induced her to go with him and get married and after half an hour's absence the girl returned to her father who knew nothing of what had happened, the offence of kidnapping was held to have been committed, *R. v. Baillie*, 8 **Cox. 238**. It is a question of fact in each case whether or no there has been a taking or enticing out of the keeping of the lawful guardian, 27 **C. 1041** at 1050, 1051, 32 **C. 444**; 1907 **U. B. R. (P. C.) 1**; 6 **Cr. L. J. 30**. On the other hand, where a girl ran away from her home from ill-treatment, and met the prisoner, with whom she made an engagement, duly registered before the magistrate, to serve as a cooly, a conviction under s. 361 was set aside. *Glover, J.*, said: "Was the girl then under her father's guardianship, when she fell in with the prisoner? I think not; she had volun-

larly abandoned her home, and was running away. She was fourteen years of age, and not therefore of such tender age as to lead to the supposition that she had strayed from home, and was to all appearance a free agent. She, when taken before the magistrate, asserted that her parents were dead, and that she was going with her mother-in-law to Sylhet." 4 W. R. (Cr.) 6. Similarly where she was driven from her parental roof she can no longer be said to be in the keeping of her father. [1912] M. W. N. 538=13 Cr. L. J. 598=16 Ind. Ca. 166. And so a conviction was held bad, where the indictment charged that a girl was enticed from the possession of her mother, the fact being that her mother refused to allow the daughter to live with her, but sent her to reside with her grandmother, under whose care she supposed the girl to be. *R. v. Burrell, L. & C. 354=32 L. J. (M. C.) 54*. Possibly, under the Code, the grandmother might have been alleged to be the lawful guardian. Where the accused met a young married girl at a prostitute's place and seduced her, it was held his having taken advantage of the opportunity would not amount to taking or enticing within the meaning of s 361 2 C. W. N. 81. If a minor is in service, away from her own home, the charge should state that she was taken away from the lawful charge of her employer, not of her parents. *R. v. Henkers, 16 Cox. 257; R. v. Miller, 13 Cox. 179*. In a Bombay case, a girl under sixteen on her way to a vegetable market in search of work was accosted by a woman who took her to her own house and kept her till the evening, and the accused took her away to a solitary bungalow and detained her for two days and nights. On its being argued that the girl was no longer in '*the keeping of the lawful guardian*' when she was so taken, the judges say, "The legislature has advisedly preferred this phrase to the word *possession* which frequently occurs in the Code in connection with inanimate objects. The word keeping, we think, connotes the fact that it is compatible with independence of action and movement in the object kept. It implies neither prehension nor detention, but rather maintenance, protection and control, manifested not by continual action but as available

on necessity arising. And this relation between the minor and the guardian is, we think, certainly not dissolved so long as the minor can, at will, take advantage of it and place herself within the sphere of its operation. 6 Bom. L. R. 785=1 Cr. L. J. 931 *followed* in 1 Sind. L. R. 104=8 Cr. L. J. 361; 14 Cr. L. J. 439=20 Ind. Ca. 599; 6 Sind L. R. 71=13 Cr. L. J. 736=16 Ind. Ca. 768.

It is a question of fact in each case whether or not the person from whom one was alleged to be kidnapped was or was not lawfully entrusted with the care or custody, 13 C. W. N. 754=11 Cr. L. J. 9=4 Ind. Ca. 543.

It is a question of fact when the keeping of the lawful guardian is ended. As soon as it is ended by the wrongful act of one or more persons, the offence is completed, and those who take or entice the child away have committed the offence created by s. 361. No further dealing with the person already kidnapped, by one who was not associated in the original offence can constitute a new act of kidnapping, as there is no longer any keeping by the guardian which is violated. In this sense the question which has been much discussed in India, whether kidnapping is a single or a continuing offence, seems to be immaterial. A person who has kidnapped continues to be a kidnapper, and to be punishable as such, till he has been convicted. The child who has been kidnapped cannot be kidnapped again till it has again got into the keeping of someone who can be considered its lawful guardian. 18 A. 350; 19 A. 109; 26 A. 197=1 Cr. L. J. 561; 27 C. 1041=4 C. W. N. 645; see also 2 C. W. N. 81; 1904 P. R. Cr. 13=1904 P. L. R. 410=1 Cr. L. J. 949; 15 O. C. 351=14 Cr. L. J. 93=18 Ind. Ca. 653; 26 M. 454; 7 Sind. L. R. 17=14 Cr. L. J. 439=20 Ind. Ca. 599; 1 W. R. (Cr.) 39; 5 E. 338; 19 E. 105; 6 C. 307; 1894 P. R. No. 6 & 8; 1911 P. L. R. 56=12 Cr. L. J. 94=9 Ind. Ca. 511. The offence of kidnapping from British India, created by s. 300, consists in conveying any person beyond the limits of British India without the consent of that person or of some person legally authorised to consent on his behalf. That offence is a

continuing offence and is not completed till the limits of British India have been passed. Any succession of persons may be guilty of that act, so long as the absence of consent exists. 1 M. 173 in which this was laid down, does not appear to have been inconsistent with the rulings under s. 361, though the judges who decided it seem to have thought it was.

(1) In order to constitute a taking or enticing under this section, the consent of the minor is wholly immaterial, neither force nor fraud are required. 2 W. R. (Cr.) 5 & 61; 7 W. R. (Cr.) 36 & 62 [98] 16 W. R. (Cr.) 42; *R. v. Bellis*, 62 L. J. (M. C.) 155; *R. v. Kipps*, 4 Cox. 167. It is not necessary to show trespass or use of violence other than the act of taking, *Fraser*, 8 Cox. 446; 3 W. R. (Cr.) 15. Where a female minor met a person in the street and went away voluntarily with that person it was held she was as much in the possession of her legal guardian when she was walking in the street unless she had given up the intention of returning home, as if she had actually been in her guardian's house when taken off, 1907 U. B. R. (P. C.) 1, but to sustain a conviction, there must be proof of taking, 10 W. R. (Cr.) 33; 16 W. R. (Cr.) 42. It is not necessary that there should be any intention to make an unlawful use of the minor. The offence consists in the violation of the rights of the guardian. Convictions have been maintained where a man carried off his betrothed wife, after the marriage had been broken off by her father, 4 W. R. (Cr.) 7; 3 W. R. (Cr.) 9, where a Hindu wife carried off her daughter to be married, without the knowledge or consent of her husband, 8 C. 969; 1878 P. R. No. 8, where a paternal relation took away by fraud and force a minor girl from the custody of a person to whom the mother had entrusted her child by her will conferring upon him also the right to get her married, *Ratanlal* 820, and where a father carried away his daughter from her husband, 17 C. 293, 1906 P. W. R. (Cr.) 14. But if a mother *bona fide* takes away her own children from the guardianship of their father, her good faith and her relationship to the children, especially if they be illegitimate, would take her act out of s. 361, *Weir* l. 348. It was so held in

18 C. W. N. 484=15 Cr. L. J. 72=22 Ind. Ca. 424, where a decree *nisi* in an *ex parte* divorce suit instituted by the husband having adjudged the custody of a child to the father, the father obtained possession of the child without the assistance of the Court and before the decree had been made absolute, the wife removed the child from the father's custody. The exception to s. 331 may protect a mother taking away her child from a guardian or person appointed by the Court under the *Guardian and Wards Act*, VIII of 1890, but the exception would not protect any one other than the father abetting her in the act, see *R. v. Dugid*, 70 J. P. 294. Motive has nothing to do with this offence though it may affect the *quantum* of punishment, nor can the consent of the guardian given after the commission of the offence render innocent the original taking. If a minor is taken away from her temporary guardian with his consent improperly given the result would be the fraud of the temporary guardian would revive the right to possession of the natural guardian and the law will deem the taking to have been out of the keeping of the lawful guardian 31 A. 443=6A. L. J. 632=10 Cr. L. J. 295=3 Ind. Ca. 480. If the consent of the parent has been induced by false and fraudulent misrepresentations, the act of taking has been held penal by English law, *R. v. Hopkins*, Car. & M. 254 followed in 15 Cr. L. J. 24=22 Ind. Ca. 168. It is not necessary that the prisoner should be present when the minor quits its home with the intention of abandoning it; *R. v. Robb*, 4 F. & F. 59; *Kipps*, 4 Cox. 167, *Meadows*, 1 C. & K. 399; but the influence of the prisoner such as the common blandishments of a lover, *R. v. Twistleton*, 1 Lev. 257, must instigate, or co-operate with, the inclination of the minor at the time the final step is taken, for the purpose of causing it to be taken. Where the defendant went in the night to the house of the girl's father, and placed a ladder against the window, by which she descended and eloped with him, this was held to be a taking of her out of the possession of her father, though she had herself proposed the plan. *R. v. Robins*, 1 C. & K. 456. If the suggestion to go away came from the girl only and the accused

took merely the passive part of yielding to such suggestion, he may not be liable, *Jarvis*, 20 Cox. 249, 1 L. B. R. 205, though under s 497 *supra* it was held in 2 M. H. C. R. 331, that a man is liable if he goes away with another's wife though the request and solicitation came wholly from the wife and he passively yielded to it. When a female minor elopes out of her parents' house and meets the accused at a place appointed, the accused has been held to be an active participator in the minor's leaving the house, 1907 U. B. R. (P. C.), 11=14 Bur. L. R. 262=7 Cr. L. J. 210, 1909 U. B. R., (P. C.) 27=11 Cr. L. J. 81=4 Ind. Ca. 901. But care must be taken in using English decisions based upon the statutory law in England. Thus in *Kaufman*, 63 J. P. 189, there was evidence to prove that previously to the taking the prisoner had taken the girl to various places of entertainment and had connection with her. But there was no proof that on this particular occasion there was any inducement on his part which conduced to her leaving her home. But where the girl left her home alone, by a preconcerted arrangement with the prisoner, and went to a place appointed, where she was met by him, and they then went off together without the intention of returning, he was held liable since up to the moment of her meeting with the defendant she had not absolutely renounced her father's protection. *R v Munkletow*, Dears C. C. 159=22 L. J. (M. C.) 115=6 Cox. 133. And it makes no difference that the girl has left her home before the prisoner wished her to do so, if, finding that she has left, he avails himself of her position to induce her to continue away from her lawful custody, provided she left her home under the influence of his previous persuasion. If, however, the girl leaves her home, without any persuasion or inducement held out to her by the prisoner, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to restore her to her home, yet his not doing so is no infringement of the law, for the statute does not say he shall restore her, but only that he shall not take her away. *R v Olifier*, 10 Cox. 402, 10 W. R. (Cr.) 33.

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Where there has been a taking within the section, it makes no difference that it was, and from the first was intended to be, only temporary. In a case under the English statute, it appeared that the prisoner asked the girl to go out with him, to which she consented, and she remained away from her home with him for three days, visiting places of public entertainment by day and sleeping together by night. They then separated, he telling her to go home. The father of the girl swore that she went away without his knowledge and against his will. The girl went of her own wish, and the jury found that the prisoner had no intention of keeping her permanently away from her home. The conviction was affirmed. The Court said:

"The statute was passed for the protection of parental rights. It is perfectly clear law that any disposition of the girl, or any consent of forwardness on her part, are immaterial on the question of the prisoner's liability under this section. The difficulty arises on the point whether the prisoner has taken her out of the possession of her father within the meaning of the statute. The prisoner took the girl from her father, from under his roof and away from his control, for three days and nights, and cohabited with her during that time, and placed her in a condition quite inconsistent with her being at the time in her father's possession. We think that in these facts there is enough to justify the jury in finding that he took her from the possession of her father, even though he intended her to return to him. The offence under this enactment may be complete almost at the instant when the girl passes the threshold of her father's house, as where the facts show that the man who takes her away has an intention of keeping her permanently. We do not mean to say that a person would be liable to an indictment, if the absence of the girl whom he takes away is intended to be temporary only, and capable of being explained, and not inconsistent with her being under the parental control. All we say is that there is in the present case sufficient evidence for the jury to act upon. *R. v. Timmins*, 30 L. J. (M. C.) 15—Bell C. C. 275—S. Cox. 401; *R. v. Ellis* 8 Cox. 353, but see *R. v. H. Bert*, L. R. 1 C. C. R. 184.

(4) In the absence of evidence to the contrary, it will be assumed that the taking was against the guardian's consent. If the defendant relies upon her consent he must prove it, or facts from which it may be inferred. Where the girl's mother had encouraged her to a loose course of life, by permitting her to go out alone at nights, and dance at public-houses, Cockburn, C.J., ruled that

she could not be said to be taken away against the mother's will within the meaning of the statute. *R. v. Primelt*, 1 F. & F., 50. (This ruling was followed in 1912 U. B. R. 136=14 Cr. L. J. 109=18 Ind. Ca. 663, *distinguishing* 13 Eur. L. R. 30=6 Cr. L. J. 30; 11 Cr. L. J. 81; & 14 Eur. L. R. 336.) The fair inference from the facts was that the mother had renounced all moral control over her daughter, and left her to follow her own inclinations. A very important question has been raised with reference to a case where a mother placed her daughter, less than sixteen: . . . caused her own . . . s consent. This . . . Ph & M., cl. 8, s. 2, because the marriage was openly solemnized, *Hicks v. Gore*, 3 Mod., 84. East says: "It deserves good consideration before it is decided that an offender, acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute. For, then every schoolmistress might dispose in the same manner of the children committed to her care; though such delegation of the custody of a child for a particular purpose be no delegation of the power of disposing of her in marriage, but the governance of the child in that respect may still be said to rest with the parent," 1 East, P C 457. There can be no doubt that if a schoolmistress were to connive at the elopement of one of her pupils with a man he would be convicted under s. 361. She could have no authority to consent to such an act, and he could not have supposed that she had

As to the effect of ignorance of, or mistake as to, the above facts, in *Prince's* case, L. R., 2 C. C. R. at p. 175. Bramwell, B., said

"If the taker believed he had the father's consent, though wrongly, he would have no *mens rea*, so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In these cases he would not know he was doing the act forbidden by the statute—an act which, if he knew she was in possession and in care or charge of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not

know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause."

The latter branch of the above dictum was founded upon the ruling in *R. v. Hibbert*. L. R., 1 C. C. R. 184= 38 L. J. (M. C.) 61. There the prisoner met a girl in the street going to school, and induced her to go with him to a town some miles distant, where he seduced her. They returned together, and he left her where he met her. The girl then went to her home where she lived with her father and mother, having been absent some hours longer than would have been the case if she had not met the prisoner. He made no inquiry and did not know who the girl was, or whether she had a father or mother living or not, but he had no reason to believe, and did not believe, that she was a girl of the town. The decision in this case turned upon the absence of any circumstances to show that the prisoner had knowledge that he was taking the girl from the possession of those who lawfully had charge of her. In the absence of any finding of fact upon that point, the Court said that the conviction could not be supported.

In this case, and in the earlier case of *R. v. Green*, 3 F. & F. 274, which it followed, it did not appear that the prisoner believed or imagined that the girl was not under lawful guardianship, but only that he did not concern himself to have any opinion on the matter. If the same case occurred in India, the prisoner could certainly not protect himself under s. 79. In a very similar case, 3 B. 178, where, however, the girl was much younger, the conviction was affirmed. The Court was of opinion "that the fact of the accused not inquiring at the time of removing a child ten years of age from lawful guardianship, whether she had a guardian or not, is no excuse, for by not inquiring, the accused takes the risk on himself, and cannot escape the legal consequences. A child of such tender age is subject to guardianship, and no one is allowed to take away such child without permission of the Court. The objective fact of the child being in guardianship satisfies in this the req

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section of the Code." See also 3 W. R. (Cr.) 9; *Watkins & Major*, 44 L. J. (M. C.) 122; *Tinkler*, 1 F. & F. 113; *Fowler v. Paget*, 7 T. R. 509; *R v. Sleep*, 1 Cox. 472=30 L. J. (M. C.) 170 following *R. v. Cohen*, 1 Cox. 41. In this country, where every girl under sixteen, not being a prostitute, is under legal guardianship, it would seem that anyone charged with an offence under s. 361 must establish that he had good reason to believe, either that the minor was not under guardianship, or that he had secured the guardian's consent to her act. See 4 W. R. (Cr.) 6. The case in 34 A. 340=9 A. L. J. 307=13 Cr. L. J. 300=14 Ind. Ca. 764 would seem to be a curious one, but all the facts are not set out in the report. There, two minor girls left their home and were wandering about and ultimately found their way to the house of a prostitute who allowed them to stay there for two days. The prostitute was held liable under s. 366.

The offences defined by ss 360 and 361 are continuing offences, and may, therefore, be abetted as long as the process of taking the minor out of the keeping of her lawful guardian continues. 1 M 173. The offence under s. 361 is completed when the taking from lawful guardianship is completed. Once the taking is complete, during the period of detention out of guardianship, the offence is not a continuing one so as to render anyone liable for abetment, 27 C. 1041, 1904 P. R. No. 13; 1905 P. L. R. 410; 18 A. 350; 19 A. 109. But if there is a

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1903 P. R. N. 333=14 A. L. J. 1 Cr. L. J. 561=1903 A. W. N. 233. In the case of an offence under s. 360, it is a continuing one until the limits of British India are crossed. The offence of kidnapping, if committed with certain intents, is liable to heavier penalty as an aggravated offence, but it must be proved that the intention charged was present at the time of taking or abduction, 18 C. L. J. 573=15 Cr. L. J. 43=22 Ind. Ca. 187. A subject of an Independent State who commits the offence of kidnapping or abduction from British India is amenable to the British courts for that offence, and if it is committed with the

intention of murdering, or endangering the life of that person, he would be liable to the additional penalties of s. 364. If, however, the person so kidnapped or abducted was actually murdered beyond our territories, there could be no jurisdiction in respect of the homicide. 1 W. R. (Cr.) 39.

167. Abduction.—The offence as defined in s. 362, requires the element of force or fraud, which is absent from kidnapping, coupled with certain intent which alone renders abduction punishable. Abduction, *per se*, is not an offence under the Code, 6 B. L. R. 129=15 W. R. (Cr.) 4; 21 T. L. R. 148; 6 C. W. N. 208. Thus when a girl was removed from Cawnpore to Allahabad and there offered to a cooly Emigration Agent, Knox, J., held that abduction is an offence only when coupled with certain intents and it would be far-fetched to hold that there was knowledge she would be forced or seduced to illicit intercourse when she was offered to the Emigration Agent. A conviction under s. 366 was therefore quashed, 12 A. L. J. 91=15 Cr. L. J. 154=22 Ind. Ca. 730. The offence is against the person abducted, and it may be committed against a person of any age. The force or deceit specified in this section must operate upon the person who is abducted, not upon any other person, whose consent is necessary in order to get possession of such person. When no force or deceit is practised on the person abducted, a conviction cannot stand, 2 W. R. (Cr.) 7. It follows therefore that a married woman cannot abet her own abduction, 1883 P. R. No. 11, 1866 P. R. No. 40 (which overrules 1866 P. R. No. 17); 1871 P. R. No. 6; 1875 P. R. No. 14. The offence of abduction is said to be a continuing one. Thus in 12 A. L. J. 91 referred to above, Knox, J., ruled that the girl was being abducted not only when she was taken from Cawnpore but also when she was taken to the Agent's house at Allahabad. A prisoner was indicted under the English statute, 21 & 25 Vict., c. 100, s. 56, which renders it an offence "unlawfully," either by force or fraud, to take away a child." It appeared that the boy, being anxious to get away from school, arranged with the prisoner, that the latter should write to him as if he

were the boy's uncle, stating that he was coming to see him. The prisoner did so, and then called at the school, and by representing that he was the boy's uncle, obtained leave to take him away for the day. He took him away, but did not return him to school. It was held that the offence created by the statute had not been committed. No force or fraud had been exercised upon the boy, and the prisoner had merely assisted him in carrying out a fraud upon his master *R. v. Barrett*, 15 Cox. 658. If, however, such a fraud were practised upon any person who had the charge of another, and that other went with the fraudulent party, believing that he was what he represented himself to be, that would bring the case within either the English statute, or s. 362, I. P. C., though the person taken away exercised no independent volition in the matter. This was the case in 1907 A. W. N. 199=4 A. L. J. 482=6 Cr. L. J. 9, where the accused induced an orphan girl of seventeen to leave her home on the pretext he would either marry her himself or get her married, but did neither, and seduced her. The expression illicit intercourse would cover all cases of fornication and all manner of intercourse between persons who are not legally husband and wife.

In *R v Moon* [1910] 1 K. B. 818 at 820, it was held 'seduction' in its ordinary sense means the inducing of a girl to part with her virtue for the first time. But this is obviously not the meaning of the word as used in this section, 19 K. L. R. 111=10 Cr. L. J. 176; 10 Bur. L. R. 199—per Adamson, J.

Where a woman is either kidnapped or abducted, with intent that she may be compelled, or with the knowledge that it is likely she will be compelled, to marry any person against her will, or in order that she may be, or with the knowledge that it is likely that she will be, forced or seduced to illicit intercourse, the offender is punishable under s 366.

This section seems to apply to cases where, at the time of the abduction, the woman has no intention of marriage or illicit intercourse, but it is contemplated that

her marriage, or illicit intercourse with her, will be accomplished by force or seduction, brought to bear upon her afterwards. On the other hand, if before abduction the girl had already voluntarily surrendered her chastity and after abduction intends to co-habit of her own free will with her seducer, it will be no offence under s. 366, though if the girl happened to be below sixteen the kidnapper would be liable under s. 363, or if she had been married, under s. 498 for having taken her from her lawful guardianship or her husband; it would be no offence at all if she had no husband and is over sixteen, 1905 U. B. R. 17=2 Cr. L. J. 476 where (1897-1901) U. B. R. 329 & 1903 U. B. R., P. C. 15=10 Bur. L. R. 199 are *not followed*. See also 1 L. B. R. 297, 5 Bur. L. R. 285; 1905 P. R. No. 13; 1883 S. J. L. B. 202. *The intention to seduce* to illicit intercourse must be proved. In a criminal statute, such intention cannot be presumed, 1911 P. L. R. 193=1911 P. W. R. (Cr.) 12=12 Cr. L. J. 393=11 Ind. Ca. 577, 11 Bur. L. R. 326. The question of intention is a pure question of fact, 14 A. 25. Also, consent to illicit intercourse or marriage obtained after the act of kidnapping or abduction will not save the prisoner from liability under s. 366 if he had the requisite intention at the moment of taking, *Fulwood's case*, Cro. Car. 488=73 Eng. Rep. 1021. *Sicendon's case*, 5 St. Trials 450. Section 498 embraces all cases where the object of the taking, or enticing, is that the wife may have illicit intercourse with some other person, even though, as generally happens, she is quite aware of the purpose for which she is quitting her husband, and is an assenting party to it. Therefore, in 1 W. R. (Cr.) 45. where a procuress induced a married woman of twenty to leave her husband, and the facts showed that "she had made her deliberate choice, and was determined of her own free will to leave her husband, and become a prostitute in Calcutta," the Bengal High Court held that no conviction could be maintained under s. 366; but that there was quite sufficient evidence to convict the prisoner of enticing, under s. 498, "for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interfered."

Where the husband is the complainant in a charge preferred under s. 366, the Court is authorized, by s. 238 of the Cr. P. C., to convict of the minor offence under s. 498, if the facts show that the special intention required by s. 366 is wanting. His complaint under one section of the Code, in cases connected with marriage, is sufficient authority, under s. 199 of the Cr. P. C., to justify the Court in dealing with the case under an analogous section. 20 C. 483. The complaint required by Cr. P. C., s. 199, means a complaint as defined by s. 4, cl (h); 30 C. 910 (F. B.). But this is not the view accepted in *Allahabad*, 5 A. 233 in *Madras* 27 M. 61 = 1 Cr. L. J. 281 and in *Bombay*, 9 Bom. L. R. 148 = 5 Cr. L. J. 164. The fact that the husband as a witness deposed to facts in the trial on a charge under s. 366 would not give jurisdiction to convict under s. 498 as the deposition of the husband cannot be treated as a complaint, 14 Bom. L. R. 141 = 13 Cr. L. J. 287 = 14 Ind. Ca. 671. One cannot defeat the provisions of this section by first marrying the girl and then driving her to a life of prostitution so that the husband might live on the wages of her shame. If it is found that his original intention was to compel the woman to such a life the offence under s. 366 is complete in spite of the fact a valid marriage ceremony was gone through, 1881 P. R. No. 7; 1868 P. R. No. 23; 1833 S. J. L. B. 202.

As s. 366 is merely an aggravated form of the offence under s. 363, the same person cannot be convicted on the same facts upon charges framed under both sections, 7 W. R. (Cr.) 56.

Upon complaint on oath to a Presidency Magistrate or District Magistrate of the abduction or unlawful detention of a woman, or of a female child under the age of fourteen years, for any unlawful purpose, he may make, and enforce, an order for the restoration of the woman to her liberty, or of the child to her husband, parent, guardian, or other person having the lawful charge of such child. When an application was made under this section by the mother and husband of a Hindu girl, under fourteen, who had gone to, and been received in, a Mission House, and

where the application was resisted by the Lady Superintendent, on the ground that the girl was not married and was being really brought up to prostitution; on these allegations being disproved, it was held that the Magistrate had no power to act under s. 551, Cr. P. C. The detention was unlawful, as the consent of the minor was immaterial, but this was not sufficient unless it was also *for an unlawful purpose*, that is, for one which was unlawful in itself. It did not become unlawful merely because it was entertained in opposition to one who was really the guardian of the child, though not supposed to be such. **16 C. 487.** The High Court, however, while reversing the order, refused to remove the child from the persons to whom, by an irregular process, it had been properly restored.

Any person who wrongfully conceals or keeps in confinement a person whom he knows to have been kidnapped or abducted commits an offence under s. 368, and is punishable as if he had himself kidnapped or abducted the person, with the same intention, knowledge, or purpose with which he detains or conceals such person. That is, he may be punished under any one of ss. 363—367, or 369, according to the facts of the case. The mere keeping in a man's house of a girl whom he knows to have been kidnapped or abducted, is not an offence under this section, though it might be strong evidence of abetment of the principal offender. It is necessary to show that he has restrained her liberty of movement, or kept her out of view of those who might be in search of her. **5 N.-W. P. H. C. R. 133 & 189; 15 C. P. L. R. 185.** This section refers to those who assist the kidnappers, not to the kidnappers themselves. **6 W. R. (Cr.) 17.** It is not necessary to prove that the person confined was kidnapped by any particular person. **4 W. R. (Cr.) 3.** As regards *concealing*, occurring as it does in conjunction with the word *confine*, it refers to withdrawal from the observation of others by active concealment, as opposed to mere dissemination of false information. **1874 P. R. No. 10; 7 W. R. (Cr.) 56; 6 Bom. L. R. 785=1 Cr. L. J. 931.**

163. Slave dealing.—One of the intentions specified in s. 367 is that of subjecting the person kidnapped or abducted to slavery, or the danger of it. S. 370 renders penal isolated cases of dealing in slaves, either by way of procuring, disposing of, or receiving them, while s. 371 imposes an increased punishment upon those who habitually practise such offences. To purchase a slave in a foreign country is no offence under the Code and bringing into India of the person so purchased is also no offence unless the importation be as a slave. **1882 P. R. No. 26.** Again, purchasing a minor girl or selling her with intent that she should be married to the purchaser is no offence under this section as the girl is not dealt with as a slave, but only as an eligible bride, **1869 P. R. No. 19; 1882 P. R. No. 26; 1884 P. R. No. 20.**

A difficulty has been thought to arise under the latter section, inasmuch as they assume the possibility of a state of slavery still existing in India, notwithstanding what is called the *Abolition of Slavery Act, V* of 1843. This is clearly the case as regards some of the offences created by the section, though others, such as exporting, removing, selling, or disposing of a person as a slave might be completed in India by a person who sold another into slavery in Turkey or Arabia. In **3 N.-W. P. H. C. R. 146**, a Hindu girl was kidnapped and sold to a Muhammedan, who made her a Musulema, changed her name, and kept her for four years in menial service, giving her food and clothes but no wages, and not allowing her to leave the house. He was convicted under s. 370.

The Court said —“It is urged that to constitute a person a slave, not only must liberty of action be denied to him, but a right asserted to dispose of his life, his labour, and his property. It is true that a condition of absolute slavery would be so defined, but slavery is a condition which admits of degrees. A person is treated as a slave if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, or guardian, or a jailor.”

In a later case, **2 A. 723**, a person was convicted under this section for having sold a young girl to another with the intent that he should marry her, the other receiving

her with that intent. The conviction was reversed by the High Court. It was obvious that if the intention of both parties had been carried out the girl would have become a wife and not a slave. In the course of the case, however, some of the learned judges seemed to think that 3 N.-W. P. H. C. R. 146 had been wrongly decided, and appeared to doubt the possibility of such an offence being committed since Act V of 1843. It is a curious thing, however, that Act V of 1843 really did not profess to abolish slavery. What it did was to "declare and amend the law regarding the condition of slavery," and this it effected by picking out various results flowing from that condition, and providing that for the future the courts should not recognize or enforce them. Until the passing of the Penal Code it is difficult to say that slavery was illegal. Certainly the mere buying, selling, or keeping a person as a slave, was not punishable *per se*, though of course no defence could have been offered to an action or indictment for false imprisonment. But in any case, the fact that a person cannot be in law the slave of another, can be no conceivable reason why that other should not be punished for treating him as if he was a slave. Accordingly, in 7 M. 277, where both the above decisions were considered, a conviction under s. 370 was sustained, when the prisoner had first enticed away a young girl, and then sold her by a document which described her as a slave. The Court adopted the language of Oldfield, J., in 2 A. at 731.

"I apprehend that the sections of the Penal Code with which this reference deals, were enacted for the suppression of slavery, not only in its strict and proper sense, *viz.*, that condition whereby an absolute and unlimited power is given to the master over the life, fortune, and liberty of another, but in any modified form where an absolute power is asserted over the liberty of another." "To bring the act of the accused within the meaning of s. 370, there must be a selling or disposing of the girl as a slave; that is, a selling or disposal whereby one who claims to have a property in the person as a slave, transfers that property to another."

Offences under ss. 367, 370, and 371 committed by any subject of His Majesty or of an allied Prince, upon the high seas, or in Asia, or Africa, are punishable in India under the *Slave Trade Act*, 39 & 40., Vict c. 46. s. 1.

169. Forced Labour.—Section 374 creates an offence of a somewhat analogous character, that of unlawfully compelling any person to labour against the will of that person. The section is probably aimed at the abuses arising from the forced labour which the ryots were in former times compelled to render to the great landholders. The word “unlawfully” applies both to the person compelled and the means resorted to. It is not unlawful to compel a child, a scholar, or an apprentice to work, even by means of personal chastisement, when of a moderate nature (*ante*, Ch III., § 48, p 127). It is unlawful to compel a servant, or a person who is under a contract to labour, by means of personal violence, though it would be lawful to do so by moral compulsion, as threats of legal coercion. It would be unlawful to compel a person, who was not under an obligation by contract, to do work against his will, whatever the species of compulsion might be. I conceive, however, that the compulsion employed must be such as amounts in law to duress, and must at least be as great as would vitiate a contract, *e.g.* actual violence, or restraint, or illegal arrest, *Duke de Cadaval v. Collins*, 4 A. & E. 858, an unlawful detainer of goods, *Wakefield v. Newbon*, 6 Q. B. 276, a refusal to perform an act which the party employing the compulsion was legally bound to do. *Traherne v. Gardner*, 25 L. J. (Q. B.) 201=8 E. & B. 161. Mere threats of personal enmity, hostile influence, withdrawal of favour, and the like, would probably not be sufficient. This seems to have been the view taken by the majority of the High Court in Calcutta, in 19 C. 572 where the prisoner had been convicted under s. 374. There it appeared that under colour of debts asserted to be due to him from various persons, he had induced them to live in his house, where they were lodged, and fed, and compelled to work, and occasionally beaten when they did not work. A charge of unlawful detention under s. 314 was negatived, and apparently they could have left if they chose. The Court held that the mere fact that a person insists on another doing the work he has agreed to do is not unlawfully compelling him to labour, and that if he assaults the servant for not working to his satisfaction, this renders him punishable under s. 352, but does not

constitute an offence under s. 374. The distinction taken by the Court seems to have been this: if a person is compelled by violence to labour for another, that is an offence under s. 374; but if, having from other motives entered into a voluntary service, he is beaten to keep him up to his work, it being open to him to give it up whenever he likes, only the offence created by s. 352 has been committed. Thus where a forest-officer impressed some carts for his use under the executive orders of Government which had not the force of law, he was adjudged guilty of an offence under s. 374, 9 B. 558. Amends cannot be awarded in or under this section. 5 W. R. (Cr.) 1.

170. Dealing in Prostitution.—Sections 372 and 373 render it criminal to deal in minors under the age of sixteen years, with the intent that any such minor shall be employed or used for the purpose of prostitution, or for any unlawful or immoral purpose, or knowing it to be likely that such minor shall be so employed or used. The word unlawful has to be construed, *ejusdem generis* with the word 'immoral' with which it is coupled. **Ratanlal 440.** The purpose must be both unlawful and immoral, 1888 P. R. No. 3. The gist of the offence lies in the intention or knowledge without which the mere buying or selling or letting or obtaining possession of a minor is not *per se* penal, 1880 P. R. No. 27; 1900 A. W. N. 133=1 A.L.J. 559=1 Cr. L. J. 972. Thus to give a girl in adoption to a prostitute for the object of the adopted inheriting her property is not an offence. 26 B. 491, 11 M. 393; but if the intention is proved it makes no difference, the minor is not dedicated to a life of shame under the guise of a religious ceremony. 7 Bom. L. R. 562=2 Cr. L. J. 500. The section makes no difference between a married and an unmarried minor, 1878 P. R. No. 12. The fact, before the sale or purchase, etc., the minor was leading a grossly immoral life does not affect the guilt of the person concerned in the particular transaction. 8 Bom. L. R. 236=3 Cr. L. J. 334; 12 M. 273. The recent amendment of these sections has made it more risky for people who choose to pursue the vocation of trafficking in young

girls for immoral purposes. Explanation II added to s. 372 defines 'Illicit Intercourse' and the mischief of selling girls to brothel-keepers is also sought to be met. In spite of the elastic definition in Explanation II, it is doubtful whether there is anything in Hindu law which would stand in the way of a Brahmin, being liable under s. 373, who having one or more legal wives of his own caste, procures a minor of the Sadra caste for a concubine knowing full well that under Hindu law a valid marriage is not permitted. The mother or guardian of the girl would also be liable under s. 372. There can be no doubt the new amendment has been conceived in a liberal spirit for the protection of minors. It remains to be seen whether the interpreters of the section will use the amendment and Explanation II for the furtherance of immorality and unbridled licentious habits of the well-to-do classes. The right view has already been taken by Muthuswamy Iyer, J., in *Weir I. 373*, even before the amendment. Elaborate rescue-provisions have been made in the Code of Criminal Procedure by the introduction of ss. 552A—552D. The addition of the words '*at any age*' in ss. 372 and 373 will probably render obsolete the ruling in *Weir I. 364* and observations in *22 C. 164 at 172* and *12 M. 273*. Even before the amendment of the section, this view had been taken by Miller and Sundra Iyer, JJ., after an exhaustive examination of the authorities in *24 M. L. J. 211=13 M. L. 7. 131=14 Cr. L. J. 33=18 Ind. Ca. 257*. Commenting upon the words 'such minor' occurring in the section before the amendment, Miller, J., said "It seems to me at least doubtful whether an adequate content cannot be ascribed to the words 'such minor' in s. 372 or s. 373 by making them simply the equivalent of 'such person' or 'she'. The view that all that is necessary in the interest of morality is to leave the minor a virgin till sixteen years of age so that she may then make her choice between prostitution and a decent life seems to me to give too little weight to the probable effect of training and surroundings—and those who acquire possession of minors in order to prostitute them on their reaching the age of sixteen may be trusted to see that their training and surroundings during

constitute an offence under s. 374. The distinction taken by the Court seems to have been this: if a person is compelled by violence to labour for another, that is an offence under s. 374; but if, having from other motives entered into a voluntary service, he is beaten to keep him up to his work, it being open to him to give it up whenever he likes, only the offence created by s. 352 has been committed. Thus where a forest-officer impressed some carts for his use under the executive orders of Government which had not the force of law, he was adjudged guilty of an offence under s. 374, 9 B. 558. Amends cannot be awarded in or under this section 5 W. R. (Cr.) 1.

170. Dealing in Prostitution.—Sections 372 and 373 render it criminal to deal in minors under the age of sixteen years, with the intent that any such minor shall be employed or used for the purpose of prostitution, or for any unlawful or immoral purpose, or knowing it to be likely that such minor shall be so employed or used. The word unlawful has to be construed, *ejusdem generis* with the word 'immoral' with which it is coupled. **Ratanlal 440.** The purpose must be both unlawful and immoral, 1888 P. R. No. 3. The gist of the offence lies in the intention or knowledge without which the mere buying or selling or letting or obtaining possession of a minor is not *per se* penal, 1880 P. R. No. 27; 1900 A. W. N. 133=1 A.L.J. 559=1 Cr. L. J. 972. Thus to give a girl in adoption to a prostitute for the object of the adopted inheriting her property is not an offence. 26 B. 491, 11 M. 393; but if the intention is proved it makes no difference, the minor is not dedicated to a life of shame under the guise of a religious ceremony. 7 Bom. L. R. 562=2 Cr. L. J. 500. The section makes no difference between a married and an unmarried minor, 1878 P. R. No. 12. The fact, before the sale or purchase, etc., the minor was leading a grossly immoral life does not affect the guilt of the person concerned in the particular transaction. 8 Bom. L. R. 236=3 Cr. L. J. 334; 12 M. 273. The recent amendment of these sections has made it more risky for people who choose to pursue the vocation of trafficking in young

girls for immoral purposes. Explanation II added to s. 372 defines 'Illicit Intercourse' and the mischief of selling girls to brothel-keepers is also sought to be met. In spite of the elastic definition in Explanation II, it is doubtful whether there is anything in Hindu law which would stand in the way of a Brahmin, being liable under s. 373, who having one or more legal wives of his own caste, procures a minor of the Sadra caste for a concubine knowing full well that under Hindu law a valid marriage is not permitted. The mother or guardian of the girl would also be liable under s. 372. There can be no doubt the new amendment has been conceived in a liberal spirit for the protection of minors. It remains to be seen whether the interpreters of the section will use the amendment and Explanation II for the furtherance of immorality and unbridled licentious habits of the well-to-do classes. The right view has already been taken by Muthuswamy Iyer, J., in **Weir I. 373**, even before the amendment. Elaborate rescue-provisions have been made in the Code of Criminal Procedure by the introduction of ss. 552A—552D. The addition of the words '*at any age*' in ss. 372 and 373 will probably render obsolete the ruling in **Weir I. 364** and observations in **22 C. 164** at **172** and **12 M. 273**. Even before the amendment of the section, this view had been taken by Miller and Sundra Iyer, JJ., after an exhaustive examination of the authorities in **24 M. L. J. 211=13 M. L. 1. 131=14 Cr. L. J. 33=18 Ind. Ca. 257**. Commenting upon the words 'such minor' occurring in the section before the amendment, Miller, J., said "It seems to me at least doubtful whether an adequate content cannot be ascribed to the words 'such minor' in s. 372 or s. 373 by making them simply the equivalent of 'such person' or 'she'. The view that all that is necessary in the interest of morality is to leave the minor a virgin till sixteen years of age so that she may then make her choice between prostitution and a decent life seems to me to give too little weight to the probable effect of training and surroundings—and those who acquire possession of minors in order to prostitute them on their reaching the age of sixteen may be trusted to see that their training and surroundings during

minority are such as to assist the fulfilment of the intention." The Legislature has accepted the learned judge's suggestion and made the meaning of the section clearer by the recent amendment. S. 372 applies to the person who sells, lets to hire, or otherwise disposes of the minor; and s. 373 to the person who buys, hires, or otherwise obtains possession of, the minor. In the great majority of cases these offences will be committed in respect of girls, but they would equally apply to boys, who are intended for the gratification of unnatural lust. They would also apply in cases where no sexual object was in view, if the minor was intended to be trained up for any criminal career, as theft, burglary, murder, or the like. If the scene of "Oliver Twist" had been laid in India, Fagin might have been indicted under s. 373. The fact that the person who disposes of the minor commits an illegal act in so doing does not bring him within s. 372, if the minor is intended to be employed for an innocent purpose. Where the prisoners, by falsely representing that girls of whom they had obtained possession were Rajpoots, palmed them off as wives upon members of that caste, and obtained money for them as such, the prisoners committed the offence of cheating under s. 415, but were not punishable under s. 372. 7 W. R. (Cr.) 55; 2 A. 694. But where a married girl of the *Koli* caste was sought to be passed off for purposes of marriage as an unmarried girl of the *Soni* caste the accused were held liable under this section. 19 K. L. R. 111=10 Cr. L. J. 176. See also 1904 P. R. No. 13=1904 P. L. R. 410=1 Cr. L. J. 949.

The distinction between these two sections has been lucidly pointed out by Plowden, J., in 1888 P. R. No. 13; see also 1880 P. R. No. 7. These sections were very much considered in 5 M. H. C. R. 473 & 14 W. R. (Cr.) 39=6 B. L. R. App. 34, the principle was followed in 1907 U. B. R. (P. C). 1=6 (Cr.) L. J. 30 where it was held letting a girl for a single act of sexual intercourse is not an offence under s. 372. The words 'let to hire' in s. 372 are the counterpart of the word 'hire' in s. 373. It cannot be said that a girl living in a brothel and prostituting herself to all comers was 'let to hire' to

each and every one who visited the brothel so as to make the brothel-keeper liable under s 372. The words refer to a making over of a minor either in perpetuity or for a term and not merely for the commission of isolated acts of sexual intercourse, *Ratanlal* 962. See also 1872 P. R. No. 29, 1873 P. R. No. 73, 13 Bur. L. R. 389; 11 C. P. L. R. 6; 1873 P. R. No. 16. Explanation I to s 372 and the explanation to s. 373 newly added would now render the brothel-keeper liable. In 5 M. H. C. R. 473, the charge was under s. 373. It appeared that the prisoner by an offer of money induced a girl of the age of ten years to have a single act of sexual intercourse with him in an uninhabited house to which she went at his request for the purpose. Both parties were surprised in the act, and the man was at once taken into custody. The judges, upon a case referred by Scotland, C. J., were of opinion that the conviction was bad. In the first place, they were all of opinion that the prisoner had never obtained possession of the girl within the meaning of this section. Scotland, C. J., said

"But, to bring a case within the section, it is, in my opinion, essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession, whether ostensibly for a proper purpose or not. Complete possession and control of the minor's person obtained by buying, hiring, or otherwise, with the knowledge or intent that, by the effect of such possession or control, the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime. The provision seems to me to exclude the supposition that an obtaining of possession, in the sense in which that expression is, no doubt, sometimes used, of merely having sexual connection with a woman, could have been in the mind of the framers of the section."

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On the other hand, Holloway, J., was of opinion that it must be a transaction "of which other parties are the subjects and the minor is the object." "This view need afford no encouragement to the debauching or seduction of innocent girls without the consent of their guardians; such cases are fully provided for elsewhere, and the fact that they are so removes all doubt from my mind as to the construction of the present section."

On a third point, Holloway, J., said: "I must guard myself against being supposed to think that nothing more is required than minority, a contract, and an intent to have sexual connection, to render the man who hires punishable under this section. The intention or knowledge must be made out, and it may well be, looking at the whole scope of the sections, that the previous ones deal with the corruption of girls without the consent of their guardians, or of women by suppressing their will by force of deceit, and that these deal with the case of trafficking in innocence. They are, perhaps, not intended by confounding the provinces of law and ethics to make men virtuous by legislative enactment. A minor, not generally unchaste, may still be protected by its provisions; while she, who has been already devoted to prostitution, may not be within the protection, because, on any reasonable construction of the words, an unchaste act cannot have been committed with intent to do that which has already been done."

A similar decision was given upon the principal point in **7 N.-W. P. H. C. R. 295**. There the prisoner was convicted of attempting to commit an offence under s. 373, the evidence being that he had written to a girl under eleven to induce her to make an assignation with him for immoral purposes. The prisoner was an associate of prostitutes, but his letter showed no wish that she should become one. The Court held that the conviction was bad. Another similar decision was given in **21 C. 97** under s. 372. There the defendants had handed over a girl of about eleven to a man who professed to want her for a single occasion, and received from him Rs. 5, which they said was the charge if the girl was kept for a short time. The Court, following the Madras decision, held "that the commission of an immoral act of sexual intercourse at an interview so brought about was not in the contemplation of the section," and dismissed the charge under s. 273 of the Cr. P. C. In the particular case, the girl was already a prostitute, a fact which might, if the circumstances had been different, have raised the point suggested by Mr. Justice Holloway, as to whether the two

sections were not limited to ' trafficking in innocence.' See also 6 Cr. L. J. 30

In 6 B. L. R. Appx. 34=14 W. R. (Cr.) 39, where one defendant was charged under s. 372 with disposing of a minor for prostitution, and another was charged under s. 373 with obtaining possession of her for the same purpose, and also under s. 372 with letting her out for hire, this curious state of facts appeared. A Muhammedan married woman, under sixteen, who generally lived with her grandmother Nourjan, formed an adulterous intrigue with two Hindus, who, in order to facilitate their intercourse with her, persuaded her to become a prostitute. The grandmother assented to the arrangement, and the two proceeded to a distant village, where they took up their residence with a woman Jaggat Tara, where the girl received men who were introduced to her by Jaggat Tara. The latter took all money that was paid to the girl, and in return boarded and lodged her and her grandmother. On the facts Nourjan was convicted under s. 372, and Jaggat Tara under ss. 372 & 373. Glover, J., considered that the convictions were right. Louis Jackson, J., both convict the daughter the whole by prostitution. At the outside she had helped her in so disposing of herself. Jaggat Tara had not obtained possession of her under s. 373, but had received her for the girl's own purposes. Nor had she let the girl out for hire under s. 373, but had merely, by what Jackson, J., described as "a common arrangement enough," fed and clothed her, in consideration of receiving the wages of her prostitution.

To constitute an offence under s. 372, it is not necessary that there should have been a disposal equivalent to a transfer of possession or control over the minor's person; the mere fact of enrolling a minor among the dancing-girls of a pagoda, whose profession is admittedly that of prostitution, is sufficient to constitute the offence. 6 B. H. C. R. (Cr. Ca.) 60; 5 M. H. C. R.

415; 1 M. 164; 15 M. 41 & 75; 16 B. 737; 24 B. 287 = 1 Bom. L. R. 678; 23 M. 159., Weir I. 359 & 364, [1911] 2 M. W. N. 479 = 12 Cr. L. J. 566 = 12 Ind. Ca. 654. Where such an enrolment is only provisional, and not final, the offence may, perhaps, not be made out. See *per* Parker, J., 15 M. 323 at 329. When a prostitute attached to a temple was in the habit of taking her granddaughters with a view to teaching them singing and dancing, accomplishments necessary to qualify them as *Dasis*, this was held not sufficient to constitute a disposal within the meaning of s. 372 to render her liable. Weir I. 364. The evidence only disclosed a present intention to dispose—a stage of preparation—which may or may not be carried out. The giving or taking in adoption of a minor to be a dancing-girl is an offence under ss. 372 and 373, if the intention that she shall be a prostitute is made out. It is not an offence for a dancing-girl to adopt a daughter, if her intention is that the girl should be brought up as a daughter, and that then she should be at liberty either to marry or to follow the profession of her prostitute mother. 12 M. 273. Where the criminal intention is established, it is immaterial that the age of the girl is such that it cannot be carried out for many years. 22 C. 164. See the same case as to the onus of proof of intention *fold.* in 18 A. 24.

VII. RAPE.

171. Rape.—The essence of the offence of rape as defined in s. 375 consists in the act being committed against the will of the woman, or without her consent. These conditions of mind are quite distinct. An act is done against a woman's will when she knows what is being done, and objects or resists. The terms of s. 90 are, however, wider than those of cls. (3) and (4) of s. 375 which are limited to particular kinds of injury or misconception of fact. But s. 90, as occurring in the chapter on *General Exceptions*, controls this section also. Hence cls. (3) and (4) of this section must be treated as merely illustrative. Sexual intercourse without the woman's consent, *i.e.*, with her consent given under fear of injury or misconception of fact, is rape by the combined

operation of cl. (2) of s. 376 read with s. 90. Hence cls. (3) and (4) are only dealing with some special cases already covered by cl. (2) and except as illustrations of the offence as defined by cl. (2) are of no value, as cl. (2) covers all cases covered by cls. (3) and (4) in addition to various cases outside their scope. Clauses (3) and (4) were evidently drafted in view of the rulings in *R. v. Jones*, L. R. 2 C. C. 10; *R. v. Saunders*, 8 C. & P. 265; *Middleton*, 42 L.J. (M. C.) 84; *Clerk, Dears C. C.* 396 which are no longer law even in England as the effect of later legislation. An act is done without her consent [as to Consent, see s. 90; and *ante*, Ch. III, § 70, at 195-96] when from any cause she is incapable of knowing what is being done, or, supposes that something different is being done, or, being aware of the nature of the act, supposes that it is being done under circumstances which make it an innocent act.

As to the first class of cases,

"It is no mitigation of this offence that the woman at last yielded to the violence, if such her consent were forced by fear of death, or of hurt. Nor is it any excuse for the party indicted that the woman consented after the fact; nor that she was a common strumpet, for she is still under the protection of the law, and may not be forced; nor that she was first taken with her own consent, if she were afterwards forced against her will; nor that she was a concubine to the ravisher, for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment." *1 East, P. C.* 444; *1 Hale, P. C.* 628; *1 Hawk, P. C.* 122.

Nor is the mere cessation of a genuine resistance evidence of consent, *1 W. R. (Cr.)* 21. All these circumstances, however, may be very material in considering the question, whether the woman was really forced or not. It must also be remembered that whatever a woman's actual state of mind may be, a man does not commit rape unless his act is done with the knowledge that the woman does not consent, and with the intention to effect it, notwithstanding her want of consent. "There may be cases in which a woman does not consent in fact, but in which her conduct is such that the man reasonably believes she does." *Per Denman, J., R. v. Flattery*, 2 Q. B. D. 410. And the law was so laid

down, in charging the jury, by Honyman, J., *R. v. Burratt*, L. R., 2 C. C. R. 81=43 L. J. (M. C.) 7. Don Juan could not have been convicted of a rape, when Donna Julia, "whispering, I will ne'er consent, consented."

As regards the second class of cases, the law was laid down in England, that where a woman was so absolutely imbecile as to be unconscious of the nature of the act attempted, the offence was rape; but that if she understood it in the same way that an animal does, and consented to it from animal instinct, there was no rape. *R. v. Fletcher*, Bell C. C. 63=28 L. J. (M. C.) 85=8 Cox. 131; *R. v. Pressy*, 10 Cox. 635; *R. v. Fletcher*, L. R., 1 C. C. 39=35 L. J. (M. C.) 130; *R. v. Ryan*, 2 Cox. 115. Even in the latter case the act is now made a misdemeanour by 48 & 49 Vict., c. 69, s. 5. Under the Code, however, by s. 90, consent is not sufficient, if given by a person who from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives consent. Many lunatics possess quite this amount of understanding. No idiot does. If a man by drugs or by liquor, renders a woman incapable of knowing what she is about, and takes advantage of her condition to have connection with her, this is as much rape as if he had knocked her down and rendered her senseless. *R. v. Camplin*, 1 Den. C. C. 89=1 Cox. 220; and it would be just the same if he found her in that condition, and then availed himself of it, or took advantage of her when she was asleep. *R. v. Mayers*, 12 Cox. 311; *R. v. Young*, 14 Cox. 114.

Some cases are recorded by Taylor in which rapes were alleged to have been committed on women while asleep. In one, the prisoner was convicted; in another, he was acquitted on the ground, which is no longer law, that such an act was not rape. It is obvious, as Taylor remarks, that where the sleep was not produced by artificial means, or of a lethargic character, the assertion should be received with extreme suspicion. Its truth is only possible in the case of a woman who was accustomed to sexual intercourse (Taylor, 6th Edn., ii. 114.)

So it was held to be rape when a man violated a girl, who supposed that she was submitting to a surgical operation. *R. v. Flattery*, 2 Q. B. D. 410; *R. v. Case*,

4 Cox. 220=1 Den. C. C. 580; *Rosinake*, 1 Lew 11. The case of a woman who consents under the belief that the man is her husband, is expressly declared by the Code to be rape. A contrary decision in England, which had met with strong disapproval in *R. v. Flattery*, was finally over-ruled by statute in 1885. *R. v. Barrow*, L. R., 1 C. C. R. 156; 45 & 46 Vict., c. 69, s. 4. Finally, no consent is sufficient when it is given by a mere child. The earliest age at which a girl could consent to intercourse so as to prevent the act being rape, was originally fixed by the Code, in conformity with English law, *R. v. Beale*, 35 L. J. (M. C.) 60 at ten. By the Age of Consent Act X. of 1891, s 1, the age has now been raised to twelve, so that cases of rape are no longer an exception to the general rule as to consent laid down by s. 90.

A similar change in the Code has been made by s 2 of the Age of Consent Act X. of 1891, in the exception to s. 375, which now makes twelve the earliest period for conjugal intercourse, thus *over-ruling* 18 C. 49. After that age, of course, a husband cannot be guilty of a rape upon his wife. He may, however, be guilty of abetting others to commit the offence, *Lord Audley's Case*, 3 St. Tr. 401, and if he is actually present, assisting in the crime, he will be a principal, and not merely an abettor. Except that such cases have actually occurred, one would suppose them to be impossible, 1 *Hale*, P. C. 629.

Some degree of penetration is necessary to complete the offence of rape, but the smallest amount is sufficient, even though the *hymen* remains intact. *R. v. Hughes*, 2 Moody 190; *R. v. Lines*, 1 C. & K. 393; *R. v. Allen*, 9 C. & P. 31; *Cox*, 5 C. & P. 297=1 Moo. C. C. 337; *McRue*, 8 C. & P. 641; *R. v. Marsden*, [1891] L. R. 2 Q. B. 149; *Gammon*, 5 C. & P. 321.

As regards the fourth clause it embodies the principle that fraud vitiates consent in so far as it is applicable to a case of rape.

This proposition has but limited scope as applied to criminal law. As remarked by Stephen, J., in *R. v. Clarence*, L. R. 22 Q. B. D. 23

at 43, "It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If you

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rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage is also a case of rape. Many seductions would be rapes and so might acts of prostitution procured by fraud, as for instance, by promises not intended to be fulfilled The only sorts of fraud which destroys the effect of a woman's consent so as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself or as to the identity of the person who does the act." In the same case *Wills, J.*, cited the apt illustration that if a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent or that he is guilty of rape.

By the English law there is an invincible presumption as to the impossibility of a rape being committed by a boy under fourteen. *Jordan*, 9 C. & P. 118. He may, however, be convicted of abetting the crime when committed by others, or of an indecent assault under s. 354. 1 *Hale*, 630; *R. v. Waite*, [1892] 2 Q. B. 600; *R. v. Williams*, [1893] 1 Q. B. 320. So also could a woman be liable for abetment, *R. v. Ram*, 17 Cox. 609. It has been decided in England that he cannot be convicted of an assault with intent to commit a rape, *R. v. Eldershaw*, 3 C. & P. 366, and in the case of *Williams*, cited above, Lord Coleridge, C.J., held that he could not be convicted of an attempt to commit a rape, that is to do what the law said he was physically incapable of doing. *Hawkins and Cave, JJ.*, intimated that in their opinion he could be convicted. The recent agreement of authorities in reference to attempts (see *post*, *supra* XIV) renders it probable that the later view would hold, whenever it became necessary to decide the case. As the courts in America have held that in cases of attempt against boys under fourteen, physical capacity should be treated as a matter capable of proof, and should be proved independently of any arbitrary presumption.

tion. *1 Bishop s 466*. I am not aware of any Indian decision under the Penal Code. In an earlier case under the old law, where a boy only ten years old was convicted by the *Futuah* of rape upon a girl only three years old, the *Court of Nizamut Adalat* viewed it as an attempt only, and punished it as a misdemeanour with one year's imprisonment, *1 Mor. Dig. 176, s. 513*. Chevers cited from the *Nizamut Adalat Reports* a case of a boy of thirteen or fourteen who was convicted of rape, and another of the same age, who was convicted of an attempt, it being doubtful whether he had consummated the crime. It must, however, be remembered that statements as to the age of Indians must be accepted with great caution. Chevers mentions, *Med. Jur. pp. 674, 675* two cases of boys who were tried or convicted of rape, who alleged themselves to be twelve and eleven years of age, though in the opinion of the Court they were above fourteen.

Where the offence of rape is incomplete for want of penetration, the prisoner may be convicted of an attempt to commit a rape under Cr. P. C., s. 238. In order, however, to justify such a conviction, it must be shown that the prisoner was attempting something which would have been rape, if it had succeeded. As where the accused had stripped a girl naked and was lying upon her when her cries attracted people to the spot. 1910 P.W.R. No. 42=11 Cr. L.J. 611=8 Ind. Ca. 257. But in the case of a person physically incapable of committing the offence, he cannot be convicted of an attempt. *Ratanlal 865*. It is not sufficient to show an indecent assault with intent to have illicit connection. The Court must "be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance." 5 B. 403; see *per Coleridge, J., R. v. Stanton, 1 C.&K. 415; R. v. Lloyd, 7 C.&P. 318; R. v. Wright, 4 F.&F. 967*. If, however, a man attempts to get possession of a woman who is imbecile, or unconscious, or who is deceived as to the nature of the act, or the character of the person, no force is used or contemplated; and yet the attempt, if successful, would be rape, and, if unsuccessful, would be an attempt to commit a rape.

This was so held by Lush, J., as regards the act of a man who attempted to have connection with a woman whom he knew to be asleep. *R. v. Mayers*, 12 Cox. 311. The language of Coleridge, J., in *R. v. Stanton*, cited above, which was used in reference to the case of a man who was attempting to have connection with a woman under the pretence of applying a medical remedy, seems to have been incorrect as regards its application to the particular facts.

There is probably no accusation which requires to be watched with more caution than a charge of rape. As Lord Hale says, "It is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent." He mentions a case which was tried before himself, in which a wealthy old man of about sixty-three was indicted for a rape, which was fully proved against him by a young girl of fourteen years old, and the concurrent testimony of her mother and father, and some other relations. When it came to the defence, in which in those days the prisoner had not the assistance of counsel, he afforded ocular demonstration to the jury that he was physically incapable, by displaying a rupture, which, as Lord Hale says, was "full as big as the crown of a hat." *1 Hale, P. C. 635*. Probably it alone stood between him and the gallows. Such charges are often made for revenge, often for extortion, and still more often to shield a reputation which has been voluntarily endangered. On the other hand, among the lower classes such offences are very common, and are effected with most revolting brutality. It is not *a priori* improbable that the accusation should be either true or false. The surrounding circumstances are even more important than the direct testimony.

In the majority of cases, the only direct evidence of the rape is that of the prosecutrix herself. Where this breaks down, or cannot be obtained, as where the female from extreme youth, or from some incapacity, such as being deaf and dumb, cannot give her testimony, and there is no other evidence producible, (see *R. v. Whitehead*, L. R., 1 C. C. R. 33,) there is nothing for it but to

acquit Her evidence should always be received, not with distrust, but with caution The first thing necessary to examine in support of her statement is, whether there is any indirect evidence that sexual connection took place. *Upon this point it is most important to have the evidence of a medical man as to the state of the parts.* In India such evidence is often unattainable, but it would certainly be a suspicious circumstance if no female relation were produced to testify to marks of injury or the like. The next thing is to see whether the connection, if it took place, was against her will For this purpose all the surrounding circumstances should be carefully sifted. The character of the prosecutrix, her intimacy with the prisoner, and the amount of familiarity which she had formerly permitted him to indulge in, the place in which the act took place, as showing that she might have obtained assistance, the distance at which other persons were passing by, any screams or cries which were heard; her conduct immediately after the outrage, her appearance, and so forth. See *1 Hale, P. C 683, 17 K. L. R. 12=5 Cr. L. J. 465.*

The most important point for inquiry in these cases is the character of the prosecutrix She may be a prostitute, or of such loose character as to fall little short of being such. She may have previously had improper relations with the accused, or with some other man or men other than the accused, or she may be of perfectly unblemished character. It is evident that the last supposition raises a very high degree of improbability as to the woman's consent being given to the act. In general, the character of a witness is assumed to be good, unless it is impeached by cross-examination. In cases of rape, however, the character of the prosecutrix is so directly relevant to the charge which she is making, that it becomes of itself a relevant fact within the meaning of s. 11, cl. 2, of the Ev. Act. Evidence that no suspicion of impropriety had ever fallen upon her would certainly be admissible for the prosecution, though if she were not cross-examined upon the point it would hardly be necessary. On the other hand, where a woman's chastity is admittedly tainted, the degree of taint will

affect her evidence in very different ways. If she was of such loose character as to be open to the approaches of anyone, or if she was living on terms of improper intimacy with the accused, the charge of rape becomes not impossible, but, to the last degree, improbable. Where, however, it is merely shown that a woman has had one or more clandestine intrigues, this raises no presumption that she would yield to anyone who presented himself, and hardly any that she would yield to any particular man. Accordingly, in two recent cases, where the question was raised for solemn decision in England, it was laid down that, in cases of rape, attempt to rape, or indecent assault, the prosecutrix could be cross-examined as to facts relating to her chastity; that if it was imputed to her that she was a prostitute, or woman of generally loose character, or that she had had connection with the prisoner himself, and if she denied it, distinct evidence to contradict her might be called for the defence. (See *Ev. Act*, s. 155 [4]). If, however, she was asked as to previous intimacy with other men, and she denied it, her statement was final, and could not be contradicted. The distinction taken was, that in the two former cases the fact suggested went directly to the point in issue. In the last, it had only a very remote bearing, if any, upon that issue, and if rebutting evidence was admitted, the woman would be called upon to defend the whole of her previous life against charges of which she had no notice. *R. v. Holmes*, L. R., 1 C. C. R. 334; *R. v. Riley*, 18 Q. B. D. 481. In some cases the courts have gone so far as to hold that a woman, when cross-examined as to particular facts relating to other men, might decline to answer. *R. v. Hodgson*, Russ. & Ry., 211; *R. v. Cockcroft*, 11 Cox. 410. The former decision, however, was doubted upon this point by *Williams, J.*, in *R. v. Martin*, 6 C. & P. 562, and is opposed to the general principle that in all cases, civil and criminal, a witness may be cross-examined as to matters affecting character, though otherwise irrelevant, and is bound to answer, unless the answer might criminate himself. *Cundell v. Pratt*, M. & M. 108; *R. v. Yewin*, 2 Camp. 638. This principle is affirmed by the Evidence Act, though the judge is given a controlling

power, ss. 146—148, & 153, which prevent the monstrous abuse of the right of cross-examination which took place on the trial of the *Tichborne* claimant

It was formerly held in England that evidence might be offered in a trial for rape and the cognate cases, that the prosecutrix had made a complaint immediately after the outrage, but that the particulars of the complaint could not be stated, nor the name of the person complained of. In two recent cases, however, judges of great experience refused to be bound by this practice, and laid down the more rational rule, that not only the fact that the prosecutrix made a complaint of rape, but everything which she stated immediately after the outrage as to its details, and as to the name of the offender, and what was said to her in reply, should be admitted in evidence, and this practice was finally sanctioned by the Court for Crown Cases Reserved. *Per Byles, J., R. v. Eyre*, 2 F. & F. 579; *per Bramwell, L.J., R. v. Wood*, 14 Cox. 46; *R. v. Lillyman*, [1896] 2 Q. B., 167; *R. v. Osborne*, [1905] 1 K. B. 551=74 L. J. (K. B.) 31=92 L. T. 393=53 W. R. 494; *R. v. Rowland*, 62 J. P. 495. This also is in accordance with the Ev. Act, s. 8, illus. (j). But if the complaint is made not by the prosecutrix of her initiative but in answer to a question, it is still doubtful whether it is admissible as evidence in England. *R. v. Merry*, 19 Cox. 442. The question may be of a suggestive or leading or intimidating character.

In all cases of rape it is most important to have the skilled and unimpeachable evidence of a medical witness, who has examined the prosecutrix immediately after the alleged offence. Where many days have elapsed, such an examination is of little value. Taylor says:

"The indications of rape, however well marked they may be in the first instance, either soon disappear or become obscure, especially in those women who have been already habituated to sexual intercourse. After two, three, or four days, unless there has been an unusual degree of violence, no traces of the crime may be found about the genital organs. In unmarried women and in children, when there has been much violence, the signs of rape may persist, and be apparent for a week, or longer." Casper records a case of undoubted rape committed on a child of eight years, the

indications of which on the day following were undoubted. Eleven days after the assault the girl was again examined. The sexual organs were then in their natural state, and there was not the least appearance of local injury. As showing the caution which medical practitioners should observe in giving testimony in such cases, Taylor mentions an instance in which, on a charge of rape on a girl a little over seven years of age, the accused was committed for trial, solely on the evidence of the medical man who examined her six weeks after the alleged event, and swore that in his opinion she had been violated. At the trial the child admitted on cross-examination that the whole of her previous evidence was untrue, and the man was acquitted. *Taylor, 6th Edn. ii., 136.* On the other hand, it is probable that acquittals have taken place improperly in many cases, on the supposition that marks of injury would have been found a short time afterwards, where none such appeared.

The indications naturally to be looked for will vary according to the age of the sufferer. Taylor says: "With respect to marks of violence on the body of a child, these are seldom met with, because no resistance is commonly made by mere children. Bruises

which brings him within the law, it is probable that he will cause injuries far exceeding the mere destruction of virginity, which are often evidenced by ruptures or lacerations of a dangerous or fatal character. It must, however, be remembered that while there may be a rape which has left the hymen intact, the absence of the hymen is not necessarily evidence of a rape, unless there is proof of its having been recently torn with violence. The hymen itself is sometimes congenitally deficient, or is destroyed by ulceration, or suppurative inflammation, a disease to which female infants of a scrofulous habit are subject. *Taylor, 6th Edn. ii., 125-127.* Where distinct signs of violence are established, they are in the case of a child almost conclusive proofs of rape, as, except in some rare cases of precocious depravity, the consent of a child cannot be assumed, and if she is below twelve would be unavailing. The possibility of a false charge still remains. Chevers mentions a case of a procuress who, in revenge at the rejection of a child whom she had brought into the officers' quarters at Fort William, injured the girl's genitals, and then charged the officer with rape. *Chevers, Med. Jur. 701.*

Where the prosecutrix is a girl who has attained full maturity, and who was at the time of the offence a virgin, a rape carried out to the last degree would of course leave its trace on the female organs. Here the questions would be: first, was it clear that the girl had been violated; secondly, was there evidence of any degree of violence beyond what was consistent with her having consented to the act. Marks of injury on other parts of her person as

showing resistance overcome by force, would of course be most material on the latter point. Taylor (ii., 130.) On the other hand, the very ignorance of an innocent girl, coupled with the shock of an unexpected attack, may prevent any resistance until it is too late.

In the case of a woman who is so informed to sexual intercourse

her person, as it is to these that, if she resists at all, the first outburst of force will be applied. Some have even doubted whether it was possible to violate an adult woman of health and vigour against her will. Queen Elizabeth's illustration, when she handed a sword to a frail lady, and desired her to sheath it in a scabbard which was being constantly moved about, appears plausible, but is probably fallacious. When there is more than one assailant no woman has any chance. Nor where she is drugged, or intoxicated, or terrified into submission. But apart from such cases, as Taylor observes. "A rape may be committed on an adult woman, if she falls into a state of syncope, or is rendered powerless by terror and exhaustion. An eminent judicial authority has suggested that, in his opinion, too great distrust is commonly shown in reference to the amount of resistance offered by women of undoubted character. Inability to resist from terror, or from an overpowering feeling of helplessness, as well as horror at her situation, may lead a woman to succumb to the force of a ravisher, without offering that degree of resistance which is generally expected from a woman so situated. As a result of long experience, he thinks that injustice is often done to respectable women by the doctrine that resistance was not continued long enough." Taylor, ii., 112, see *Chetters*, 681, 702.

In many cases where rape is falsely charged, advantage is taken of some peculiar condition of the female which gives plausibility to the charge. There are certain forms of purulent discharge from the female organ, resulting from inflammation of the vagina, or from *leucorrhœa*, which are sometimes supposed to be the result of rape, and sometimes are maliciously used as the pretext for accusing the hye
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The modern use of anæsthetics in surgery and dentistry has given rise to a new class of cases, in which the practitioners administering the narcotic have been charged with availing themselves of the condition of their patient, to do an act which the law considers to be rape. In some cases, it is to be hoped very few, the accused has been convicted of the offence. In others the charge has been proved either to be maliciously false, or made under the influence of mistake. Taylor says :

"Anæsthetics stimulate the sexual functions, and the anogenital region is the last to give up its sensitiveness. These charges are sometimes made in good faith by modest females. A woman under the partial influence of an anæsthetic may mistake the forcible attempts to restrain her movements, whilst she is passing through the preliminary stage of excitement induced by the anæsthetic, for an attempt upon her person. In one instance, a lady engaged to be married was accompanied to a dentist by her affianced husband. Chloroform was given, and a tooth extracted in the presence of this gentleman. She could hardly be convinced that the dentist had not made an attempt upon her chastity *Taylor, u., 111.*

It has been held in Calcutta, on a charge of rape, where the injured woman died of the violence used on the occasion, that her dying declarations were admissible in evidence, although there was no charge for culpable homicide against the prisoner. 6 W. R. (Cr.) 75. The English rule would have excluded such evidence. It would seem to be receivable under the Indian Evidence Act, s 32 (1).

VIII. UNNATURAL OFFENCES.

172. Unnatural Offences.—Section 377 deals with unnatural offences such as sodomy, buggery and bestiality; consent of the other party is no defence. A married woman who consented to her husband's committing an unnatural offence with her has been treated as an accomplice, *Jellyman, 8 C. & P. 604.* A man who committed sodomy with a boy of twelve was convicted of that offence, though the boy was discharged, *Allen, 3 Cox. 270=18 L. J. N. S. (M. C.) 72.* It was held in *Jacobs, R. & R. 331*, that the act of having connection with a child in the mouth is not the offence of sodomy.

We find an inclination to follow this decision in *Weir* l. 382, but if an actual case were to arise, probably this decision would not be followed

It has now been authoritatively decided that domestic fowls are animals within the meaning of this section. An attempt to commit an unnatural offence with domestic fowls would be punishable, *Brown*, L. R. 24 Q. B. D. 357.

In the absence of satisfactory proof of penetration, it would be advisable to substitute a conviction for indecent assault (s. 354) in cases where the other party happens to be a woman, *Weir* l. 383; *Reekspear*, 1 Moo. 342. When the evidence merely disclosed that the accused went about in woman's clothes and bore upon his person unmistakable physical signs of habitual sodomy, a conviction under s. 377 had to be quashed as the charge specified no time or place nor pointed to any particular person with whom the offence was committed, 6 A. 204, 1884 A. W. N. 25.

CHAPTER X.

OFFENCES AGAINST PROPERTY.

173. Division of the Chapter.—This chapter is divided into ten Parts for the sake of convenience.

- I. Theft, ss. 378—382.
- II. Extortion, ss. 383—389.
- III. Robbery and Dacoity, ss. 390—402.
- IV. Criminal Misappropriation, ss. 403 and 404.
- V. Criminal Breach of Trust, ss. 405—409.
- VI. Receipt of Stolen Property, ss. 410—414.
- VII. Cheating, ss. 415—420.
- VIII. Fraudulent Deeds and Disposition of Property, ss. 421—424.
- IX. Mischief, ss. 425—440.
- X. Criminal Trespass, ss. 441—462.

In groups I to VIII, there is deprivation of property, while in group IX, there is mischief to property, while in the last group, some rights of property are violated with a view to the commission of some ulterior offence.

Again, when the owner (person entitled to possession as against the accused) has full possession and control, it is theft to deprive him of it secretly without his consent. If he is compelled to part with it by threats, it is extortion, and if by violence, it is robbery or dacoity. When the owner's possession has accidentally ceased, it is misappropriation. But when he has voluntarily given up possession, if the offence consists in a violation of the terms on which it is held it is criminal breach of trust. It is cheating, if the owner is induced by deceit or fraudulent means voluntarily to part with his possession. The ingredients of the several offences will be discussed in the order set forth above.

I. THEFT.

174. The elements of theft analysed.—The elements of theft, as defined by s. 378, are (1) movable property; (2) in the possession of anyone; (3) a dishonest intention to take it out of that person's possession, (4) without his consent, and (5) a moving in order to such taking.

(1) *Movable Property* is defined by s. 22 as including "corporeal property of every description except land, and things attached to the earth, or permanently fastened to anything which is attached to the earth." It is expressly stated by Expls 1 and 2 of s. 378, that things attached to the land may become movable property by severance from the earth, and that the act of severance will of itself be theft. This of course applies to everything growing or built upon the earth. 5 M. H. C. R. Appx. 36. So it was held to be theft to gather salt spontaneously formed on the surface of a swamp appropriated by Government. 4 M. 228, Ratanlal 66; 10 B. H.C.R. 74, but removal of spontaneous salt from a swamp not proved to be guarded by Government so as to be in their possession was held not to be theft, Weir 1. 412. In a later case, 10 M. 255, it was held that the rule laid down in s. 378 was limited to things attached to the earth, and did not apply to portions of the earth itself, when quarried and dug up by the persons who then carried them away. Kernan, J., distinguished 5 M.H.C.R. Appx. 36, on the ground that the salt was not part of the earth, but a growth upon it. But the Bombay High Court, in 15 B. 702—an exactly similar case—refused to follow this decision, and a Full Bench of the Madras High Court in 27 M. 531=1 Cr. L. J. 429 accepted the Bombay view over-ruling 10 M. 255. Even according to English law, where the severance and the removal of things attached to the soil, such as trees, or the lead of a church, were not continuous, but separate acts, the final carrying away was larceny; and for this purpose a tree was exactly on the same footing as minerals in the soil. *R. v. Townley*, L. R. 1 C. C. R. 315; *R. v. Cooper*, 24 T. L. R. 867. But there can be no doubt that a sale of standing crops or trees rooted to the soil of another in which

the seller has no interest whatever cannot constitute the offence of theft. *Weir* l. 419. A house cannot be the subject of theft, but there may be a theft of its materials, 10 *Bur. L. R.* 356=1 *Cr. L. J.* 558, or of a boat, 16 *W. R. (Cr.)* 63. The object of s. 378 appears to be to abolish this distinction, and to put the thief who severs and carries away, in exactly the same position as if he carried away what had previously been severed.

The Code gives no colour to the idea, which was at the bottom of many distinctions in the English law of larceny, that the thing stolen must have some appreciable value of itself, and not merely as evidencing a right to something else. 1 *Hawk, P. C.* 148; 2 *East*, 597. Valuable securities may be stolen, *Ratanlal* 43; so also halves of currency notes, *R. v. Mead*, 4 *C. & P.* 535. But where the plaintiff in a suit, snatched up a bond lying on the table of an arbitrator, ran away and refused to produce it, it was held in 3 *M.* 261 that it cannot be said that the act of the accused was prompted by any desire to cause wrongful loss or wrongful gain and that he is guilty only of secreting a document under s. 204, I. P. C. Whatever a man has, it is a crime to steal from him. Where the article taken is utterly without value, so that the prosecution is frivolous or vexatious, an acquittal under s. 95 would be supported. 5 *B.H.C.R. (Cr. Ca.)* 35. The article must, however, be something which can be the subject of property. It is laid down in the English law books, that there can be no property in a human body, whether living or dead, and, therefore, stealing a corpse is not larceny, though it was indictable as an offence against public decency. 1 *Hawk, P. C.* 148, n. Sir James Stephen says that this is the only movable object known to him which is incapable of being property, and suggests that anatomical specimens and the like would be personal property, 3 *Steph., Crim. L.* 127, 25 *A.* 129; *R. v. Haynes*, 2 *East P. C.* 652. The contrary, however, was held by Chief Justice Willes, in a case of trover against *Dr Handyside*, who had carried away the preserved bodies of two children which had grown together, and had been kept as a *lusus nature*. 1 *Hawk*,

P. C. 148, n. one cannot think that such a decision would be given now, as it would authorize the wholesale plunder of a surgical museum. If the rule as to a corpse should be applied in India, the only punishment for such offences as were committed in stealing, after burial, the bodies of Mr. Stewart, the American millionaire, and of Lord Crawford, would be by framing a charge under s. 297. Where a testator had left directions in his will as to the disposal of his body, it was held that they were invalid, and Kay, J., said, "the law in this country is clear that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried" *Williams v. Williams*, 20 Ch. D. 659 at 665. Apparently, then, it would be theft to remove a corpse from the possession of a person who had charge of it for the purpose of burial. Shrouds and coffins are the subject of larceny, and are the property of the executors of the deceased, or of whoever buried him, but not of the churchwardens, or of the persons in whom the property of the burying-ground is vested, 2 *East, P. C. 652*. The difficulty under the Penal Code would probably be to assert that they were in the possession of anyone. Water and gas in pipes, and electricity is the property either of the persons by whom, or of the persons to whom, the article is supplied, as the case may be. *Ferens v. O'Brien*, 11 Q. B. D. 21; *R v White, Dears.* C. C. 203=22 L. J. (M. C.) 123=6 Cox. 213; *Firth*, L. R. 1 C. C. R. 172. But not running water in a river, 35 C. 437=12 C. W. N. 534=7 Cr. L. J. 367, unless it has been reduced into possession by being stored in a reservoir or canal completely under the control of a person; 11 M. L. T. 162=[1912] M. W. N. 119=13 Cr. L. J. 131=13 Ind. Ca. 819.

(2) *Possession* The property which is alleged to be stolen must have been in the possession of someone at the time of the theft 2 C. W. N. 216; 20 W. R. (Cr.) 80; 29 C. 489. It must therefore have been something of which a continuous possession is possible. There can be no theft of wild animals, or birds, or fish, while they are at large, even though they are on the property of the prosecutor, or on property where he has a right

to capture them. 2 *East*, P. C. 607; *Weir* I. 384, 385; 20 W.R. (Cr.) 15; 5 M. 390; 15 C. 388; 24 M. 81; 19 W.R. Cr. 47; 16 W.R. (Cr.) 78; 2 C. 354. They become absolute property only when killed upon the soil, *Blades v. Higgs*, 11 H. L. C. 621; *Rigg v. Earl of Lonsdale*, 1 H. & N. 923; *Mallison*, 20 Cox 204. As to chanks and oysters, see 27 M. 551=14 M. L.J. 248=1 Cr. L.J. 809 and *Parker v. Lord Advocate*, L. R., [1904] A. C. 364; *Dowling*, 11 Cox. 584; *Taylor*, 72 Am. Dec. 347; 5 Sind L. R. 122=13 Cr. L. J. 22=13 Ind. Ca. 214; [1912] M. W. N. 42=22 M. L. J. 184=11 M. L. T. 23=13 Cr. L. J. 38=13 Ind. Ca. 278. The same principle has been applied to edible birds' nests, 4 L. B. R. 275=8 Cr. L. J. 473. Fish in a pond, a sheet of water five miles long by twenty feet broad though leased out to a contractor was held to be in no one's possession, 1878 P. R. Cr. 11. But it is otherwise where the creature is tame by nature or training, or is confined in some place where it may be taken at pleasure, as in a menagerie, or an enclosure, or a fish-pond, or is too young to escape from a place where it is under control, or is dead. 2 *East*, P. C. 607; 10 B. 193; 15 C. 402; *R. v. Shickle*, L. R., 1 C. C. R. 157; *R. v. Townley*, *ibid.* 315; *R. v. Sherriff*, 20 Cox. 334; 1897 A. W. N. 41; *Brooks*, 4 C. & P. 131; *Cheafor*, 5 Cox. 367=21 L.J. (M. C.) 436; *Head*, 1 F. & F. 350; *Garnham*, 2 F. & F. 347; *Car*, 10 Cox. 23; *Roe*, 11 Cox. 554; *Howell*, 2 Den. 362 n; 1914 M. W. N. 168=15 Cr. L. J. 77=22 Ind. Ca. 429. U. B. R. (1889-96) I. 234. A domestic animal which strays upon a neighbour's ground, or upon a common, does not cease to be in the owner's possession. 1 *Hale*, P. C. 506, e.g., cattle grazing in open lands, 4 Bom. L. R. 626, 1879 P. R. No. 19, 1883 U. B. R. 238, 13 M. L. J. 123; *Ratanlal* 136. A bull, which has been set at liberty by a Hindu, as part of a religious ceremony, is not the subject of theft, as its owner has abandoned his property in it, and it has not become the property of anyone else. 8 A. 51; 9 A. 348; 17 C. 852; 1904 P. R. Cr. 5=1904 P. L. R. 308=1 Cr. L. J. 501; 1884 A. W. N. 87. A bull which, being dedicated to an idol, and accepted on behalf of the temple, is allowed to roam at large, does not become *res nullius*, but is the property of the trustees, who retain

all the rights and obligations of ownership 11 M. 145. Where a man loses or mislays property in his own house, or upon his own premises, it still remains in his possession, and anyone who finds the article is bound to assume that it belongs to the owner of the place where it is found. If he appropriates it to himself without making the proper inquiries, he commits theft. 1 Hale, P. C. 506; 2 East, P. C. 664, R. v. Kerr, 8 C. & P. 176. The same principle applies to inanimate objects. If a man sends a coat to a tailor, in the pocket of which he has left his purse, or sends a table to a carpenter, in the drawer of which there is money, he retains both the property and the possession of the purse and money, and it makes no difference that he was not aware of the contents of the pocket or drawer, because he was entitled to have both coat and table back again, with everything which they contained. But if he had sold the coat or the table in ignorance of their contents, his property in the valuables would remain, but his possession would be lost. In the former case the offence would be theft, in the latter, misappropriation *Cartwright v Green*, 8 Ves. 405=2 Leach, 952; *Merry v Green*, 7 M. & W. 623. Where iron had dropped out of a canal boat, and was found and carried away when the water was drawn out of the canal, it was held that both the property and the possession of the Canal Company continued, and that the taking was theft. *R v Rowe*, 28 L. J. (M. C.) 128=Bell 93; *South Staffordshire Co v Sharrman*, [1896] 2 Q. B. 44; *Ratanlal* 314. But where a man buried the carcass of a bullock, suspecting it to have been poisoned, it was ruled that this showed an intention to abandon both property and possession, and that a person who dug up and carried away the carcass could not be convicted of theft. 4 M. H. C. R. Appx. 30. In England there have been decisions the other way, *Edwards*, 13 Cox. 384. If a person picks up some rubies lying beside a channel into which water pumped from a ruby mine or pit was poured to be carried away, his act is not theft but criminal misappropriation since the rubies are not in any one's possession so long as they could be carried away by the current of water, but if a cooly picks up from a railway truck a ruby he is undoubtedly guilty of theft,

the truck and the ores being undoubtedly in the possession of the Railway Company. Again if he had picked up a ruby near the mouth of the mine, the exact place not being known, it is neither theft nor criminal misappropriation, U. B. R. [1892-1896] I. 236.

Property still remains in the possession of the owner, where it is in the physical custody of someone to whom he had entrusted it for his own benefit, and from whom he can demand it unconditionally whenever he pleases. But, apart from this, the possession of a trustee is sufficient possession, for purposes of s. 378, and the author of the trust, or the *cestui qui trust* may be liable for theft, 1887 S. J. L. B. 410; 9. B. 135. See the Judgment of *Stevens, J.*, in 27 C. 501. The particular cases of a person's wife, clerk, or servant, are especially mentioned in s. 27 of the Code, but the same principle applies to all similar cases. The plate which is supplied for the use of a guest at a hotel; the goods which are placed in the hands of a customer at a shop, or left at his house for inspection; a horse at a livery stable, which a professing purchaser is allowed to mount, in order to try his paces, still remain in the possession of the owner. 1 *Hale*, P. C. 506; 1 *Hawk.*, P. C. 145; 2 *East*, P. C. 677, 687. So, where a lady who wanted a railway ticket handed the money to a stranger, who was nearer than herself to the ticket-office, that he might procure a ticket for her, and he ran away with the money, this was held to be theft, as she never parted with the dominion over the money, and merely used his hand in place of her own *R. v. Thompson*, 32 L. J. (M. C.) 53=L. & C. 225. And if, as frequently happens in such cases, the mere physical custody is obtained in the first instance by a false pretence, that will be the offence of cheating, but the subsequent appropriation of it will be theft. It was the duty of a servant daily to ascertain the amount of money required to pay current demands upon his master, and then to obtain the amount from the cashier, and to discharge the claims. He designedly demanded more than the necessary amount from the cashier, paid the charges out of the sum received, and appropriated the balance to himself. It was held that

he still retained the balance as a servant, the master's possession being unchanged, and that the misappropriation was theft, whether the excess was originally obtained by a false pretence or not. *R. v Cooke*, L. R., 1 C. C. R. 295, explaining, *R. v Thompson*, 32 L. J. (M. C.) 57. And so it would be if a man at a railway station, intending to steal a passenger's luggage, induced the passenger to entrust it to him by representing that he was a railway porter. From the moment he got possession of the luggage he would have been guilty of cheating, but from the moment he moved the luggage away from the direction to the train, he would be guilty of theft. *East*, P. C. 697.

In order to maintain a charge of theft, it is not necessary to show that the person out of whose possession the property was taken was the owner, or even had any title to it whatever. If X steals the goods of A, and then Z steals them again from X, both X and Z have committed theft. Thus in *R. v. Swinson*, 64 J. P. 73, the complainant found a lost purse and decided to keep it pending the offer of a reward to the finder. Meanwhile he showed it to the accused to inspect but the accused retained it against the complainant's wishes. This was held to amount to larceny. Under English law much difficulty arose from the necessity of stating whose property the article stolen was, and in the case of theft from a thief the difficulty was got over by holding that the possession of the original owner was unchanged. 1 *Hale*, P. C. 507; 2 *East*, P. C. 654. Under the Code, the question of property is immaterial, but where the person from whom the goods were taken had only the physical custody of them, it would still be advisable to frame a count stating that they were taken out of the possession of the person who is, in law, considered to have had the possession at the time of the taking. 2 *East*, P. C. 652.

(3) *Dishonest Intention*—There must be a dishonest intention at the time of the act. The word "dishonest" is defined by s. 24 as involving an intention "of causing wrongful gain to one person, or wrongful loss to another." 3 W. R. (Cr.) 2. One who opens the door

of the complainant's cattle-pen and allows the cattle to trespass with the object of sharing with the pound-keeper the fees to be paid for their release if impounded may not be guilty of theft though he moves the cattle with intent to cause wrongful loss to their owner and wrongful gain to himself, because here the lawful act of a third party, viz., the owner of the crop, would be interposed between the moving and the causing of the wrongful gain or wrongful loss. But if the accused himself drove the cattle to the pound the offence of theft would be completely made out in all its essentials, 22 C. 139; *R. v. Pitman*, 2 C. & P. 423. A person who removes the goods of another at a fire, with the honest intention of preserving them for the owner, and who subsequently conceals them and denies possession of them, would commit misappropriation under s. 403, but would not be guilty of theft. *Leigh's case*, 2 East, P. C. 694. Nor can there be dishonesty where the defendant does what he *bona fide*, though erroneously, thinks he has a right to do. But illegal seizure and impounding of cattle was held by the Calcutta High Court not to be theft, 10 C. W. N. 228n, even if effected with the malicious intent of exposing the owner to additional expense, in convenience and annoyance, 24 W.R. (Cr.) 7. Similarly, a servant would not be guilty for merely carrying out his master's bidding, unless it is shown that he participated in his master's knowledge of the dishonest nature of his act. 9 C. W. N. 974=2 Cr. L. J. 836; 18 W.R. (Cr.) 8. One of the earliest definitions of larceny describes it as "the treacherously taking away from another, movable corporeal goods, against the will of him to whom they do belong:" and then explains, "it is said treacherously, because that if the taker of them conceive the goods to be his own, and that he may well take them, in such case it is no offence, nor in case where one conceives that it pleases the owner of the goods that he takes them." *Mirror*, cited 3 Steph., *Crim L.* 134; 1 Hale, P. C. 508; *Knight's case*, 2 East, P. C. 510. In such cases the maxim *Ignorantia legis neminem excusat* has no application. The ignorance does not operate to excuse the crime, but to show that one of the essential ingredients of the crime is wanting.

So, where a servant found fishermen poaching on his master's premises, and seized their nets, which he refused to give up without his employer's orders, the Bengal High Court held that a conviction for theft must be quashed, as it was clear the prisoner was acting *bona fide* in the interests of his master without any dishonest intention. 6 W. R. (Cr.) 79, 1888 A. W. N. 97; *R. v. Bailey*, L. R. 1 C. C. R. 347; *Ratanlal* 22 & 920; 16 W. R. (Cr.) 68; *R v. Hale*, 3 C. & P. 409, 28 M. 304=2 Cr. L. J. 754; 10 C. W. N. 233n; The claim must be proved by evidence to be fair and good, it should not be a mere pretence, 9 C.W.N. 974=2 Cr. L. J. 836; 14 C. W. N. 408=11 Cr. L. J. 248=5 Ind. Ca. 794; 11 C. L. J. 410; 4 Bom. L. R. 56; 1909 U. E. R. 389; 1 A. L. J. 508; 15 W. R. (Cr.) 47; 16 W. R. (Cr.) 18 & 75; 15 C. 390n. Thus a ticket-collector taking possession of the umbrella of a passenger with a view to compel the latter to pay up his fare could not be convicted of theft, 14 C. W. N. 936=11 Cr. L. J. 444=7 Ind. Ca. 257. Similarly when the complainant got possession of land in a *Mamiatdar's* court and the brothers of the debtor not parties to the suit cut and carried away the crops which they had themselves raised, then act was held not to amount to theft, *Ratanlal* 866; 1 L. E. R. 334; *Cape v. Scott*, L. R. 9 Q. B. 269 at 277; *Hall v. Harding*, 4 Burr. 24, 26; *Weir* I. 411; 3 C. W. N. 332. The taking of wood by Zemindary ryots from a Zemindary forest under a *bona fide* belief of right arising from usage was held not to constitute theft *Weir* I. 411; see 1 Cr. L. J. 160 & 1881 A. W. N. 73. Similarly, in the absence of an express agreement in the patta or elsewhere between the landlord and tenant with regard to the trees growing on the holding in the tenant's possession, they must be taken to be the tenant's property and the tenant cannot be convicted of theft in respect of such trees, *Weir* I. 426. For other instances of *bona fide* taking, see *Weir* I. 431, 29 A. 484, 8 M. L. T. 119=11 Cr. L. J. 484=7 Ind. Ca. 416; 1913 F. W. R. (Cr.) 40=14 Cr. L. J. 659=21 Ind. Ca. 899; 13 Cr. L. J. 298=14 Ind. Ca. 762; 18 C. W. N. 397; 1903 P. L. R. 63; 4 C. W. N. 345; 7 W. R. (Cr.) 57; 1 C. P. L. R. Cr. 100. The absurdity of the claim may, however, be

ample evidence to disprove the assertion that the act was done in good faith. 8 C. P. L. R. 15, 27 C. 501; 2 A. 101 referred to in 4 Bom. L. R. 936 at 939; 4 C. W. N. 190. In 25 C. 416, the accused who was charged by his master with having committed theft of a box stated that he had removed the box and left it concealed in the cowshed to give a lesson to his master. The Session Judge told the jury, "that if they find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner, and the act is theft." The jury did so find, and returned a verdict of guilty. This was reversed by the High Court. They said: "Of course when the owner is kept out of possession, with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily, not with any such intention, but only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or receiving any benefit, it is difficult to say that the detention amounts to causing wrongful loss in any sense." Thus the fact that a person had cultivated *Dharkhast* land without the permission of Government could not justify a taking of the crop out of his possession by a party who had no right to them. Weir I. 426. An owner may commit theft of property under attachment. Weir. I. 419, 420; 8 A. L. J. 656=12 Cr. L. J. 374=11 Ind. Ca. 142. But if the cutting of the crop was merely to prevent it being damaged while under attachment, he would not be liable for theft, Weir I. 423. Again a tenant carrying away crop attached by a landlord without paying the landlord's share would be guilty not of theft but of an offence under s 424, I.P.C. 22 M. 151. Cf. 16 M. 364; Weir I. 421; 26 M. 481=13 M. L. J. 123, followed in 1914 M. W. N. 106=15 Cr. L. J. 186=22 Ind. Ca. 762. See also 10 A. L. J. 527=14 Cr. L. J. 3=18 Ind. Ca. 146; 5 Sind L. R. 130=12 Cr. L. J. 611=12 Ind. Ca. 987.

It must not, however, be supposed that even a *bond fide* claim of right to property in the possession of

another will always be a sufficient answer to a charge of theft, if the right claimed cannot be fairly supposed to justify the mode in which it was exercised. "If the property was in the possession of the prosecutor in such a way that he had a right to hold it against the prisoner, that is, that the prisoner could not get it without the consent of the prosecutor, then it would be theft, if the prisoner dishonestly possessed himself of it with the intention of appropriating it." *Per* Scotland, C.J., *R. v. Ammoyee*, 4th Mad. Sess 1862. Mere assertion of right does not constitute a valid claim of right, 1906 P. R. No. 12=4 Cr. L.J. 293 at 304, 305; 7 B.L. R. Appx. 55, 16 W. R. (Cr.) 15, 75 & 78. Thus if a man trespasses on land and sows paddy that will not disentitle the original occupier to the property in the paddy that results from the sowing, 3 L. B. R. 199=4 Cr. L. J. 465. Still less would it be any defence that the accused had a claim for the price of an article which had subsequently been sold to a third person, and had passed into that person's possession. *R. v. Chellen*, Scotland, C.J., 4th Mad Sess 1862. Or, that he took the property in satisfaction of a debt due to himself, 5 W. R. (Cr.) 68. And so, although a joint owner of an undivided family property can neither be sued, nor indicted, for taking what appears to be more than his own share, because the extent of his rights can only be settled by taking the accounts of the whole coparcenary, *Jacobs v. Seuard*, L. R., 4 C. P. 328. (See cases cited, *Mayne's Hindu Law*, 8th Edn., ¶¶ 298, 299), it would be theft if he took the goods for the fraudulent purpose of getting any dishonest advantage for himself. For instance, if he secreted any part of the family property for the purpose of appropriating it for his own exclusive benefit, or if, when a division was in progress, he took possession of any articles without the knowledge of the other co-parceners. for the purpose of securing to himself an extra share *R v Chockanathen*, 3rd Mad Sess. 1864, Bittleston, J.; 7 M. 557, 560; 10 M. 186, Weir I. 408, 1881 A. W. N. 115; 4 C. P. L. R. 174; *Bramley, R. & R.* 478; *R v Cain*, 2 Mood. 204. And so it would be when the holder of the goods had some interest in them, which authorized him to retain them against the owner. If I pawn my watch it would be theft to take it away from

the pawnbroker's shop without repaying the loan. s. 378, *illus. (k)*; 9 B. 135; *R. v. Wilkinson*, R. & R. 470; 1889 P. K. No. 12; U. B. R. (1892-1896) I. 232. And, similarly, if the effect of the taking were to charge the holder with its price, as when a member of a benefit society entered the room of a person who was both a member and the manager of the society with whom a box containing the funds of the society was deposited, and took and carried it away, this was held to be larceny, the manager being answerable to the society for the funds. And a man might even be convicted of stealing his own money from his own servant, if the servant, being ignorant of the manner in which the money was abstracted, would have to make it good. *R. v. Webster*, 31 L. J. (M. C.) 17=L. & C. 77=9 Cox. 13; *R. v. Burgess*, 32 L. J. (M. C.) 185=L. & C. 299=9 Cox. 302; *M'Daniel*, 19 St. Tr. 746 at 803. The servant, in this case will have special property as he was accountable, see *Ratanlal* 343. But, if cattle be unlawfully distrained, their retaking by the owner is not dishonest and would not amount to theft. *Weir* I. 422. Similarly where a bailiff attached a judgment-debtor's wife's property under the impression it belonged to her husband, the removal of the goods by the wife was held justifiable as she had not parted with her right to possession, *R. v. Knight*, 25 T. L. R. 87=73 J. P. 15. There can be no doubt that a member of a joint family may commit theft by stealing the separate property of one of his co-parceners. 3 A. 181. Though under Hindu Law, ordinary gains of science by one who has received family maintenance would belong to the coparcenary, 2 M. H. C. R. 56, 7 M. H. C. R. 47, the wages of a cooly cannot be said to constitute gains of science.

Where the dishonest intention is established, it makes no difference in the prisoner's guilt that the act was not intended to procure any personal benefit to himself. In one case a man was indicted for horse stealing, whereupon his companion broke into the prosecutor's stable, took out another horse, drove it into a coal pit and so killed it, with the view of suggesting that a similar accident had happened to the first.

horse. He was found guilty of stealing, though he had never intended to make any other use of the animal. *R. v. Cabbage*, Russ. & Ry. 292; see, too, *R. v. Wynne*, 18 L. J. (M. C.) 51=1 Den. C. C. 365; *R. v. Jones*, 1 Den. C. C. 188. And, so it was held in 3 W. R. (Cr.) 2, where the prisoner took the prosecutor's bullocks against his will, and distributed them among the creditors of the latter. Erskine, J., held the same view in *White*, 9 C. & P. 344. In 15 A. 22, where a number of Hindus had taken a cow out of the possession of a Muhammedan, to prevent its being killed in violation of their religious principles, it was held by Tyrrell, J., that they had not committed the theft which is a necessary element in dacoity, because their intention was not to cause the prosecutor wrongful loss, but to prevent the slaughter of kine. It seems, however, that in this case the learned judge confounded intention with motive. The prisoners did intend to cause the prosecutor the loss of his cow wrongfully, that is, without any shadow of lawful excuse. This decision has not been followed in subsequent cases as sound law, 5 N. L. R. (Cr.) 17=9 Cr. L. J. 389=1 Ind. Ca. 800; *Pirvitt*, 2 C. & K. 114; *Handley*, Car. & M. 547; *Morfit*, R. & R. 307. Their motive for doing so was a highly conscientious one, and outweighed in their minds the obvious illegality of the act. In a subsequent case, 15 A. 299, which was quite undistinguishable, an exactly opposite decision was given, and was based on the true ground, that the law is made to protect temporal rights, whatever may be the motives which lead to their violation. There can be no difficulty the tricks played upon a penny-in-the-slot machine by way of obtaining goods by putting in brass or tin discs of the requisite size would be theft, *R. v. Hands*, 16 Cox. 182.

Much difficulty arose in many cases under English law, owing to the rule that there must be "an intention to appropriate the chattel, and exercise an active dominion over it." Per Lord Campbell, C. J., *R. v. Trebilcock*, 27 L. J. (M. C.) 103=D. & B. 453; *Holloway*, 1 Den. 370=2 C. & K. 942. Under the Code no such questions arise. In 11 C. 635, illustration (e)

to s. 378 is apparently overlooked. If the dishonest intention, the absence of consent, and the moving are established, the offence will be complete, however temporary may have been the proposed retention, 15 B. 344 at 346, see also 25 C. 416; Weir I. 405 & 407; Ratanlal 908. Nor will a man be justified in taking one property from its owner with a view to put pressure upon him to give up some other property to which the taker is legally entitled. The Calcutta High Court in 22 C. 669 ruled taking cattle by a creditor from the possession of his debtor with a view to secure prompt payment was not theft and much ingenuity based upon the labours of successive draftsman before s. 378 assumed its present shape was displayed. But 22 C. 1017 (F. B.) has now settled the law *over-ruling* 22 C. 669 that such taking is undoubtedly dishonest within the meaning of s. 378. See also 18 A. 88; 1888 A.W.N. 97; 18 W. R. (Cr.) 8, *Wade*, 11 Cox. 549; 1895 A. W. N. 233. As a school-boy was emerging out of his school, the accused snatched some books from his hand and told the boy the books would be returned only if he came to the accused's house, the object of the accused being to get the boy into his house and commit an unnatural offence upon him. Held there was wrongful gain to the accused and wrongful loss to the school boy and the taking of the books constituted theft, 8 A. L. J. 1237=12 Cr. L. J. 580=12 Ind. Ca. 844.

(4) *Without Consent*.—The taking must be without the consent of the person in possession, which is something different from being *against* his consent (*ante* Chap III, § 70, p. 195 & Chap. IX, § 171 p. 592.) There can be no theft where the owner actually consents to, or authorizes, the taking. Where a debtor gives up property to his creditor and subsequently discovering that the debt was time-barred charged the latter with theft, the same was held unsustainable in 1 A. L. J. 508=1 Cr. L. J. 803. Even if the creditor discovers subsequently that the debt was time-barred but still chose to keep the articles he would not be liable for theft. Because the supervening *mala fides* cannot convert the innocent receipt into an offence, *R. v. Flowers*,

L. R. 16 Q. B. D. 643; *R. v Fish*, 64 J. P. 137; *R. v. Mucklow*, 1 Moody 160. It would be otherwise if the original receipt lacked in innocence. This was the case in *R. v. Middleton*, L. R. 2 C. C. R. 38. Accused to whom 10s being due from a Savings Bank produced a warrant for that amount. The clerk referring by mistake to another warrant handed over £8-16s.-10d. The taking of this larger amount was held to constitute theft. Where the taking is the exclusive and spontaneous act of the prisoner, it is no defence that the owner has offered facilities for it, in order to secure the detection of the thief. For instance, where A conspired with several persons to induce two others, who were ignorant of the design, to rob him on the highway, that he might obtain the reward offered for apprehending highway robbers, and A accordingly went, in pursuance of the agreement, to the place appointed, where the supposed robbery was effected, it was held that no felony had been committed *R. v. M'Daniel*, 2 East, P. C. 665=19 St Tr. 746. So, if a person, who desires to steal the property of another, applies to the owner's servant to help him, and the servant tells the master, who desires him to hand over the property to the thief, that he may be taken in the act, this is no theft, as the owner consented to the taking, but the actual taker may be convicted of abetting a theft by the servant, *per Alderson, B., R. v. Bannen*, 1 C. & K. 295 at 301; 4 C. 366; *Dolan*, 6 Cox. 449; *Hancock*, 14 Cox. 119. On the other hand, where in a similar case the owner arranged with his watchman to admit the thieves at the outer door, but locked up his counting-house, and a desk in which a quantity of marked money was left, and the prisoners were captured, after they had broken open the locks and carried away the money, their act was held to be larceny. *R. v. Eggington*, 2 East P. C. 666=2 Leach 913=5 R. R. 689; *R. v. Dannelly*, R. & R. 310; *R. v. Williams*, 1 C. & K. 195.

The English lawyers hold, that even where the owner of the property gives it up to another it is still larceny, if he is induced to give it up by a trick; as where a person presented himself at a post-office, and obtained a

watch which was lying there, by falsely representing that he was the party to whom it was addressed; *R. v. Kay, D. & B. 231=26 L. J. (M. C.), 119*, or by a degree of coercion which falls short of what would constitute robbery; as where the defendant, acting as auctioneer at a mock auction, knocked down an article to a woman who, he knew, had not bid for it, and refused to allow her to leave the room unless she paid for it. *R. v. McGrath, L. R., 1 C. C. R. 205=39 L. J. (M. C.) 7*. In the former case, the consent was clearly ineffectual under s. 90, as being given under a misconception of fact. In the latter case, it is doubtful whether the threatened detention would cause fear of injury within the meaning of that section. But it is very doubtful whether either case could be dealt with as theft under the Penal Code. The English law requires the owner's consent to the change of property in the goods, *R. v. McKale, L. R., 1 C. C. R. 129=37 L. J. (M. C.) 97*, and that consent may be absent though he assents to the manual possession by another. But the Code seems merely to inquire, whether the removal, if fraudulent, has been without the owner's consent. There certainly has in the above cases been a consent by the owner to the removal, though brought about by fraudulent means. At most, the crime is a constructive theft, and the object of the Code is to get rid of constructive offences. Every instance of the sort would be indictable under s. 420 as cheating. Until, therefore, an authoritative decision has been given, it would be well always to join a count under that section.

In the great majority of cases, theft is clandestine, and effected absolutely without the knowledge of the owner. Of course it will be equally theft where the taking is open and unconcealed, provided it is without the consent of the person in possession. Wood in the forest though under the control of a forest-officer is really in the possession of Government and a removal without payment of the necessary fees, though with the consent of the officer, was held in *1 B. 610* to constitute theft as the consent obtained was unauthorised and fraudulent. See per Blackburn, J., in *Prince, L. R. 1 C. C. R. 155*, but if the servant had authority express or implied from

his master, *Explanation 5* would save the act from being theft, *Jackson*, 1 Mood. 119; *Barnes* 20 L.J. (M. C.) 34; *Essex*, 27 L. J. (M.C.) 201; *R v. Maltison*, 66 J. P. 503 = 86 L. J. 600 = 20 Cox. 204. Where the taking is effected with any of the circumstances of violence or intimidation stated in s 290, it will become robbery, but it does not cease to be theft, and where there is any doubt whether the facts of the case will establish a robbery, it is better to add a charge for theft. "No sudden taking of a thing unawares from the person, as by snatching anything from the hand or head, is sufficient to constitute a robbery unless some injury is done to the person." 2 *East*, P. C 708. A mere struggle for the possession of the article raised the offence to robbery under English law. *Davies' case*, 2 *East*, P. C 709, but it would still be mere theft under the code, unless some actual hurt, or wrongful restraint was caused or attempted to be caused in the contest.

(5) *Moving*.—Lastly, in addition to all the other requisites, there must be a moving of the property with a view to the taking of it. As the essence of the offence consists in the fraudulent taking, that taking must have been commenced. 2 *East*, P. C 555-556, *Simson*, Kel. 31. It is not necessary to prove that the goods were removed out of their owner's reach, or were carried away at all from the place in which they were found. Removal, or carrying away, which is a literal translation of the term *asportatio* required by the English law, implies something more than the mere moving, which is required by the Code. For instance, where a man lifted up and set on end a package of linen, which was lying in a waggon, and cut the wrapper to get at its contents, but was apprehended before he had taken anything out; and where a pick-pocket got a purse out of the owner's pocket, but was unable to carry it away, because it was attached to his pocket by a string; the judges held that there had been no larceny, "for a carrying away in order to constitute a felony must be a removal of the goods from the place where they were, and the felon must, for the instant at least, have the entire and absolute possession of them." *Cherry's case*, 2 *East*, P. C 556,

Wilkinson's case, *Coslet*, 1 Leach 236; *Contra*, *Walsh*, 1 Moody 14; *Hall*, 3 Cox, 245; *Martin*, 1 Leach 171; *Wallis*, 3 Cox. 67; *Taylor*, 27 T. L. R. 108; 1886 S.J.L. B. 399. Under the Code the mere cutting down a tree completes the theft. S. 378, *illus. (a)*, 5 M. H. C. R. Appx. 36; *Ratanlal* 928. In the case of growing grass, a moving by the same facts which effect its severance from the earth would amount to theft, 2 Bom. L. R. 752, even where the cutting was done by a man set to watch the same, 36 C. 758=10 Cr. L. J. 253=3 Ind. Ca. 189. In the case of a post-office letter-carrier, the taking of a letter out of the bag in which letters were carried during delivery, and placing it in his own pocket, was deemed sufficient, the jury having found that he put the letter in his own pocket intending to steal it. *R. v. Poynton*, L. & C. 247=32 L. J. (M. C.) 29. And so it was held in Madras, where a letter-sorter, instead of handing a "bearing" letter out for delivery in the usual course, secreted it on his person, that he might give it to the delivery peon himself, with a view to sharing the postage payable by the addressee. The High Court ruled that by this act he took the letter out of the possession of the post-office authorities, without their consent, for a fraudulent purpose, and therefore committed theft. 14 M. 229. Where proof of taking of property found in the possession of the accused was wanting, a conviction for criminal misappropriation or receipt of stolen property may be sustained. *Ratanlal* 143.

175. Theft as between Husband and Wife.—There is one point upon which the Indian courts appear to be in conflict with the English courts and with each other, viz., upon the question whether husband and wife can be convicted of stealing from each other. According to English law, husband and wife can bring no criminal charge against each other, and cannot be allowed to give evidence against each other upon any criminal charge, unless in cases where personal injuries have been effected by violence or coercion by the husband upon the wife, or by the wife upon her husband. This doctrine is founded upon the legal identity of husband and wife, which, according

to the habit of English lawyers, is disregarded in cases where it would lead to results too flagrantly absurd. *R. v. Lord Mayor of London*, 16 Q. B. D. 772. Consequently, neither wife nor husband can be convicted of stealing from each other, nor can anyone be convicted of receiving from either, property stolen by one from the other, because where there is no thief there can be no receiver. *R. v. Kenny*, 2 Q. B. D. 307, though under the *Married Women's Property Act*, persons who receive from the wife money, dishonestly taken from her husband, are punishable for a misdemeanor, *Payne*, L. R. [1906] 1 K. B. 97=75 L. J. (K. B.) 115=21 Cox. 121=94 L. J. 288=54 W. R. 200; *R. v. James*, L. R. [1902] 1 K. B. 540 at 542=20 Cox. 156. Nor can anyone be convicted of larceny for assisting a wife to remove her husband's property, even though her intent be wrongfully to deprive her husband of his goods, and although she is about to leave him, provided she is not leaving him for any adulterous purpose *R. v. Avery*, Bell, 150=28 L. J. (M. C.) 185. Where, however, a man, acting in concert with a wife, who has committed, or who is about to commit adultery with him, helps her to carry away her husband's goods, he may be convicted of larceny, as the adultery, by revoking the wife's authority to deal with her husband's goods, makes her taking fraudulent from the first. *R. v. Featherstone*, 23 L. J. (M. C.) 12=Dears 369; *R. v. Mutters*, L. & C. 511=34 L. J. (M. C.) 54; *Tollet*, Car. & M. 112; *Rosenberg*, 1 C. & K. 233; *Fitch*, 26 L. J. (M. C.) 169; *Prince*, 11 Cox. 145. These principles have, however, been to some extent trenching upon by the *Married Women's Property Acts* of 1882 and 1884. By the former Act, 45 & 46 Vict., c. 75, ss 12 & 16, either husband or wife may commit larceny by stealing the separate property of the other, provided such act is done by either while leaving or deserting, or while about to leave or desert, the other. Where criminal proceedings can be taken under this Act, then, under the later Act, 47 & 48 Vict., c. 14, husband and wife may give evidence against each other.

As regards India, it might almost be sufficient to say

that there is nothing in the Code to warrant the application of the English rules to cases governed by it. *Illus. (o)* to s. 378 has been relied on as showing an intent to adopt at least part of that rule; but that illustration is probably only meant to distinguish the case of one who must necessarily know the wife's authority had ceased, from the case in the preceding illustration, where he might suppose it to exist. Where husband and wife are living together on the usual terms, each possesses, or may reasonably suppose that he or she possesses, a considerable authority to deal with the goods of the other. Acts done under such a belief can never be theft. The limits of such a belief are easily reached. Neither under Hindu nor under Muhammedan law does either party to a marriage obtain any right to the separate property of the other, except in certain clearly defined cases. The same rule is expressly laid down by s. 4 of the *Indian Succession Act*, X. of 1865, as regards marriages governed by it. By s. 120 of the *Ev. Act*, husband and wife are competent in criminal cases to testify for or against each other. There is, therefore, no indication in the law of India of that mystical union of persons by marriage which should render a deliberate theft by one from the other an innocent act.

The current of authority in India appears to be in favour of this view. In *3 Mor. Dig. 129 s. 185* under the old law, the *Bengal Foujdary Adalat* ruled that a Hindu husband cannot be convicted of robbing his wife, the wife, according to the Hindu law, being completely under the control of her husband. And so, Scotland, C. J., directed the jury, that a count which charged a prisoner as a receiver could not be sustained, inasmuch as he had received the goods from the prisoner's wife, and she could not have been convicted of stealing from her husband. *R. v. Venkata Reddy*, 4th Mad. Sess 1864. On the other hand, it has been laid down in Bombay that a Muhammedan wife may be convicted of stealing from her husband, as there does not exist the same identity of interest between husband and wife under Muhammedan as under English law. *6 B. H. C. R. (Cr. Cs) 9*. And in a Madras case, where two persons were indicted,

the one for adultery with and enticing away the wife of the prosecutor and theft of his property, and the other for abetting the enticing and theft, and it appeared that the wife, by means of false keys supplied to her by the second prisoner, got possession of the prosecutor's jewels, and handed them over to the prisoner, but the adultery was negatived, the High Court held that it was still open to the jury to say that the prisoner dishonestly took part in the removal of the husband's property. 5 M. H. C. R. Appx. 23. This is directly opposed to the decision in *R. v. Arery*, Bell 150=28 L. J. (M. C.) 185. In 17 M. 401 a Hindu wife, during her husband's absence, removed his property from his house to that of her paramour. On the husband's return he charged them both with theft. Both were convicted, but on appeal the deputy magistrate acquitted the wife on the strength of the illustration (c) to s. 378. The High Court reversed the acquittal. They said:

' There is no presumption of law that the wife and husband constitute one person in India for the purpose of criminal law. Theft is an offence against property. And where there is no community of property, each may commit theft in regard to the property of the other. The question is one of intention. If the wife, removing the husband's property from his house, does so with dishonest intention, she is guilty of theft." This case is directly opposed to *R. v. Kenny*, 2 Q. B. D. 307, where the wife was also an adulteress, but a Hindu wife removing her *stridhanam* from the possession of her husband was held not liable for theft in 3 B. H. C. R. (Cr. Ca.) 11, & *Ratanlal* 44. "Everything acquired by a woman during coverture is the property of her husband" is a proposition counter to the spirit of Hindu law which allows to a married woman the same proprietary capacity as to her husband, 3 M. H. C. R. 272.

176. Theft in a building, tent or vessel.—S. 380 makes it more heinous to steal when the property is secured under the protection of a building, tent or vessel used as a human dwelling or for the custody of property. Thus taking away the beams and rafters of a house in a state of disrepair is not an offence within this section. Nor does it apply to theft from the person while he was inside a dwelling house, 1876 P. R. No. 14: but in *Ratanlal* 56 a contrary opinion prevailed. The section aims at affording greater security to property deposited

in a house, etc., or kept in the abode of the owner. Thus while theft from an open verandah is not within the section, **Weir I. 435**, theft from a covered verandah is, **1881 P. R. No. 1**; and so would be theft from a cattle-shed as it is a building used for the custody of property, **M. H. C. Pro. 24-11-1896, 6 N.-W. P. H. C. R. 307**; from an out-house, *Gilbert*, **1 C. & K. 84**, from an entrance-hall surrounded by a wall in which there were two doorways but no doors, **1879 P. R. No. 10**, from a court-yard, **1879 P. R. No. 35, 1889 P. R. No. 16, 1882 A. W. N. 224**; but theft from a compound, *Ratanlal* **484**, or from an outer yard, *Davis, R. & R. 322*, or from a cattle-fold enclosed with a thorn hedge, **1887 P. R. No. 57, 1905 P. R. No. 18**, or from the brake-van of a train, **Weir I. 436**, was held not to be theft in any building, tent or vessel. Though a railway-carriage was held not to constitute a building, tent or vessel used for human dwelling, or for the custody of property, **23 A. 306, Weir I. 436**, yet where the accused stole some baggage and cash from a waggon standing at a railway-station, a conviction under this section was sustained in *Ratanlal* **293** as the station was a building though not the waggon. The ruling in **Weir I. 435** has been much criticised. In this case a cloth was spread out to dry on the roof of a house, the prisoner scaled the wall and took it away. But the High Court held there has been neither housebreaking (s. 442) nor theft in a house and that it made no difference that the roof of a house is ordinarily used for various purposes by people in Madras. The criticism is based on the ground s. 380 does not contemplate entry into the house, see **24 W. R. (Cr.) 49**. Surely theft of property from the hurricane deck, or bridge of a steamship would be within the section.

Even the owner of the building, tent or vessel may commit an offence under this section in respect of property under the protection of his house, **1885 S. J. L. B. 367; Taylor, R & R; 418, Hamilton, 8 C. & P. 49, Bowden, 2 Mood. C. C. 285.**

This being an aggravated offence of theft, a village-headman in the Madras Presidency has no jurisdiction

under Reg. IV of 1821 to deal with an offence under this section as a petty theft

177. Theft by Clerk or Servant.—Theft is punishable with increased penalties when committed in respect of any property in possession of his master or employer, by anyone being a clerk or servant, or being employed in the capacity of a clerk or servant (s 381). Exactly the same words are used in s. 408, see § 183 *infra* at p 66 for further discussion of the matter. In their application to s 381 the words *clerk or servant* are not likely to cause much difficulty. A clerk or servant is a person bound by a contract of service express or implied by his conduct so that he has *to obey the orders and submit to the control of his master* in the transactions of the business for which he is so employed, 1905 P. R. No. 50; *per* Boville, C.J., in *R. v. Negus*, L. R. 2 C. C. R. 31 at 36=42 L. J. [M. C.] 62, *Chater*, 9 Cox. 1. The test is whether the alleged servant is under the control of the prosecutor who can arrange what he is to do and how and when he is to do it, *Sadler v. Henlock*, 4 El. & Bl. 570, *Yewens v Noakes*, L. R. 6 Q. B. D. 530 at 532. Remuneration by commission, *Bailey*, 12 Cox. 56, or a share of profits, 9 W. R. Cr 37, does not destroy the relation of master and servant, *M'Donald*, 9 Cox. 10; *Hartley*, R. & R. 139; *Carr*, R. & R. 198; *May*, 8 Cox 421=30 L.J. (N.S.) M. C. 81; *Turner*, 11 Cox. 551; *Bowers*, L.R. 1 C.C.R. 41=35 L.J.M.C. 206. It is necessary that the business should not be wholly illegal, *Hunt*, 8 C. & P. 642, but the fact that it is partly illegal would not affect the relationship of master and servant, *Stainer*, L.R. 1 C.C.R. 230. *Tankard*, [1891] 1 Q. B. D. 548 at 550; *Frankland*, 32 L. J. (M. C.) 69=L.&C. 276=9 Cox. 273; *Webb* [1893] T. L. R. 199. The services need not be of a continuous character. Temporary service as a cart-hirer, to convey tamarind-fruits from a forest is within the section, *Weir* 1. 437; *Spencer R. & R.* 299; *Thomas*, 6 Cox. 403; *Winnall*, 5 Cox. 325; *Hughes*, 1 Mood. 370. A man may be a servant of several masters at the same time, *Batty*, 2 Mood. 257; *Tite*, L. & C. 29; *Stanbury*, 2 Cox. 272, though a hired ~~breastman~~ was held to be not within the section in 8 W.R.(Cr.) 22. An unpaid

apprentice was held to be a servant in 1905 P. R. No. 50=1905 P. L. R. 157=3 Cr. L.J. 70. *Mellish*, [1805] R. & R. 80. The driver of a coach hired by the day, *Haydon*, 7 C. P. 445, a person requested to receive money in a single instance, *Nettleton*, 1 Mood. 259, a person employed to collect sacrament money from the communicants of the minister, *Burton*, 1 Mood. 327 or the treasurer of a friendly society who is accountable, *Tyres*, L. R. 1 C. C. R. 157, *Hall*, 1 Mood. 474, *Miller*, 2 Mood. 249, *Woolley*, 4 Cox. 251, *Proud*, 9 Cox 22, *Eren*, 9 Cox. 398, a person sent to cash a cheque for a remuneration of six pence for the job, *Frceman*, 5 C. & P. 534, *Thomson*, 32 L.J. (M.C.) 53, a debt-collector paid by commission on recoveries, *Hall*, 13 Cox. 49, were all held not to be servants. But a rate-collector, *R. v. Callahan* 8 C. & P. 154, and an assistant overseer, *R. v. Carpenter*, 12 Jur. (N. S.) 380, were held to be servants. Property is in the possession of a master or employer, if it is in the possession of any clerk or servant who holds it for the master. *R. v. Murray*, 1 Mood. 276, or if it has been received by the clerk or servant on account of his master, and has been appropriated to his use, as, for instance, by placing it in a till, cart, barge, granary, or any other place of deposit, for property belonging to his master, or by crediting it to him in account. *Spears'* case, 2 Leach. 825; *R. v. Read*, *Dears*. 168=23 L. J. (M. C.) 25; *R. v. Wright*, D. & B. 431=27 L. J. (M. C.) 65=7 Cox. 413. If, however, the master has never had any possession of the property except by the delivery of it by a third party to the servant for the use of his master, and if the servant has not done any act to change his own original possession into a possession on behalf of the master, his misappropriation of the property to his own use would not be theft under s. 381, but criminal misappropriation under s. 403, or criminal breach of trust under s. 405. *Watts* case, 2 East, P. C. 570; *Baseley's* case, *ibid.* 571. In a case where the prisoners, who were *burkundauzes*, placed on guard over the Police Treasury buildings, stole money in a box which was placed in the building, the Court held that they should be convicted under s. 381, as having stolen the property of their master while being employed as servants. 2 W.

R. (Cr.) 55. In a similar case, where the prisoners were constables employed to guard the house of a private person, the Court convicted under s. 380, not under s. 381, **3 W. R. (Cr.) 29.** The reason of the difference was, that in the former case the prisoners were the servants of the Government, to whom the building belonged while they were not such in the latter case.

178. Evidence of Theft.—In cases where no direct proof can be given of the actual taking the usual evidence of a theft consists in showing that the prisoner was found in possession of, or dealing with the stolen property. *Ev. Act.* s. 111 (a). **5 W. R. (Cr.) 66, 7 W. R. (Cr.) 73, 13 W. R. (Cr.) 26, 23 W. R. (Cr.) 16, 25 W. R. (Cr.) 10; 21 C. 328 at 336; 1879 P. R. No. 19; 1891 P. R. No. 15.** The weight to be given to such evidence is purely a question of fact, and may vary from absolute proof to the weakest degree of suspicion.

“ It may be laid down generally, that wherever the property of one man which has been taken from him without his knowledge, or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise, the presumption is that he obtained it feloniously. This, like every other presumption, is strengthened, weakened, or rebutted, by concomitant circumstances, too numerous in the nature of the thing to be detailed. It will be sufficient to allude to some of the most prominent, such as the length of time which has elapsed between the loss of the property and the finding it again, either as it may furnish more or less doubt of the identity of it, or as it may have changed hands oftener in the meantime, or as it may increase the difficulty to the prisoner of accounting for how he came by it, in all which considerations that of the nature of the property must generally be mingled. So the probability of the prisoner's having been near the spot from whence the property was supposed to be taken at the time, as well as his conduct during the whole transaction, both before and after the discovery, are material ingredients in the investigation. But the bare circumstance of finding in one's possession property of the same kind which another has lost, unless that other can from marks, or other circumstances, satisfy the Court and jury of the identity of it, is not in general sufficient evidence of the goods having been feloniously obtained. Though, where the fact is very recent, so as to afford reasonable presumption that the property could not have been acquired in any other manner, the Court is warranted in concluding it is the same, unless the prisoner can prove the contrary. Thus, a man being found coming out of another's barn, and, upon search, corn being found upon him of the same kind with what was in the barn,

is pregnant evidence of guilt." *2 East., P.C. 656*; as to the provisions of s. 35 of the *Police Act XIII* of 1856, in regard to the possession of property reasonably suspected to be stolen, see *20 B. 348*.

Where property is found in the possession of another immediately after it is missed, the presumption is in general overwhelming that the person is the thief. Lord Hale, however, mentions a case in which a man who was found in possession of a horse on the very day on which it was stolen, was tried and condemned, "before a very learned and wary judge," and afterwards executed. About six months after, another man upon conviction for another robbery, "confessed he was the man that stole the horse, and being closely pursued desired a stranger to walk his horse for him, while he turned aside on a necessary occasion and escaped." *2 Hale, P. C. 289*. Lord Hale does not say whether the accused offered this explanation on his arrest, or when first placed before the magistrate. If he did not, he had no one to blame but himself. Thieves in a crowd have been constantly known to transfer their booty to the pocket of the most respectable person near them. False charges of theft are often founded upon similar contrivance. Where the place in which the property is found, is one to which several persons have equal right of access it cannot be said to be in the possession of any of them. The mere fact of finding property in a family house, can raise no presumption that any one of several males living in the house had brought it there *6 B. 731; 22 A. 445, at 447, 1905 P.L. R. 196=2 Cr. L.J. 230*. It would be otherwise, of course, if the property was found in a room, or in a box, exclusively used by any individual member. *1896 P. J. L. B. 279. Evans, 2 Cox. 270*. So, when stolen property was traced to the husband's house, and the wife and husband were shown to have been jointly secreting it, it was held that these facts established no original possession by the wife, and that her subsequent conduct only showed a wish to screen her husband. *5 N.-W. P. H. C. R. 120*.

When a considerable interval has elapsed between the theft and the finding, the weight to be attributed to

this latter fact will depend on the special circumstances of the case. 26 M. 467; when a stolen buffalo was not traced to the accused until twelve months after the theft, it was held the interval was too long to justify the presumption, 1885 S. J. L. B. 366. Where the property lost consisted of two pieces of woollen cloth, in an unfinished state, each about twenty yards, which were missed on the 23rd January, and traced to the prisoner on the 21st March, Patteson, J., said: "I think the length of time is to be considered with reference to the nature of the articles which are stolen. If they are such as pass from hand to hand readily, two months would be a long time; but here it is not so." *R v. Partridge*, 7 C. & P., 551 11 C. 160, & 23 W. R. (Cr.) 16; 6 A. 224 at 227; L.B.R. (1872-1892) 354. See *Adams*, 3 C. & P. 600, where Parke, J., directed that possession after three months is not recent where the articles were common articles. See *R v. Cooper* 3 C. & K. 318; L. B., R. (1872-1892) 366; 9 Bom. L. R. 27=5 Cr. L. J. 63, where *R. v. Crouchurst*, 1 C. & K. 370, is followed. In a case where property stolen was traced to the accused about two years after theft but the accused falsely alleged that he had the articles continuously in his possession for eight years, this statement was construed to mean that he had possession immediately after the theft and he was held disentitled to the benefit ordinarily ensuing from the fact there is an interval of two years between the theft and the tracing of the stolen property to the accused, *R v. Evans*, 2 Cox. 270. Where there was an interval of three weeks, the Madras High Court held the proper presumption would be not that the accused stole but that he was the receiver of stolen property, 13 Cr. L.J. 140=13 Ind. Ca. 828. Where stolen property was found on the neck of the accused's sister twelve days after the theft and the jury found the accused guilty of being in possession of stolen property, the High Court held the conviction was right, 12 Cr. L. J. 48=9 Ind. Ca. 288. See 11 A. L. J. 94=14 Cr. L. J. 124=18 Ind. Ca. 684. In 10 M. L. T. 237=12 Cr. L. J. 549=12 Ind. Ca. 525, an interval of four months was considered not recent enough to fasten responsibility upon the accused especially where some of the articles

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were found in the accused's wife's house where he was not residing at the time of search. In another case, a knife, candlestick, watch, eye-glass, and muffineer were all stolen from the same house. A year after, all five articles were found in the possession of the prisoner. Tindal, C J., pointed out to the jury that it was improbable that this curious selection of articles could all get into the hands of the same person, unless he had something to do with the original taking. *R. v. Dorey*, M. S. note by Mr Greaves, 2 *Russ.* 1309 (7th Ed). At all events, the circumstance required a good deal of explanation, which does not appear to have been given

Where the property stolen can only be identified by its species, it would generally be unsafe to convict the prisoner, *Ratanlal* 227; 7 M. H. C. R. Appx. 19. Thus when the property stolen is paddy or salt not easy to identify, conviction had to be quashed, *Weir* l. 429. But where the article stolen was money but the accused had secreted exactly the lost amount in his trousers it was thought safe to convict him, 2 M. L. T. 498=7 Cr. L. J. 218. It is unsafe to convict on bare possession of such common articles unless he can be brought into personal connection with it, either as having just left a place where property of the same kind was stored, as pepper in a warehouse; or where he has been entrusted with goods, such as coal, for delivery, and afterwards is found disposing of similar goods, out of the usual course of business for a person in his position. *R. v. Burton*, *Dears C. C.* 282=23 L. J. (M. C.) 52; *R. v. Hooper*, 1 F. & F. 85. Lord Hale says: "I would never convict any person for stealing the goods of an unknown person, merely because he would not give an account of how he came by them, unless there was due proof made that there was a felony committed of these goods" 2 *Hale*, P. C. 290. But in *Burton's* case, just cited, Maule, J., said: "If a man go into the London Docks sober, without any means of getting drunk, and comes out of one of the cellars very drunk, wherein are a million gallons of wine, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was stolen, or any wine was missed."

And so, if a train had just started from a railway station, and a cooly was found leaving the station with a valuable watch in his waistcloth, of which he could give no reasonable account, I imagine he might be convicted of theft, though the actual owner could not be produced. But on suspicion of theft of certain articles from a running goods train, a van in which four coolies were travelling was searched, the property missed was not found but hidden under a heap of clothing belonging to the four, coolies were discovered ten *Thans* of cloth abstracted from the next van, it was held none of the four could be convicted of theft in the absence of evidence to connect one or more of them individually with the possession of the cloth, 23 A. 306.

When an accused is convicted on the ground that he is found in possession of property the subject of recent theft under the presumption raised by s 114, ill. (a), Ev Act, he may not only be convicted of theft, but also of any of its aggravated forms dealt with in ss. 380 or 381. 1882 A. W. N. 143 & 224.

II. EXTORTION.

179 Extortion.—Extortion (s 383) agrees with theft in being a mode of dishonestly getting possession of the property of another, and therefore it can never be committed where the demand, which is the foundation of the charge, is one which the accused *bona fide* believed himself entitled to make 3 B. H. C. R. (Cr. Ca.) 45; 5 M. H. C. R., Appx. 14. The property which is obtained by extortion is not limited, as in theft, to movable property. It is described as "any property or valuable security, or anything signed or sealed which may be converted into a valuable security." A man might commit extortion by compelling another to assign to him an estate, or to create a mortgage or an annuity in his favour. A valuable security is defined by s 30. The radical difference between theft and extortion or robbery, is, that in the latter cases, the offence is carried out by overpowering the will of the owner, and thereby inducing him to give up his own property. Th-

important question therefore is, what means are so illegal as to convert an innocent, or actionable, proceeding into a crime.

As regards extortion, these means are described by the words (s. 383) "whoever intentionally puts any person in fear of any injury to that person or any other, and thereby dishonestly induces the person so put in fear to deliver to any person," etc. The word "injury" is defined by s. 44 as denoting "any harm whatever illegally caused to any person, in body, mind, reputation, or property." It is obvious, however, that no criminal charge could be sustained by a man of ordinary health and vigour, who gave up his property because he was threatened with a blow from a switch, or with the repetition of a story which would bring him into ridicule. The threat must be of an injury which would so put a person into fear as to induce him to deliver his property. Exceptional cases might arise where the person was a child, a nervous woman, or a man in weak health or advanced old age. Putting aside such cases, the question will be, what is the degree of fear which would justify a person of ordinary strength of mind in giving up his property, in order to escape from the injury with which he was threatened.

This question was for the first time thoroughly examined in a case where the prisoner was charged with robbery, the fact being that the prosecutor had given him the money, under terror induced by a threat that the prisoner would take him before a magistrate and accuse him of having attempted an unnatural offence *Donnelly's case*, 1 Leach 229, 2 East, P. C. 715. The judges held that the charge was made out. The result of the discussion is stated as follows in 2 East, at 718:

"On the one hand the fear is not confined to an apprehension of bodily injury; and, on the other hand, it must be of such a nature as, in reason and common experience, is likely to induce a person to part with his property against his will, and to put him as it were under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case, fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence.

or assault upon the person." See, too, *per* Wilde, B., *R. v. Walton*, L. & C. 288=32 L. J. (M. C.) 79=9 Cox. 268.

A threat of charging another with misconduct, not amounting to a crime, but calculated to injure him in his reputation, or in his domestic relations, would come within the section *R. v. Tomlinson*, [1895] 1 Q. B. 706; threatening to expose a clergyman who had intercourse with a woman in a house of ill-fame, in his own church and village, to his own bishop and archbishop and also to publish his shame in the newspapers was held to be such a threat as a man of ordinary firmness could not be expected to resist, *Miard*, 1 Cox. 22; followed in *Chalmers*, 10 Cox. 450; *Southerton*, 6 East 126. In *Smith*, 1 Dep. C. C. 510=19 L. J. (M. C.) 80 it was held the rule the threat is not of a criminal character unless it is calculated to overcome the ordinary will of a firm man has reference to the general nature of the evil threatened and not to the probable effect of the threat on the mind of the particular party addressed. The threat need not be one of accusation before a judicial tribunal, *Robinson*, 2 M. & Rob. 14. Money extorted by frightening the complainant is covered by the section, *Lotell*, 8 Q. B. D. 185. In 1 C. P. L. R. 24, money obtained by a vaccinator on threat of causing pain to children was held to be within this section. So also money obtained by a village headman threatening certain people with prosecution for indulging in cock-fighting near a public road. 14 Cr. L. J. 413=20 Ind. Ca. 237.

Threats of bringing criminal accusations are expressly recognized as modes of extortion by ss 388 and 389, which inflict special punishment, whether the person threatened has yielded or not, where the accusation threatened is of a heinous nature. Extortion is not limited to threats of such accusations, though cases may easily be imagined where the accusation threatened ought not to overpower an ordinary mind.

Where a woman was got into a room where a mock auction was going on, and was told that an article was knocked down to her, and that if she did not pay she should go to Bow Street before a magistrate and thence to Newgate, there to be imprisoned till

she could raise the money, and then a pretended constable was brought in, and she paid the money for the purpose of obtaining her liberty, a conviction for robbery was set aside. The judges held "that there was no reason for such a degree of terror in this case as to induce the prosecutrix to part with her money; she might have known that having done no wrong, if she had been taken to prison, the law would have taken her under its protection and set her free. And that the law did not allow the fear of being sent to prison to be a sufficient ground of terror to constitute a robbery." *R. v. Wood*, 2 East, P. C. 732; cf. *R. v. McGroth*, L. R., 1 C.C. 205, R. where, under rather weaker circumstances, the judges doubted whether a robbery had not been made out.

Such a case in India would certainly be robbery under s. 390, as there was an actual wrongful restraint. If, however, there was only a threat, with no immediate power of carrying it out, it would probably be held insufficient to amount to extortion.

In the case of criminal accusations, as in all other cases, the threat may be of injury to another, if it is intended to operate upon the person to whom it is made. Where the prisoner threatened A's father that he would charge A with having committed an abominable offence with a mare, unless he would buy the mare from him for £3 10s, it was held that he had committed an offence under a statutory provision similar to s. 389 *R. v. Redman*, L. R., 1 C.C.R. 12=10 Cox. 159. Similarly by arrangement between several persons the threat may be used by one and the property received by another, 2 B. H. C. R. 394. And it is immaterial whether the charge is true or false, for the offence consists in using the terrors of the law for the purpose of extracting money. 7 W. R. (Cr.) 28; *Gardner*, 1 C. & P. 479; *Hamilton*, 1 C. & K. 212; these rulings were followed in *Weir* L. 441, where it was laid down that though the threat to use the process of the law is perfectly lawful, to do so for the purpose of enforcing payment of more than is due is illegal and such a threat made with such an object was threat of injury. So that a village headman demanding Rs 10 for injury to his goat worth Rs 2½ and obtaining payment by threat of a prosecution for mischief was rightly convicted under s. 384. This ruling does not seem to be sound. The courts are not entitled to

scrutinize the motive of a party entering into a contract with respect to a compoundable offence. Though the goat was worth only Rs 2½ it would cost the offender more than Rs 10 in time trouble and money if he had been prosecuted on a charge under s. 434. On a trial for extortion, evidence that the complainant in truth deserved the imputation levelled against him with a view to coerce his will would be irrelevant, *Cracknell*, 10 Cox. 408; unless it be that the imputation was in respect of a compoundable offence and that the accused did not really extort but obtained payment by way of compounding such an offence, *Richards*, 11 Cox. 43. Similarly where the object is to compel the delivery of accounts of money honestly believed to be true and owing, *Coghlan*, 4 F. & F. 316.

Threats in times of public disturbance to bring a mob down upon the prosecutor's house to destroy it, unless money is given. *Astey's case*, 2 East, P. C. 729, *Brown's case*, *ibid* 731, or threats to cause the loss of an appointment, by the use of influence with the superior of the person threatened, 18 W.R. (Cr.) 17, or a wrongful arrest, and threat of continued detention by a police officer, 27 C. 925, *Robertson*, 10 Cox. 9, or threat of burning a Bank and stopping its business, if money was not paid to the accused by being deposited at a place indicated, *Smith*, 2 C. & K. 882=4 Cox. 42, *over-ruling Pickford*, 4 C. & P. 227, come within s 383. Now the subject is regulated in England by 24 & 25 Vic. c. 96, s. 49. The seizure and detention of carts of firewood until dues were paid on them, was held not to create a fear of an injury within the meaning of s 383, even on the assumption that the claim was unfounded. 3 B. H. C. R. (Cr. Ca.) 45. Similarly as to obtaining money by threats that otherwise the complainant's trespassing cattle would be impounded, *Weir I.* 438 & 440, or that the accused, a junior pleader would retire from the case if complainant did not pay the extra fees demanded, 5 M. H. C. R., Appx. 14, or a toll-gate keeper demanding tolls not really due and detaining carts to enforce payment, *Weir I.* 440. Where tolls were paid on entry into a town but the contractor's Gumasta disregarding previous

warnings illegally levied toll a second time when the carts were leaving the town preventing the carts from passing until such illegal payments were made, it was held in *Weir* 1. 441 that he was rightly convicted. It is not extortion to obtain money from a person who believes it to be legally due, though his belief is created by a fraud. The offence is cheating, 4 W. R. (Cr.) 5; 3 W. R. (Cr.) 32. It has been ruled in 5 W. R. (Cr.) 19, that extortion can never be committed unless the owner of the property actually delivers it to the accused, and that it is not sufficient if he takes it away in the presence of the prosecutor. In the particular instance, it was held that the offence really committed was robbery. But suppose a man enters the room of another, and threatens to accuse him of murder, unless money is paid to him, and then takes up a purse which is lying on the table. If the prosecutor nods to him, and he then carries it away, surely this is a delivery to him; and what difference can it make that the prosecutor simply allows his purse to be carried away, under the influence of fear, without resistance or objection? See 2 *East. P. C.* 707. Where several persons are engaged in the same design to extort money, and some use the threat while others receive the money, all are guilty of extortion, 2 B. H. C. R. 394. But the mere fact that extortion is committed in the presence of a village-choukedar without eliciting any disapproval on his part is not enough to render him liable as an abettor, 8 C. 728. Similarly one who advances money to another to pay to the extortioner cannot be regarded as an accomplice, 27 C. 144 & 925; 33 C. 649.

The fear caused by the threat must be the operating influence which caused the delivery. The essence of the offence is that by reason of the threat a person's conduct is deprived of "that element of free voluntary action which alone constitutes consent". *R. v. Ogden*, L. & C. 288, *R. v. Robertson*, L. & C. 483=10 Cox. 9. If the prisoner is already in possession of the property, a subsequent threat which prevents the owner from claiming the return of the property will neither be extortion nor robbery. He slipped his hand into the prosecutor's pocket,

and took his purse. The prosecutor then saw his purse in the hand of H, and demanded it. H replied, "Villain, if thou speakest of thy purse, I will pluck thine house over thy ears, and drive thee out of the country as I did John Somers." Upon this he went away with the purse. It was held that if he had used this language before he got possession of the purse, it would have been robbery, but as the theft was complete before the menace, it was only larceny. *Harman's case, 1 Hale, P. C. 534*, recognized by De Grey, C. J., and Lord Mansfield, C. J., in *Donnolly's case*; *2 East, P. C. 724, 726*. So, if persons come to rob a man, and make him swear to bring them a sum of money, which he afterwards does; if the subsequent delivery is from a sense of the obligation of the oath, it is not extortion; if from a continuing sense of fear, it is, *1 Hale, P. C. 231*; *2 East, P. C. 733*. In one case the prisoner threatened to accuse the prosecutor of an infamous crime. Various negotiations were entered into to buy off the charge, and at last a sum of money was paid to him. The prosecutor deposed that at the beginning of the transaction he apprehended injury to his person and character, but that at the time when he handed over the money he had no such apprehension, but parted with it for the sole purpose of bringing the prisoner to justice. It was held that no robbery was committed, and in India it would be held that there was no extortion. *Reane's case, 2 East, P. C. 734*.

III. ROBBERY AND DACOITY.

180. Robbery and Dacoity (s. 390) is a special and aggravated form of either theft or extortion. In either case, it is necessary to establish all the facts which are required to make out a complete theft or a complete extortion, already defined. Extortion becomes robbery "if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so putting him in fear, induces the person so put in fear then and there to deliver up the thing extorted.

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The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint." Theft becomes robbery if the offender voluntarily causes, or attempts to cause to any person, death, or hurt, or wrongful restraint, or fear of such. It will be observed that the person to whom the injury is caused or threatened need not be the person who is being robbed. A threat by a robber, that he will kill a man's wife or child, if there is an immediate capacity of carrying out the threat, will satisfy the section. *Per* Hotham, B, *2 East, P. C. 718.*

There is, however, an important difference between robbery founded on extortion and robbery founded on theft. In the former case, the entire menace must have been completed before the property was delivered up, and must be the cause of the delivery. In the latter case, it is indifferent whether the violence, or threat of violence has been offered "in order to the committing of the theft, or in committing the theft, or in carrying away, or attempting to carry away, property obtained by the theft." The result is, that, in the former instance, *Harmann's* case, cited above (p. 641), is still good law; in the latter instance, it is not.

Any violence which comes within the terms of s. 390. and which is used for any of the purposes there specified, will convert theft into robbery, as, for instance, if a person is hurt by the offender in the act of tearing off an ear-ring or nose-ring. *Lapier's* case, *2 East, P. C. 557* = *1 Leach 320*; *Moore*, *1 Leach 335*; *Simpson's* case, *Dears C. C. 421*. If pain is caused the offence is complete (s. 319), *Mason, R. & R. 419*, or if an attempt to cause pain is made the offence is complete even though no pain is actually caused, *5 W. R. (Cr.) 95*. But if a thief snatches away by force a packet which another is carrying under his arm, no doubt the offender uses violence in getting possession of the property but not to cause hurt or wrongful restraint or fear of hurt or wrongful restraint and consequently his act is simple theft but not robbery. *Baker's* case, *1 Leach 290*;

Robin's case, 1 Leach 290; *Steward's case*, 2 East, P. C. 702; *Horner's case*, 2 East, P. C. 703; *Macauley's case*, 1 Leach 287; *Gnosil*, 1 C. & P. 304. Again even where voluntary hurt is caused, it must be in order to the committing of theft or in committing theft, 6 W. R. (Cr.) 85, or in carrying away or attempting to carry away the stolen property, so that hurt caused to avoid capture when surprised would not convert the theft into robbery, *Ratanlal* 65, 3 W. R. (Cr.) 14; *Weir* 1. 442, or hurt caused in dispossessing people of immovable property although theft also might have been committed at the same time as an independent act, 5 C. W. N. 372. But where the accused assaulted the complainant with intent to commit rape and in her terror she offered him money to desist which he accepted, he was found guilty of robbery, *R v Blackham*, 2 East, P. C. 711; under the Code this will be extortion as defined in s 383. Similarly if thieves enter a house and the inmates are so terrified that no one dares to resist, the fact that no hurt was caused would not prevent the crime from being robbery or dacoity, 10 Bom. L. R. 632=8 Cr. L. J. 143. In the case of threats, what is important is the effect reasonably produced upon the mind of the prosecutor, not the actual purpose of the offender to carry out his threat. In *Donnolly's case*, Lord Mansfield, C. J., said "That it was clear no actual danger to the owner need exist, for if a tinder-box or candlestick were used instead of a pistol, it was still robbery." 2 East, P. C. 726. And, of course, it would be no defence to show that the pistol was unloaded or out of order. Nor is it necessary to show actual threats, if the conduct of the accused implies a threat, as, where a mob came up to a house after the prosecutor had refused to give money to one of the members, and only went away after he had given them the money they asked for *Taplin's case*, 2 East, P. C. 712, 7 W. R. (Cr.) 35; *Astley's case*, 2 East, P. C. 729, *Brown's case*, 2 East, P. C. 731. Nor does it make any difference that the article was obtained under the plea of asking for charity, or under colour of a sale, if it was really extorted by such violence, or fear of violence, as amounts to robbery. 1 Hale, P. C. 533, *Simon's case*, 2 East, P. C. 712 & 731. And

it is equally robbery, though the articles were not taken from the person of the owner, if they were taken in his presence, while he was under the influence of the fear caused by the prisoner's conduct. *1 Hale, P. C. 533*; *2 East, P. C. 707*; or while wrongfully restrained, *5 W. R. (Cr.), 19. Hughes' case, 1 Lewin 301*; *1896 P. R. No. 12, Gascoigne's case, 1 Leach 280.*

Every robbery involves a completed act of theft or extortion, and therefore the accused must have had such a possession as would constitute either of the above crimes. Where it was found that the prisoner had stopped the prosecutor as he was carrying a feather-bed on his shoulders, and told him to lay it down, or he would shoot him on which the prosecutor laid the bed on the ground; but before the prisoner could take it up, so as to remove it from the spot where it lay, he was apprehended, the judges were of opinion that the offence was not completed, and the prisoner was discharged. *Farrell's case, 2 East, P. C. 557*; *1 Hale, P. C. 533.* In India he would have been convicted of an attempt under s. 511. If, however, the accused has had even a momentary possession of the article, it is sufficient, though he afterwards drops it, or returns it to the owner. *Lupier's case, 2 East, P. C. 557*; *Peat's case, ibid.*

The violence which is necessary to make out a robbery, must have been used for one of the purposes mentioned in s. 390. Where a man was trying to steal a basket which was tied to a cart, and the owner stretched out his arm to lay hold of it just at the moment when the thief was cutting the string with a knife, and the prosecutor's wrist was cut, upon which he released his hold, and the prisoner made off with the basket, this was held to be only theft, as the wound was a mere accident. It would have been different if it had been inflicted to make the owner give up his grasp, *R. v. Edwards, 1 C. & K. 32*. So, where a thief, finding himself observed, abandoned his booty and ran away, throwing stones at the owner to prevent pursuit, the Madras High Court stated the offence was not robbery, *Weir I. 442*; *4 L. E. R. 147=7 Cr. L. J. 446.* The same result followed when the

accused stripped a child of his ornaments and when the child threatened to tell his mother beat him to obtain his silence, 6 C. P. L. R. 36. If he had retained the goods, and beaten off pursuers by pelting the pursuers, it would have been robbery, 17 M. L. J. 118=5 Cr. L. J. 201.

In robbery, and also in the offence of dacoity (s. 391), which is one of its forms, there can be no conviction where the property was taken by force or menaces, under the *bona fide* belief that the prisoners were taking what was their own, 3 M. H. C. R. 254; *Hall* 3 C. & P. 409. But it is no excuse that the prisoners were actuated by moral or religious motives in depriving another of what they knew to be his property, 15 A. 299; ante § 174 at p 619

Robbery committed or attempted by five or more persons is dacoity (s. 391), which again gives rise to various other offences of a cognate character (ss 395—402), some of which are discussed in notes to those sections in Part I. The offence defined by s. 397 must be committed at the time the robbery or dacoity is being committed or attempted. If the offenders run away on being detected, and then attempt to commit violence to avoid arrest, they cannot be convicted under ss 397 & 511 23 A. 78. As regards dacoity, the very definition in s. 391 embraces an attempt to commit robbery. Hence s. 511 *infra* dealing with attempts in general does not apply to the offence punishable under s. 395, 7 W. R. (Cr.) 48. Where five or more persons are found assembled together under suspicious circumstances, an intention to commit dacoity may be inferred from those circumstances, as, for instance, from the possession of guns or other weapons, for which they had no license, concealed on their persons, for which no explanation was offered, 23 A. 124. The code provides for three different degrees of offence in connection with dacoity, viz (1) the actual commission of dacoity (s. 395), (2) a preparation for it (s. 399), and (3) an assemblage for the same purpose (s. 402) All the offences have this in common, that they presume an intention or agreement

to commit dacoity by five or more persons. In a popular sense, an assembly to commit dacoity may be a preparation for it. But a mere assembly without further preparation is not a preparation within the meaning of s. 399. For if it were, s. 402 would be redundant. This section applies to the case of mere assembling without proof of other preparation for which there is a maximum punishment of seven years, whilst the preparation which is the subject of s. 399 is punishable with ten years' imprisonment. A person can thus be not guilty of dacoity (s. 395) and not guilty of preparation (s. 399), and yet be guilty of an assembly. (s. 402)—per Woodroffe, J., in 41 C. 350=18 C. W. N. 498.

IV. CRIMINAL MISAPPROPRIATION.

181. Criminal Misappropriation.—This is the act of dishonestly converting to a man's exclusive use, even for a time, the movable property of another, which has come lawfully into the possession of the offender (s. 403). The latter circumstance distinguishes the offence equally from theft and from cheating. It will be observed that all the illustrations given in ss. 403 and 404 are of cases where no contractual relation exists between the owner and the possessor of the property, before the misappropriation takes place. The accused acquires the possession innocently but its retention becomes wrongful and fraudulent either from any subsequent change of intention, 1905 A. W. N. 9=2 Cr. L. J. 94; 9 Cr. L. J. 312; 6 Bom. L. R. 1093=1 Cr. C. J. 1109, or from knowledge of some new fact with which the party was not previously acquainted, 15 C. 388 at 400. Hence the offence is completed by a mental act, without the necessity for the property misappropriated being in any way used for the benefit of the accused or to the detriment of the prosecutor, 1889 P. R. No. 36. So the section applies where more money than was due was given to the accused, who retained the balance after he found out the mistake. 2 N.-W. P. H. C. R. 475; see *R v Middleton*, L. R., 2 C. C. R. 38; *Ashwell*, 16 Q. B. D. 190; *Flowers*, *ibid.* 643; *Hehir*, [1895] 2 Ir. R. 709=18 Cox. 267, but not where the payment was in

respect of a debt barred by the law of limitation as regards recovery by suit, 1 A. L. J. 508=1 Cr. L. J. 803. And so it would be if a man called at the post-office for a letter or a parcel which he expected, and the clerk gave him one addressed to a different person with a similar name, and he kept it, after he had found out that it was not intended for him. See *R v. Kay*, D. & B. 231=26 L. J. (M. C.) 119. It may, perhaps, be that s 403 only applies to such cases, and that s 405 is intended to govern all cases, where the possession is received upon a distinct understanding as to the mode in which the property is to be dealt with. One class of such cases may, however, raise discussion. It had already been pointed out that a servant cannot be convicted of theft by taking goods of which the master has never had any possession except through him. For instance, where a clerk is sent out to collect money due on a bill, or a servant to buy and bring home goods.

as embezzlement, not breach of trust, as, for instance, where a shopman sold goods over the counter, and received cash, but did not enter the transaction, and pocketed the money. *R v. Betts*, Bell 90=28 L. J. (M. C.) 69. The clerk or servant is in no proper sense of the word a trustee. The money or goods are his master's from the moment he receives them, and if they were stolen from him they would be alleged in the charge to be the property of the master. See 2 *East, P. C* 568, 652. The point seems only to have arisen twice in India, and in neither case was there any discussion. An income-tax clerk, who received money which he ought at once to have entered in an account, and paid over into the Treasury, misappropriated it. He was convicted under s 403. 12 M. 49, Weir I. 455. In another case, where a post-office clerk had abstracted a letter, in order to receive for himself part of the postage payable upon it, the High Court held that he had committed theft of the letter, and had also attempted to commit criminal misappropriation. 14 M. 229. The point might be of importance, owing to the

great difference in the penalty appropriate to each section. Cases are conceivable as in the case of *theft* where an owner might be guilty of misappropriation, *e.g.*, where agricultural crops are attached and a prohibitory notice served on the owner but the latter harvests the crops in spite of the attachment, 22 M. 15; but it is of the essence of misappropriation that the property, is not at the absolute disposal of the accused, 1938 P. R. No 19

Finding Property.—The majority of cases of criminal misappropriation will probably arise in regard to property found (s. 403, Expl. 2). There can, of course, be no criminal misappropriation of things which have actually been abandoned, as the sacred bulls referred to in a previous section (*ante*, § 174 atp. 610) *Cf.* 11 M. 145, where it was held to be the property of the temple. An idol in Hindu law is capable of holding property apart from the Pujari or Shebait and the latter may be guilty of misappropriation with respect to the property in the possession of the idol, 23 C. 645 at 655, Ratanlal 919. The newspapers, or remnants of food, which a traveller leaves behind him in a railway carriage being abandoned by the previous owner cannot be the subject of misappropriation. The difficulty arises in regard to articles which have been lost without being abandoned, or which have been abandoned only because they are lost. Where property has been mislaid or forgotten in the owner's house, or upon his premises, or in an article of furniture which still remains his own, the property is still in his possession, and both by English and Indian law the misappropriation of it is theft. Where valuable articles, which cannot be supposed to have been thrown away, are left in a shop, or in a railway carriage, or hackney coach, or in any similar place, where the owner would naturally come back to look for them, the owner's property remains, though his possession is lost for the time. A person who takes up, and converts to his own use property so found, commits larceny, according to English law, *R. v. West, Dears.* 402=24 L. J. (M. C.) 4; *R. v. Moore, L. & C.* 1=30 L. J. (M. C.) 77; *R. v. Pierce*, 6 Cox. 117; *Wynne's case*, 2 East, P. C. 64; *R.*

v. *Spurgeon*, 2 Cox. 102, and criminal misappropriation, according to the Code, even where an article of value is dropped on the road, or in a field, and the owner gives it up for lost, merely because he has no hope, of being able to find it, he does not thereby lose his property in it, and can recover it by civil suit *R. v Peters*, 1 C. & K. 215. When property so lost is traced to the possessions of another the presumption, is the offence committed by the latter is criminal misappropriation and not theft, 1 L. B. R. 123. But if a man takes cattle when they were with the herd of an adjoining village, not knowing to whom they belong and thinking they were without an owner, he commits the offence of theft and not criminal misappropriation, because (a) the cattle may return to their owner and (b) the belief that the cattle were without an owner cannot be said to be a reasonable belief, 7 C. P. L. R. 34. In such a case, according to English law, the finder commits theft, if three facts are found against him *first*, that he intended to appropriate the property from the first. *second*, that he believed, at the time he took it, that the owner could be found, and, *thirdly*, that he acquired the knowledge of who that owner was before he converted it to his own use *Per Blackburn, J., R v Glyde*, L. R., 1 C. C. R. 139, at 143 See *per Parke, B.*, in *Thurborn*, 18 L. J. (M. C.) 140=2 C. & K. 831; *S Staffordshire Water Co v Sharman*, [1896] 2 Q. B. 44; *Gardner, L. & C.* 243. If any one of these ingredients is found in his favour, he has not committed theft, nor any other crime This was the case in *Weir* 1. 455, when the accused, finding two logs of wood drifting down a river during high fresh, took possession of them and left them in front of his house unused and exposed for several months See also 1906 P.L.R. No. 28=3 Cr. L.J. 299; 10 Bur. L.R. 356; 17 W.R. (Cr.) 11; 10 C.L.R. 187; 1881 A. W. N. 100. As to persons unearthing concealed treasure on their land, see *Ratanlal* 8. The fact the complainant gave the accused time to make out the account and to pay the balance will not vitiate a conviction under s 403 or show that the matter is one entirely for the civil courts, 5 W R. (Cr.) 56; 6 A. L. J. 758=10 Cr. L. J. 417=3 Ind. Ca. 908. Under the Code the guilt of the accused is determined by the

state of his mind at the time when he appropriates the property to his own use; that is, when he sells it, realizes it, or in any other way puts it out of his own power to restore it, or when he definitely makes up his mind to keep it at all hazards as his own. As stated by Chatterjee, J., in 1908 P. W. R. (Cr.) 27=1908 P. R. No. 11=8 Cr. L. J. 250, "the mere possession of the property is not sufficient for proving the charge without something to indicate the appropriation or conversion, though long possession without any attempt to find the owner may amount to evidence of intention to do so. Explanation 2 to s. 403 makes the necessity of some positive proof of this sort quite clear. Illustration (a) shows that the picking up of a rupee whose owner is not known is not an offence. Similarly illustration (c) shows that the finding of a purse with money belonging to an unknown owner is not an offence, but the appropriation of it to the finder's own use is necessary to complete it." If at that time he does not in good faith believe that the real owner cannot be found; or if he takes this final step before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it, he has committed criminal misappropriation (s. 403, Expl. 2).

It does not necessarily follow that the finder must be convicted under s. 403, merely on proof that he had taken no steps to discover the owner, or to leave time for an effective claim being made. Where he fails to act in the prescribed manner, he does so at his own risk. If the real owner afterwards comes forward, the accused would be able to set up no defence. If the owner never comes forward, it would still be open to the tribunal to find, that at the time of the misappropriation there was an owner, who might have made good his claim if the course laid down in Explanation 2 had been followed. It would be equally open to it to come to an opposite conclusion. In 18 B. 212, the accused found a gold *mohar* in an open plain, in a village near Ahmednagar, and sold it next day to a shroff. The sale was on the 12th October, 1892, the accused was convicted of criminal misappropriation on the 12th December, and up to

March 9, 1893, when the case was disposed of by the High Court on Appeal, no one had come forward to claim the property. On this state of facts the High Court reversed the conviction, holding that it was not sufficiently made out that on the 12th October the gold *mohur* was property at all, in the sense of having any owner.* The advantage of following the statutory procedure is, that, in the absence of conclusive evidence to the contrary, every presumption will be made in favour of the accused.

The Calcutta High Court ruled in 14 W. R. (Cr.) 13, that charges under this section should specify the name of the owner of the property. This may, in many cases, be impossible. Where it is so, the averment that the article belongs to some person unknown, will bring that very important fact definitely before the minds of those who have to deal with the case. In the particular instance, the necessary allegation would have disclosed the material circumstance that the prisoner was a joint owner of the chattel he was accused of misappropriating—an admission which would, in the great majority of cases, put an end to the charge. Similarly a charge of dishonest misappropriation cannot lie against the Manager of a Joint Hindu Family until accounts have been taken and shares allotted, *Weir* L. 453, or against an agent for collection who sets off the money collected against wages due to him *Ratanlal* 700. See also 1889 A. W. N. 22; *contra* 11 W. R. (Cr.) 51; 3 N.-W. P. H. C. R. 30; 6 E. W. L. R. 553; 1903 P. R. (Cr.) 10.

When the charge is of misappropriation of money, it is sufficient to state the gross sum misappropriated, without specifying particular items or dates. The gross sum must be made up of items included within the period of one year. *Cr. P. C.*, s. 222 (2).

* The conclusion arrived at by the High Court was by no means a necessary one. Many years ago I was throwing stones into a lake in Ireland, when a much-prized ring followed me down. When the water went down, the ring was found, and was sent to me—*Mayne*.

In spite of Explanation the appropriation must be dishonest, an intention to deprive the owner temporarily, of the use of the property may not amount to dishonesty because wrongful loss is defined in s. 23, as loss of property and not deprivation of its use—*per* Plowden, J., 1836 P. R. (N.) 27. Thus the deterioration of an article (pledged turban) through being worn was held not to be a dishonest use, 3 M. H. C. R., Appx. 6. To constitute wrongful loss the property must be lost to the owner or the owner must wrongfully be kept out of its possession. But on the other hand, where a Hindu girl picked up a gold necklet and made it over to a sweeper and the accused, the brother of the finder, got it from the sweeper on the false representation that it belonged to an acquaintance of his but ultimately gave it up when pressed by a Police constable, it was held the accused had misappropriated the jewel though he had possession of the same only for a brief while and had made no manner of use of the article, 1886 P. R. No. 24. See also 1881 A. W. N. 80; 10 Bur. L. R. 170.

V. CRIMINAL BREACH OF TRUST.

182. Criminal Breach of Trust.—The two ingredients in the offence, (as defined in s. 405) are, *first*, an original trust, and, *secondly*, a dishonest appropriation of the trust property, Weir I. 460; 1 Cr. L. J. 385. The section, however, applies only to moveable property, Ratanlal 928; 23 C. 372 following 6 B. H. C. R. (Cr. Ca.) 33; 36 C. 758=10 Cr. L. J. 253=3 Ind. Ca. 189 in respect of the custody or management of which the offence is committed, 16 W. R. (Cr.) 39; 10 Bur. L. R. 110=1903 U. B. R. (P. C.) 9. But the property need not have any appreciable value as held in 27 A. 28=1 Cr. L. J. 633. where cancelled cheques of no higher value than as mere pieces of paper were held to be property within the meaning of s. 405. Similarly where a paper was handed up to another for being read, it was held an offence under this section could be committed by the taker, the motive for the trust being immaterial, 1935 A. W. N. 9=2 Cr. L. J. 94, *R. v. Gardner*, L. & C. 243.

A *trust* may be defined as, any arrangement by which one person is authorized to deal with property for the benefit of another. This definition will cover both clauses of the description of a trust given in s. 405. A person is entrusted with property, when he is given the actual possession of it, as the trustee of a marriage settlement, or a banker. He is entrusted with dominion over it, when the possession remains with the owner, but he is given authority to dispose of it under certain conditions, as a shopman, or an agent, with a power of attorney to sell. In general, there can be no doubt as to the existence of a trust, or as to the obligations created by it. Difficult questions of this sort often arise in the civil courts, especially in such cases as those of implied trusts, precatory trusts, or voluntary trusts. No criminal liability can arise in such cases if the party acts honestly, though wrongly, under a mistaken view of his duties or rights, 6 M. H. C. R. Appx. 28; 1902 P. L. R. 157; *R v. Norman*, C. & M. 501; 28 C. 362; *Davey v. Cory*, [1901] A. C. 477; *Donald v. Suchling*, L. R. 1 Q. B. 585, or where the entire transaction out of which the alleged trust arises is *bona fide* disputed 2 B. H. C. R. 133. Nor can a person commit breach of trust unless he has acted dishonestly as that word is defined in s. 24, 1879 P. R. No. 30; 1909 U.B.R. (P. C.) 21. Bare refusal by the accused to allow the removal of a box left in his house by the complainant unless some debt due to him was paid would not constitute any offence under s. 402. 17 M.L.J. 413=6 Cr. L. J. 330. But use by a printer of blocks entrusted to him to print complainant's catalogue for the purpose of printing a rival firm's catalogue would be an offence, 6 C. W. N. 203. It is also 9 B. M. L. R. 120. Causing temporary loss for a time would be an offence, 8 B. M. L. R. 951=5 Cr. L. J. 5. In 29 C 489, a servant was ordered by his employers to burn a quantity of waste paper on their premises, instead of which he kept them for himself. It was held that he had not committed an offence under s. 408. He had certainly not intended to cause wrongful loss to his employers, nor was the keeping of the paper wrongful in his keeping for himself proper as the employer only wanted to get rid of it.

followed where a Calcutta Municipal employee made money by sale of condemned rice which he had been directed to destroy as unfit for food, 2 C. W. N. 216. Where, however, the trust and the dishonest breach of it are both made out, it would be no answer to a charge under these sections that the accused had an interest in the property, provided it was not an interest which justified his mode of dealing with it. There is nothing to prevent one partner being convicted under s. 405 of criminally misappropriating the partnership property 13 B. L. R. 307=21 W. R. (Cr.) 59; F. B. *over-ruling* 9 W. R. (Cr.) 37; 6 Bom. L. R. 553=1 Cr. L. J. 757; 1903 P.R. No. 10; 21 W. R. (Cr.) 10; *R. v. Tankard*, [1894] 1 Q. B. 548; *Balls*, L. R. 1 C. C. R. 328. But it must be remembered that each partner as the agent of all the others is entitled to collect and disburse and it is only when the other partners call upon him to account and he fails to render a satisfactory account he could be held liable, 35 C. 1108=9 Cr. L. J. 74. So a mortgagor in possession, who wilfully incurs arrears of Government revenue, and allows the property to be sold, and then purchases it *benamée*, with the object of holding it free of the claim of the mortgagee, has committed an offence under the same section, 5 W. R. (Civ.) 230. And conversely, where property has been pledged to another, who then makes use of or deals with the property, he will be guilty of breach of trust, according as he is justified in his acts by the terms of the pledge, and, if not justified, according as his conduct is dishonest (s. 24) or not. 3 M. H. C. R. Appx. 6; 6 M. H. C. R. Appx. 28; 13 Bur. L. R. 286=6 Cr. L. J. 334. Where accused was entrusted with a jewel for raising seven Rupees by pledge thereof but he pledged it for more, gave the complainant Rupees seven and applied the additional money to his own use without telling him what he had done, he was held guilty under s. 406, *Weir* I. 464. See 3 L. B. R. 200=4 Cr. L. J. 466. It is very common for adjudications in insolvency to be followed by a crop of cases of alleged criminal breach of trust. Magistrates have to be careful that in the great majority of cases the real object of the complainant is to put pressure upon the debtor and his friends and relations with a view to obtain some undue advantage to himself

There is all the difference in law between a sum due to the complainant as a debt and a sum of money held by the accused as a trust for the complainant and over which the accused had no right of disposition, 1901 P. R. No. 32. See 5 Bur. L. T. 143=6 L. B. R. 52=13 Cr. L. J. 888=17 Ind. Ca. 824 where a Full Bench of the Lower Burma Chief Court has discussed the matter at length. See also 6 Bur. L. T. 13=7 L. B. R. 16=14 Cr. L. J. 145=19 Ind. Ca. 145; 6 L. B. R. 46=5 Bur. L. T. 11=13 Cr. L. J. 269=14 Ind. Ca. 653; 1901 P. L. R. 135; 1885 P. R. (Civ.) No. 95. Very often charges are recklessly made as the chances of a prosecution for an offence under s 211 *supra* are slender in such cases

The Madras High Court has held that a married woman cannot be convicted of criminal breach of trust in respect to her husband's property, since she has a joint possession of it with him, *M H C Ruling 10th Nov. 1864* I doubt, however, whether this ruling would be adhered to at present. See 17 M. 401 discussed at p 627 *supra* with reference to a similar ruling as regards theft. I am not aware of any decision as to the liability of a married woman, where a criminal breach of trust has been committed by her in reference to the property of a person who was not her husband. The difficulty, of course, would be felt where the breach of trust arose in consequence of the violation of some legal contract, express or implied, and where the married woman was "disqualified from contracting by any law to which she was subject" (Contract Act, s 11)

It might possibly be held, on the analogy of contracts unsupported by any consideration, *Coggs v Bernard*, 1 Sm L. C 281, *Balfe v West*, 13 C B. 466=22 L. J. (C. P.) 175, that although the married woman could not be compelled to carry out the terms of the trust, she could be punished if she wilfully repudiated those terms, and then disposed of property which did not belong to her as if it was her own. See *R v Foulkes*, L. R., 2 C. C. R. 150. No such difficulty would occur, if the breach of trust consisted "in violation of any direction

of law prescribing the mode in which such trust is to be carried out." It has been held in England that a married woman could be convicted of larceny as a bailee, on the ground that a contract was not essential to a bailment, and that it was immaterial whether there was a valid contract or not. *R. v. Robson*, L. & C. 93=31 L. J. (M. C.) 22, overruling *Denmour*, 8 Cox. 440. If a shopwoman sold goods across the counter, and then kept the price for herself, I do not think it would avail her to prove that she was a married woman. She would certainly have committed criminal misappropriation (*ante*, § 181). Where a person was entrusted with money to buy coals, and he bought them and put them into his cart, and on his way back abstracted part, delivering the remainder as all that the prosecutor was entitled to, a question arose whether the prisoner could be said to have been entrusted with the property of the prosecutor, so as to satisfy the English statutes. The conviction was affirmed. Some of the judges held that the coals being purchased with money given by the prosecutor for that express purpose, vested in him, and were held by the prisoner on trust for him. Others thought that a specific appropriation by the prisoner was necessary to vest the property in the prisoner, but the Court was unanimous that, if such an express appropriation were necessary, it was made out by the facts. *R. v. Bunkall*, 33 L.J. (M. C.) 75=L. & C. 371. Where a man entrusted the accused with a horse to sell at a fair and the accused sold the horse but absconded with the money, held the money was entrusted with the accused and that he was guilty of criminal breach of trust, *R. v. De Banks*, L. R. 13 Q.B.D. 29. See also *R. v. Governor of Holloway Prison*, 18 Cox. 631=66 L. J. (Q. B.) 29. It depends entirely on the answer to the question, whether the accused received the money for himself or in trust for another. The line of distinction will be clear from *R. v. Smith*, 71 J. P. 191. Here the accused entered into a contract with the complainant that the latter was to carry on the former's business while the accused went about collecting orders. The accused received certain payments from customers who knew nothing at all of the contract with the complainant. The accused

therefore was held not to have received money for or on account of the complainant though he was liable to account on the footing of breach of contract

Most of the cases decided in India have turned upon the question whether the facts proved against the accused amounted to a breach of trust. In 8 A. 120 it appeared that the Government had made a contract with a Calcutta firm to supply them for two years with an article called *gazzi*, at Rs. 1-12-6 per piece. The prisoner was a Government servant, whose duty it was to certify the article received as being according to sample, to receive the money due, and pay it over to the contractors. It was charged against him that he had induced the contractors to make a new arrangement with him, unknown to the Government, by virtue of which he purchased as much *gazzi* as was required, from an Allahabad firm, at Rs. 1-6 per piece, charging Rs. 1-12-6 to Government, and on receipt of the amount credited the whole as paid to the Calcutta firm, while he really only paid at the rate of Rs. 1-6 to the Allahabad firm, pocketing the difference for himself

The Court held that "if this state of facts had been proved, it amounts to the offence of criminal breach of trust. It is, by whatever technical name it may be called, a stealing of the difference between the two prices by a servant of Government, and a falsification of accounts with the object of covering the crime" As a matter of fact the Court held that such a state of facts had not been proved. Petheram, C.J., went on to make the following observations upon the law of criminal breach of trust, in reference to cases where a servant, employed to pay a bill for his master, obtains a commission or a reduction of the price for his own benefit.

"Now, if the account be an open one, that is, an account of which the items have never been checked or settled, and if the transaction amounts to a taxation of the bill, and a reduction of the price by the servant, it is evident that the servant obtains the reduction for his master; that the money in his hands always remains the master's property, and that if he appropriates it, he steals it. But if the master himself has settled the account with the tradesman for a specific sum, and he sends the servant with

believes has a right to give it. It may be that, according to the strict equitable doctrines of a Court of Chancery, the servant is bound to account to the master for the money. But, however this may be, his act is a very different matter from a criminal offence, and I do not think he can be convicted of criminal breach of trust merely because, by a mere equitable doctrine of the Court of Chancery, it was obligatory on him to render an account." 1 Cr. L.J. 91. (sh. n.) If a salesman sells goods for less than the marked price with a view to make a profit to himself by accepting a present from the purchaser, he commits criminal breach of trust as regards the difference between the marked price and the price at which he sold, *R. v. De Kromme*, 17 Cox, 492—66 L.T. 301.

In 16 A. 88 arising out of the insolvency of the *Himalaya Bank*, it appeared that the bank was incorporated under the *Indian Companies Act*, X. of 1866, by virtue of which it was expressly provided that dividends could only be paid out of profits. In an indictment against the directors and others under s. 409.

It was laid down by Edge, C.J., that the directors had dominion over the property bound to manage terms of the Act bound not to pay and paid were to which they were not entitled, they were guilty of breach of trust as bankers under s. 409.

When the secretary of the Bank of India was charged with a conspiracy for being taken to a P. 1894 A. W. N. 197; where an ornament and he introduced copper inside the ornament, retaining a corresponding mass of silver for his own use, 4 B. H. C. R. (Cr. Ca.) 16; where the servant of a liquor-vendor adulterated the liquor and increased its bulk and made a profit for himself, *Ratanlal* 395; a stakeholder who misappropriates to his own use the stakes deposited with him, 2 L. B. R. 216—10 Bar. L. R. 219—1 Cr. L. J. 730, overruling 1889 S. J. L. B. 130; where the accused who was a contractor entered into an agreement with a Sowcar to endorse over to him all Government cheques received for work done but cashed two such cheques himself appropriating the proceeds, 1908 U. B. R. (P. C.) 13—8 Cr. L. J. 25; where a borrower for use of certain ornaments denied the loan, 1 Cr. L. J. 1109; when a record-clerk handed over a document to a person entitled to it, but without receiving from him a properly stamped application, 27 A. 260; in all these cases the facts, as stated above, were held sufficient to constitute the offence of criminal breach of trust.

Where the accused refused to give up land alleged to have been mortgaged, 2 B. H. C. R. 127; or failed immediately to apply the money for the contemplated purpose, *Ratanlal 484*, *contra* 1901 U. B. R. 345; where the mother of a recently vaccinated child accepted money for taking her child to a place where its lymph was to be used, but failed to do so, *Ratanlal 537*; where a Police-officer purchased a pony which had been impounded, 16 W. R. (Cr.) 52; when a common carrier delivered only a portion of the goods entrusted to him, 10 Bur. L. R. 170; where the *Nazir* of a court made advances to other employees in the office following the usual practice of recouping himself at the time of disbursement of their pay for the month, 1902 P. L. R. No. 39; where a *Nazib Nazir* retained diet money and failed to produce it when called on to account and there was no proof that he had converted the same to his own use, 2 C. P. L. R. 161, where a borrower falsely denied receipt of a loan with a view to evade his civil liability to return, [though such denial is often evidence of criminal misappropriation is not conclusive of it as the article might have been stolen or mislaid or lost] 6 Bom. L. R. 1093, in all these cases the facts as set forth above were held insufficient to constitute criminal breach of trust.

The usual evidence of breach of trust in regard to money received for the purpose of payment over, is either non-payment, or non-accounting, or false accounting. It must be remembered that breach of trust is a definite act, like theft or misappropriation, and that the above circumstances do not constitute it, but merely evidence it. Where it is the duty of the accused to pay over money at once, or at any different periods, his non-payment is *prima facie* evidence that he has wrongfully appropriated it to himself. *R v Jackson*, 1 C. & K. 384. The excessive delay on the part of village-officers in remitting revenue collections to the Treasury has been held to be evidence of dishonest misappropriation, *Weir I. 464*. But this presumption may be negatived by evidence that the delay was caused by forgetfulness, or that it was acquiesced in by the person to whom the money was due. 10 B. 256; *Weir I. 462*. Non-payment, coupled with a false account either as to the receipt of the money or its disposal, is conclusive evidence; 10 W. R. (Cr.) 28; 22 C. 313. *Goodenough*, 6 Cox. 206; *Gulder*, 8 Cox. 372, *R v Squire*, R. & R. 349; *R v. Welch*, 1 Den. C. C. 199, but even a correct entry of the receipt does not negative breach of trust, if, in fact, the prisoner has converted the money to his

own use. *R. v. Lister*, D. & B. 118=26 L. J. (M. C.) 26. On the other hand, actual expenditure of the money is not to be regarded as the only proof of conversion. The gist of the offence is a mental act. The fact that the money has not been spent may be evidence there has been no mental appropriation but is not conclusive of it. This mental appropriation may be established by any overt and visible act—*per* Plowden, J., 1889 P. R. No. 36, though failure to produce the entire amount when called on to do so would be conclusive as evidence of misappropriation, 1908 P. W. R. 97=1908 P. R. No. 19=8 Cr. L. J. 492; 1905 U. B. R. (P. C.) 19=2 Cr. L. J. 478. Thus in the absence of proof that there was any shortage in the goods entrusted to a carrier a conviction under s. 407 cannot be sustained merely because goods of a similar description were found in the house of the carrier, 9 Bcm. L. R. 229=5 Cr. L. J. 235. If a servant on receipt of a sum of money credits his master's accounts with a smaller sum he cannot escape liability for misappropriating the difference through every piece of the money or note making up the difference he has paid to the master in respect of some other transaction, *Hall R. & R.* 463. Again as regards servants it is not always easy having regard to the definition in s. 27 *supra* to say whether the offence is theft or criminal breach of trust. A salesman in a shop if he puts the money tendered by a customer into the till, and then converts a portion of it to his own use, commits theft. Why should it make a difference if he puts the money received from the customer direct into his own pocket? The act of payment is on behalf of his master. Even if the salesman had not entertained a dishonest intention, the very moment he picks up the money left on the counter, he commits the offence of theft. The only cases of criminal breach of trust by a servant are really cases where the servant has something more than the bare custody which a salesman has and for which provision is made by s. 27. In this view, the decision in 22 C. 313 cannot be supported as the offence is not one under s. 409 but is really one under s. 381. But the difficulty would really arise only where a sentence exceeding seven years (the

maximum under s. 381) is sought to be imposed. Otherwise an alternative conviction under s. 236 Cr. P. C. will avoid the difficulty. It is not necessary to prove that any specific sums of money, received on particular dates from particular persons, have been embezzled. Where money is continually coming in and being paid out, such proof would be impossible. It is sufficient if, when the defendant is called on to account, a general deficiency is found, and if the evidence establishes that the general deficiency has resulted from the fraudulent conduct of the party charged. 17 A. 153; 18 A. 116. In a case in Calcutta where a count charging a general deficiency on a series of transactions was objected to, Hill, J., after consultation with Maclean, J., but in opposition to his own opinion, ordered the count to be struck out. 24 C. 193; see now, however, Cr. P. C. s. 222 (2). A mere failure to render accounts is not itself a criminal breach of trust, unless it appears on the whole facts that the money is dishonestly withheld, or has been dishonestly converted to the prisoner's use. 9 A. 666. Where money has been spent in various small transactions, mere inability to give a correct account should not in itself raise the presumption of dishonest intention, 10 Cr. L. J. 255=3 Ind. Ca. 285; 35 C. 1108=9 Cr. L. J. 74. But it will depend to a large extent on other circumstances, 1909 U. B. R. 1=11 Cr. L. J. 44=4 Ind. Ca. 762; 2 Cr. L. J. 478; 1905 U. B. R. 19 following (1897-1901) U. B. R. 345. In this last case, dishonesty was inferred from retention of the money for a period of three years. *Oliphant*, [1905] 2 K. B. 67, where the omission to account was proved to be in pursuance of a scheme of fraud. See also 11 Cr. L. J. 699=8 Ind. Ca. 687. An agreement entered into between the complainant and the accused for the refund of the money embezzled cannot be pleaded in bar of the prosecution, *Weir* J. 462 & 465, 1909 U. B. R. (P. C.) 22; 1894 A. W. N. 105, *R v Daly*, 9 C. & P. 342; *R v Stone*, 4 C. & P. 379, nor can the fact, the entrustment was to prevent the property from being taken in execution of a decree and therefore the trust was illegal and unenforceable, *Weir* J. 463. Where the accused admits receipt of money alleged to have been misappropriated but pleads

that he spent it for authorised purposes specifying persons to whom payments were made, the *onus* is not on him to prove payment, but on the prosecution to prove non-payment, for it is only when the latter fact is proved a presumption will arise of misappropriation or breach of trust, *Ratanlal* 872 & 860. The mere fact there was a large deficit of salt in charge of a salt *Daroga* was held insufficient to sustain a conviction under s. 409 because a shortage may be due to negligence and not dishonesty, 5 W. R. (Cr.) 21; 10 Bar. L. R. 170. In cases of this description, magistrates ought not to attach undue weight to the accounts being correct or false. A fraudulent person may keep faultless accounts to avert suspicion and to serve as a defence *Lister*, D. & B. 118. overruling *Creed*, 1 C. & K. 63; *Guilder Bell* C. C. 284; on the other hand the absence of an entry may be due to mere carelessness, *Jones* 7 C. & P. 833. The mere fact the directors of a deposit and loan society issued an incorrect balance sheet is not sufficient evidence of dishonesty 9 M. L. T. 20=11 Cr. L. J. 624=8 Ind. Ca. 325. When the prosecution proves the accused has not accounted for the money, it is not incumbent on it further to establish the exact mode of misappropriation. The accused may be left to prove his defence if any, 8 A. L. J. 88=8 Ind. Ca. 687.

183. Offences by persons in Special fiduciary relationship.—Criminal breach of trust is liable to severer penalties when committed by carriers, wharfingers, or warehouse-keepers (s. 407); by clerks, or servants, or persons employed as such (s. 408); and by public servants, factors, brokers, attorneys, or agent to arise in reference to the property of the second class, however, which is identical with that in s. 381, has been dealt with in § 177 *supra* at p. 629 and the result arrived at is:—

First. The word "servant" is employed in its widest acceptation. It has been held to extend to a *Nasib Nasir*, 2 N. W. P. H. C. R. 298, a traveller for a commercial firm, *R. v. Bailey*, 12 Cox, 56; *R. v. Tite*, L. & C.

29=30 L. J. (M. C.), 142; a rate collector, *R. v. Adey*, 1 Den., 571=19 L. J. (M. C.), 149, or a bill collector, *R. v. Lord*, 69 J. P. 467 [but Cf *R. v. Harris*, 17 Cox. 656; *R. v. Bren*, 33 L. J. (M. C.) 59,] and an assistant overseer of the poor. *R. v. Carpenter*, L. R., 1 C.C.R. 29. Whether a particular official is or is not a servant depends on the relation in which he stands to his employer, and the nature of his occupation. He need not be appointed by his master, *R. v. Callahan*, 8 C. & P. 154; *R. v. Sampson*, 1 Cox. 355; *R. v. Smallman*, L. R. [1897] 1 Q. B. 4=66 L. J. (Q. B.) 82.

Therefore, *secondly*, to make out that the accused is a servant, he must be bound to obey the orders of his employer, so as to be under his control. Where he is paid by salary, or where he is bound to devote his whole time to the service of his employer, a very strong presumption arises that he is a servant. but he may be a servant though no such elements exist in the case. "All the authorities seem to show that it is not necessary that there should be a payment by salary—for commission will do, *MacDonald's case* L & C. 85; *R. v. Carr*, R. & R. 198; *R. v. Hartley*, Ib. 139 —nor that the whole time should be employed, nor that the employment should be permanent (see s 27, Expl)—for it may be only occasional, or in a single instance—if, at the time, the prisoner is engaged as a servant." Hence, where a person was employed by a merchant to obtain orders for him, he being at liberty to obtain them whenever and wherever he wished, and was under no obligation to seek for them at all unless he liked, and was paid by commission, it was held that he was not a servant, although in one case he was bound not to employ himself for anyone but the prosecutor, and in the other he was to receive money, and account for it in a stipulated manner. *Per Bovill, C J*, *R. v. Negus*, L. R., 2 C.C.R. 34, at 36; *R. v. Bowers*, L. R., 1 C.C.R. 41. As to cases of merely occasional employment, see *R. v. Spencer*, R. & Ry. 299; *R. v. Hughes*, 1 Mood, 370. Where a person contracts with another for the performance of certain services, and that other sends his servant to perform them, the latter is not the

servant of the person who requires the services, although he is bound to obey him for the time as in the case of a driver of a hackney coach. *R. v. Haydon*, 7 C. & P. 445; It is evident, then, that the question whether a man is the servant of another or not depends, not upon the duties which he performs, but upon the capacity in which he performs them. If he does a thing because he is told to do it by a person whom he must obey, he is a servant. If because it is his trade to do it, he is not a servant. *R. v. Hey*, 1 Den. 602=2 C. & K. 983. A further result follows—that the performance of duties, which are apparently the same, may involve very different obligations. The secretary of an association is its servant, and if he is also made treasurer, though this is not part of the duty of a secretary, he continues to be their servant as treasurer. He is in the position of a cashier. All money which he receives becomes at once the money of his master, and can only be paid out upon his master's orders. *R. v. Murphy*, 4 Cox. 101; *R. v. Proud*, L. & C. 97=31 L. J. (M. C.) 71. But if the association appoint a treasurer from outside, he is not a servant. His duty is to receive and pay out money in the usual course of business, and to account for such money, and to be ready to pay over the balance when called on. Subject to this obligation, he may use the specific coins or notes received by him exactly as a Banker may. *R. v. Tyree*, L. R., 1 C. C. R. 177.

Thirdly When a person comes in other respects within the definition of a servant, it is no objection that he is also the servant of other employers, *R. v. Batty*, 2 Moody, 257; *R. v. Carr*, R. & R. 198; *R. v. Tite*, L. & C. 29=30 L. J. (M. C.) 142, nor that he is jointly interested with his employer in the business in which he is a servant. *R. v. Stuart* [1894] 1 Q. B. 310=63 L. J. (M. C.) 63.

The words "*employed as a clerk or servant*" are wider than the words which precede them. They cover all cases where a person, whether he is or is not a clerk or servant, undertakes to perform the duties of a clerk or servant, although he is under no contract to perform them, and receives no remuneration for their discharge.

C. F. was clerk to a local board. The prisoner was his son, and used to assist him in the duties of his office, and act for him in his absence at the meetings of the board. He was neither appointed nor paid by the board, nor by his father. He embezzled some money which was paid in at his father's office for the use of the board. He was indicted on counts which charged that he "being employed as clerk of C. F.," embezzled the money of C. F. The conviction was affirmed. Brett, J., said, "The prisoner undertook to do things for his father which a clerk does for his master, and to do them in the way a clerk does them. Now, assuming that there was no contract to go on doing those things, still, as long as he did them with his father's agreement, he was bound to do them with the same honesty as a clerk, because he was employed as a clerk." *R. v. Foulkes*, L. R., 2 C C R 150=44 L. J. (M. C.) 65

These words would cover the case of those volunteers who render their services without pay in Government offices, with a view to future appointment 8 A. 201.

Where a person comes within the language of s. 408, he is punishable if, "being in any manner entrusted in such capacity with property, or with any dominion over property," he commits a criminal breach of trust in respect of it. He must be entrusted with it in his capacity as clerk or servant. If a clerk in an office in the Mofussil was about to go on leave, and his principal entrusted him with money to execute a private commission in the Presidency town, any breach of trust committed in respect of such a commission would be punishable under s. 405, not s. 408. If, however, he is entrusted with property in his capacity as clerk or servant, it makes no difference that the trust was something not included in his regular duty, and which he might have declined to accept. *R v Hastie*, L. & C. 269=32 L. J. (M. C.) 63; 3 W. R. (Cr. Let.) 12.

This principle was acted on in *R v Tennant*, 3rd Mad Sess., 1869. The prisoner was book-keeper of the Madras Lawrence Asylum Press, and, as such, it was no part of his duty to keep the cash. He was not paid for keeping it, and his employers did not know of, and would not have assented to, his keeping it. But, by an arrangement between himself, and the superintendent of the Press, who was the proper cash-keeper, the prisoner had taken upon himself and had discharged the duties of cash-keeper for about seven years. He was indicted for criminal breach of trust under s. 408, and Scotland, C. J., left it to the jury

as a matter of fact whether, having reference to the long course of business in the office, the prisoner had not undertaken the duty of cash-keeper in addition to his other duties, and assumed a liability to account as cash-keeper for the monies received in that capacity. He pointed to the words "in any manner entrusted in such capacity," as showing that the Legislature wished a liberal construction to be put upon the section in cases where the money was, in point of fact, received by the servant as a servant.

A clerk or servant would be equally liable if he having dominion over the property of his employer converts it to his own use. This was so held in the case of the water-works inspector of Cawnpore Municipality who tapped the water-main for the benefit of his own house and that of his tenants and also realised water-rates from his tenants which he never paid over to the Municipality. It was held he would be liable under s 408, 11 A. L. J. 369=14 Cr L. J. 415=20 Ind. Ca. 239.

Again if a servant is paid money on his master's account and he misappropriates the same, it is no valid defence that his employer had no right to the money and they would have been wrong-doers if they had themselves received it, *Beacall*, 1 C. & P. 454. Similarly if a master gets a third party to pay to a servant with a view to test the latter's honesty, *Headge*, 2 Leach 1033.

Lastly, the property misappropriated by the clerk or servant must be property which he received in conformity with the trust reposed in him by his employer. A captain of a barge belonging to the prosecutor was directed to bring it back empty on a particular voyage, and expressly forbidden to carry a particular cargo for a specified person. On his return he took the forbidden cargo, and received the freight, but said he had brought back the barge empty, and kept the money. It was held that he could not be convicted under 24 & 25 Vict., c. 96, s. 68, as a servant who had embezzled money received by him for, or an account of, his master. The fraud consisted in the wrongful use of his master's barge, not in the misappropriation of money which his master had

forbidden him to earn, and which had not been paid to, or received by him, on account of his master. *R. v. Vallum*, L. R., 2 C. C. R. 28; *Harris*, 6 Cox 263. If a similar case were to occur in this country, I think the charge would have to be framed for a criminal breach of trust in respect of the barge, not of the money, as he was entrusted with dominion over the barge

To constitute an offence under s. 409, the property entrusted to a public servant must be property which as a public servant he was authorized to receive. Thus if a traveller carrying valuables, when suddenly taken ill, sent for the nearest policeman, and put him in possession of his belongings believing that he would die, the police officer's interposition would be construed to be in the discharge of his duty under s. 149, Cr. P. C., for the prevention of a cognisable offence such as theft and his subsequent conversion of the property to his own use would render him liable to be dealt with under s. 409, 1876 P. R. No 24. Therefore, where village officers, who were only authorized to receive money in discharge of the public revenue, received grain from the ryots,

of the person accepting it that he was authorized to receive it in his public capacity cannot alter the fact and supply the deficient and requisite authority so as to convert simple breach of trust into breach of trust as a public servant, 1876 P. R. No 24; 8 W. R. (Cr.) 1. Similarly when a *Kurnam* of a village received money from the ryots as revenue due on unassessed lands and as costs of boundary-stones required for such lands and misappropriated the same, he could not be held liable under s. 409, as it could not be said he received the payment as Government money or in trust for Government, *Weir* I. 466. But where the accused, a salt officer employed to sell salt to fish-curers at a favourable rate bought some salt for himself showing the same in the books as sold to fish-curers and appropriated the difference between ordinary market price and the favourable rate to fish-curers, he was held liable under s. 409,

Weir I. 467. So a postmaster misappropriating money paid for money orders, 7 A. 174 (F.B.) It is not necessary the property must be the property of Government. It is enough if it is entrusted to the accused in his capacity as a public servant, 2 C. L. R. 515; 1 Sind L. R. 38=8 Cr. L. J. 160. S. 405 does not limit the mode in which a trust arises, whether by a specific order or by reason of its being part of the proper duty of the public functionary, 13 W. R. (Cr.) 77. The same interpretation will be applied to the word 'agent' occurring in s. 409. As to the construction of the word 'agent' occurring in association with banker, merchant, factor, broker, attorney, see *R. v. Kane*, L. R. [1901] 1 Q. B. 472 where the expression 'as a banker, merchant, broker, attorney or other agent' in s. 75 of the *English Larceny Act*, 24 and 25 Vic. c. 96, is construed. If title-deeds were deposited with an attorney, or jewels with a broker, not in their professional capacity, but as friends of the owner, for safe custody, their misappropriation of them would be punishable under s. 406, but not under s. 409.

The directors of a Joint Stock Bank are bankers, but the manager or accountant is not, 16 A. 88, though a cashier or shroff is 1908, P. R. No. 19=1908 P. W. R. 97=8 Cr. L. J. 492. The word 'manager' occurring in s. 84 of the *Larceny Act* (1861) 24 & 25 Vic. c. 96, has been construed to apply to a person who without having been appointed an officer of the company has in fact acted throughout as the manager of the affairs of the company, *R. v. Lawson*, L. R. [1905] 1 K. B. 541.

VI. RECEIPT OF STOLEN PROPERTY.

184. Receiving or Retaining Stolen Property.—In order to make out the offence of dishonestly receiving or retaining stolen property under ss. 410 and 411, it is necessary to establish three facts: (1) that the property in question was stolen property; (2) that it was dishonestly received or retained; and (3) that the accused knew, or had reason to believe, that it was stolen property. 15 B. 369, 1867 P. R. (Cr.) 8 & 13. This last element, that the receiver has knowledge or reason

to believe the property to be stolen property, would imply that this section is not meant to apply to the actual thief, 23 A. 266, or to a person concerned in the principal offence described in ss. 383, 390, 403 or 405, 3 L. B. R. 254=5 Cr. L. J. 413; nor would s. 414 apply to such a person, 1896 P. R. No. 15; 1885 S. J. L. B. 334; 2 N.-W. P. H. C. R. 312; 2 W. R. (Cr.) 63; 11 W. R. (Cr.) 12; 3 A. 181; 4 N. L. R. 71=8 Cr. L. J. 11. But a foreign thief may be dealt with under the Code for retention in British India, of property stolen outside British India, 1894 P. R. No. 30; 6 C. 307; Ratanlal 218=28 A. 372; 1906 A. W. N. 25=3 A. L. J. 146=3 Cr. L. J. 247; where property the subject of a theft in Mysore, was traced to the accused in British territory more than twenty days after the theft, the accused were acquitted on the ground the length of time destroyed the presumption they were the thieves and there was no evidence that the receipt was within Mysore territory, 9 Cr. L. J. 334.

(1) *Stolen Property*—The matter received must, under s 410, have been something which was capable of being property, in the legal sense of the word, Foster, Cr L 366, and which had not been abandoned by its owner 9 A. 348; 1884 A. W. N. 87; *ante*, § 174 at p. 608 & § 181 at p. 646. It must have been lost to the owner by one of the offences hitherto discussed in this chapter, *viz.*, I theft, II extortion, III robbery, IV criminal misappropriation, or V criminal breach of trust, 21 C. 328; 6 A. 224; 2 N.-W. P. H. C. R. 187, Ratanlal, 416, whether such offence had been committed within or without British India. (Act VIII of 1882, s 9) This gets rid of the difficulty which led to the decision in 5 B. 338, and similar cases. 10 B. 186; 28 A 372=1906 A. W. N 25=3 A. L. J. 146=3 Cr. L. J. 247. Property which has been unlawfully obtained by any other criminal means, as by forgery, 24 W. R. (Cr.) 33, or by cheating, would not be stolen property. Further, the property received must have been substantially the same as that stolen; it is not sufficient that it should be its equivalent, 1881 P. R. No. 39. A finding that property stolen was like that found with the accused

has been held insufficient to sustain a conviction, *Ratanlal* 227; when the article stolen is not produced in court and shown to the witness, courts should attach absolutely no weight to bare statements that the article found with the accused was the article stolen from the complainant, 8 W. R. (Cr.) 16. See 6 A. 224, as to the importance of establishing the identity of property in a satisfactory way; 1912 P.W.R. (Cr.) 22=13 Cr. L. J. 555=15 Ind. Ca. 971; 1912 P. W. R. (Cr.) 35=1912 P. L. R. 194=13 Cr. L. J. 720=16 Ind. Ca. 528. If a sheep is stolen, it would be an offence to receive the mutton with guilty knowledge. *Cowell's case*, 2 East, P. C. 617. If jewellery was stolen, and the stones were sold to one receiver, and the gold setting to another, each would be punishable under s. 411. But the proceeds of a stolen cheque, or the change given for a stolen bank-note, would not be stolen property. *R. v. Walkley*, 4 C. & P. 132; *R. v. Chapple*, 9 C. & P. 335. In 4 Sind. L. R. 159=11 Cr. L. J. 730=8 Ind. Ca. 929, a servant was entrusted with a thousand-rupee currency note for payment to a merchant, but contrary to instructions he changed it into small notes and gambled them away. Held the offence under s. 408 having been committed with respect to the small notes, conviction of the accused who won the notes at the gambling for an offence under s. 411 was right, though they could also be convicted under s. 408 read with s. 114. Here there was no offence in changing the larger note. Hence the moment of receipt coincides with the moment when the property becomes stolen property, and as the conversion consists in the act of paying to the accused, the conviction under s. 411 ought to have been altered to one under s. 381 read with ss. 114 & 27 I. P. C. Lastly, the property must retain the character of stolen property at the time it is wrongfully received. In the words of s. 410 "If such property subsequently comes into the possession of a person legally entitled to the possession thereof, it ceases to be stolen property." Therefore, if the owner finds his property on a thief, and then restores it to him that he may sell it to the usual receiver; or if stolen property sent by train or through the post-office addressed to a receiver is stopped by the authorities on

behalf of the owner, and then delivered by them to the receiver, in each case the property has ceased to be stolen property before it reaches his hands *R. v. Dolan*, *Dears.* 436=6 *Cox.* 449=24 *L. J. (M. C.)* 59; *R. v. Schmidt*, *L. R.*, 1 *C.C.R.* 15=35 *L. J. (M. C.)* 94; *R. v. Villensky*, [1892] 2 *Q. B.*, 597; *Miller*, 6 *Cox.* 353, *Hancock*, 38 *L. T.* 717; 1894 *P. R. No.* 30. A sale by a thief, even to a *bona fide* purchaser, does not give the latter a legal title to the possession of the article sold [Indian Contract Act, s. 104, illus. (a).] Where, however, stolen notes or money are *bona fide* changed for the thief, or taken *bona fide* from him as a matter of ordinary payment, the transaction is not one of sale, and the receiver is entitled to the legal possession as against the real owner; 3 *C.* 379; see as to coins which are not treated as money, *Moss v. Hancock* [1899], 2 *Q. B.*, 111, and the same rule would apply in favour of a person who took, in the ordinary course of business, a negotiable instrument which had been stolen, but which, prior to the theft, had been so drawn or endorsed as to pass from hand to hand by mere delivery. 5 *C.* 654; 13 *Cr. L. J.* 492=15 *Ind. Ca.* 492.

Where property has been taken from its owner under circumstances which would be theft, but for the provisions of ss. 82—85, the property is not stolen property, see 6 *M.* 373, but a person who dishonestly kept the property for himself, with knowledge of the facts, would commit criminal misappropriation. *Weir* l. 470. If, however, the act of the innocent agent had been instigated by a criminal abettor, the transaction itself would be a theft, though the agent would not be a thief (s. 103). In such a case, the property would be stolen property, and might be the subject of a charge under s. 411. The fact that a thief had been pardoned will not make the property stolen any the less stolen property within the definition in s. 410, *Ou. S. C.* 190.

It is not necessary, as erroneously directed in 1 *B. H. C. R.* 95 to prove who the actual thief was, and it is unwise, in framing the charge, to state that the goods were stolen by AB, from whom the prisoner receive

by him. *R v Hill*, 1 Den. 453=3 Cox. 533=2 C. & K. 978=13 Jur. 545=18 L. J. (M. C.) 199. But this ruling was distinguished in 14 Cr. L. J. 318=19 Ind Ca. 1006. Here the accused presented a Railway receipt, paid the freight and claimed delivery of goods, which, as a matter of fact, were stolen property. Held when the freight was paid and the receipt handed over, the accused was in constructive possession of the goods, the fact that he did not actually move them from the Railway premises did not in any way affect the finding that the goods had been delivered. See *Ratanlal* 416. And so it would be if a jeweller was found bargaining with a thief for a stolen watch, and it would make no difference that the jeweller had the watch in his hand to examine it, provided the control over the watch, and the right to claim it back if the bargain went off, remained in the thief *R v Wiley*, 2 Den. 37=24 L. J. (M. C.) 4=4 Cox. 412; see 4. M. L. T. 415=19 M.L.J. 301=9 Cr. L. J. 52. Where, however, such a control exists, manual possession is unnecessary. If a thief brings stolen property into a shop, and the owner of the shop calls his servant, and desires him to take away the goods and pawn them, and the thief hands them to the servant for that purpose, the receipt by the master is complete. *R v Miller*, 6 Cox. 353 (Ir.); *Parr*, 2 M. & Rob. 346; *R v Pearson*, 72 J. P. 451. Nor is such a control inconsistent with a joint possession by the thief, or any other person, and the receiver. A man's watch was stolen while he was in the company of a woman, of the prisoner, and of some others. Subsequently, the prisoner came to the owner of the watch, and bargained with him for its restoration. The woman was taken into a room by the prisoner, where she found another man, and immediately after she saw the watch on the table. She did not see who put it there, but it was not the prisoner. The jury were told that if they believed that the prisoner knew that the watch was stolen, and at the time when he went with the woman to the room where it was given up the watch was in the custody of a person with the cognizance of the prisoner, that person being one over whom the prisoner had absolute control, so that the watch would be forthcoming if the prisoner ordered it, there was ample evidence to

convict him of receiving the watch with guilty knowledge. *R. v. Smith*, Dears 494=24 L. J. (M.C.) 135; *Rogers* L. R. 1 C. C. R. 136=37 L. J. (M.C.) 83. Finally, it is not necessary that the receiving should be for the benefit of the receiver. "There is a receiving within the meaning of the Act—whenever a person, knowing that goods are stolen, has possession of them for a bad purpose. It is immaterial whether he claims any property in them." *Per* Bramwell, B; *White*, 1 F. & F. 665; *per* Lord Campbell, C.J., *R. v. Wiley*, *ub. sup.* If the prisoner takes the property into his possession for the purpose of concealment, or to assist the thief, it is a sufficient receiving, although he neither seeks nor gains any profit or advantage to himself. *R. v. Davis*, 6 C. & P. 177; *Richardson*, 6 C. & P. 335.

A mere acquiescence in, or approval of, a receipt by another person does not amount to a receipt by the person who approves, if the possession or control still continues to be that of the original receiver. *R. v. Dring*, D. & B. 329. But if stolen goods have been placed in the possession of a man's servant or wife, or of any other person on his behalf, though without his knowledge, and if he subsequently, knowing the goods to be stolen, accepts the possession, this makes the receipt his own. *R. v. Woodward*, L. & C. 122=31 L. (M. C.) 91. The mere fact that the accused hid out the stolen property concealed in a place not his own is not sufficient evidence to convict him. 17 A. 576; 1908 P. W. R. (Cr.) 1=4 Cr. L. J. 176; 3 Sind. L. J. 4=4 Ind. Cas. 48. *R. v. Orris*, 73 V. R. (Cr.) 38=4 Cr. L. J. 437; 1905 P. L. R. 196=1905 P. W. R. (Cr.) 130; similarly the fact that the accused intended that he would get the stolen property, but was not able to do so, is altogether insufficient for a conviction under s. 411, 1905 L. J. 189, 1912 P. L. R. 46=1912 Cr. L. J. 28=13 Ind. Ca. 220; 1902 V. N. 238=13 Cr. L. J. 127=13 P. W. R. 32=14 Cr. L. J. 602=21 Ind. 1881 A. W. N. 94; 1895 A. W. N. 229.

As to Retaining—S. 411 says: "Whoever dishonestly receives or retains stolen property." Retaining seems to have the same relation to receiving that criminal misappropriation has to theft. If a man came honestly into possession of stolen property, and then retained it, after he had discovered that it was stolen, he would have committed the offence of dishonestly retaining 4 M. H. C. R. Appx. 42. There may be cases of honest receipt and dishonest retention. But the alternative expression '*dishonestly receives or retains*' relieves the prosecutor from the duty of proving more than one branch of the alternative. It is enough to prove facts justifying the inference that the accused either dishonestly received the property, or, having received it honestly, dishonestly retained it; a similar use of an alternative expression is common in dealing with several other offences, *e g*, with the intention of causing death or with the knowledge that death is likely to be caused in s. 299; in such cases the prosecution need not prove, and the Court need not find, the intention as distinct from the knowledge, it is sufficient to prove or to find one or other to have existed,—per Plowden, J., 1889 P. R. No. 15; 1884 P. R. No. 18; 1879 P. R. No. 31; 1887 P. R. No. 46. Where the accused is charged only with dishonest retention a guilty knowledge at the time of receipt is not necessary, 4 M. H. C. R. Appx. 42; 9 C. W. N. 1027=2 Cr. L. J. 847.

(3) *Guilty Knowledge*.—The accused must have known, or have had reason to believe, the property to be stolen (s. 411) 6 W. R. (Cr.) 87; [1913] M. W. N. 696=14 Cr. L. J. 591=21 Ind. Ca. 383, 13 W. R. (Cr.) 70; 18 W. R. (Cr.) 63; 19 W. R. (Cr.) 37. The latter phrase is satisfied by something short of actual knowledge—*Per* Scotland, C. J., *R. v. Vecree*, Mad. Sess., April 28, 1862. On the other hand it involves more than mere suspicion. In a case under s. 414, where the language is the same, Melvill, J., said:

"It was not sufficient to show that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether had been honestly acquired. The word '*believe*,' in s. 41

very much stronger word than 'suspect,' and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing was stolen property." 6 B. 402; see also 1898 P. R. No. 37; 29 B. 449.

Of course, guilty knowledge is purely a matter of fact, which depends on the circumstances of each particular case; such as the nature of the goods offered for sale, *Ratanlal*, 594; 11 C. 160; 6 B. 402; the position in life of the person who offers them, the mode in which he accounted for their possession, the secrecy of the transaction, the absence of inquiry where the facts were obviously suspicious, the low price at which they were bought, 1 Hale, P. C. 620; 2 East, P. C. 765; *R. v. Mallory*, 13 Q. B. D. 33; 13 W. R. (Cr.) 26; 25 W. R. (Cr.) 10; 9 Bom. L. R. 27=5 Cr. L. J. 63; 23 W. R. (Cr.) 16; 13 M. 426; the concealment or defacing of the goods after they passed into the possession of the receiver. If an ayah was to offer English jewellery, or a native servant was to offer English plate or wine for sale, and the articles were bought without any inquiry, or upon the strength of answers clearly unsatisfactory, I think the tribunal would have little difficulty in dealing with the case. (See, as to the fraudulent possession of stolen property by persons who cannot satisfactorily account for their possession of it, *Mudras Act*, VIII. of 1867, s. 17). But the three essential ingredients of the offence must all co-exist. Receiving under an erroneous knowledge and belief that the property received was stolen property would not be an offence if in reality the article is not stolen property, e.g., where it had really been obtained by cheating, *Ratanlal* 389.

Under English law it was always open to the prosecution to show, as evidence of guilty knowledge, that the accused had on other occasions received other property of the prosecutor from the same thief; *R. v. Dunn*, 1 Mood., 146; but it was held that it was not admissible evidence that he had received other property stolen by different thieves from different owners. *R. v. Oddy*, 2 Den. 264=20 L. J. (M. C.) 198. The latter evidence has always seemed to me to be more dunnas-

tory than the former. It is now admissible in England, under certain restriction by 34 & 35 Vict. c. 112, s. 19. The Indian Evidence Act, s. 14, is in accordance with the later view. Illus. (a) gives as an example, the case of a receiver found in possession of a particular stolen article, and proceeds, "the fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles, of which he was in possession, to be stolen." It will be observed that the other stolen articles, as to which evidence is offered, are stated to have been in his possession at the same time as the particular article as to which he is charged. This agrees with the decisions on the express wording of the English statute. *R. v. Carter*, 12 Q. B. D. 522; *R. v. Drage*, 14 Cox, 85. It does not, however, follow from the illustration that evidence would be inadmissible of previous undoubted receipts of property undoubtedly stolen, although no longer in the possession of the accused. Expl. 2, and illus. (b) contained in s. 1 of the Amending Act, III of 1891, tend to show the contrary, and also that previous convictions for a similar offence could be proved for the same purpose.

The mere fact of recent possession of stolen property is, in general, evidence of theft, not of receipt of stolen property with guilty knowledge (see *ante*, § 178 at. p. 631). 1866 P. R. No. 31; 1884 P. R. No. 18; 1887 P. R. No. 46. The effect to be given to such possession is, however, a question not of law but of fact. 11 C. 160; 26 M. 467; Evi. Act, s. 114 ill. (a). It would depend upon the nature of the article stolen, 11 C. 160; *Ratanlal* 594; 1885 S. J. L. B. 354; 29 A. 138; 6 C. P. L. R. 29; *Langmead*, 9 Cox. 464; *M'Mahon*, 13 Cox. 275 (Ir); and the presumption will lose its weight with the lapse of time so that when a horse was found with the accused six months after it was stolen, it was held in England that the fact of possession raised no presumption against the accused, *Cooper*, 3 C. & K. 318. *Burton*, *Dears* C. C. 282; *Partridge*, 7 C. & P. 551. Where the thief's cousin's father-in-law had possession of the stolen property, viz. jewels, three days after the theft, and it was

very much stronger word than 'suspect,' and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing was stolen property." 6 B. 402; see also 1938 P. R. No. 37; 29 B. 449.

Of course, guilty knowledge is purely a matter of fact, which depends on the circumstances of each particular case; such as the nature of the goods offered for sale, *Ratanlal*, 594; 11 C. 160; 6 B. 402; the position in life of the person who offers them, the mode in which he accounted for their possession, the secrecy of the transaction, the absence of inquiry where the facts were obviously suspicious, the low price at which they were bought, 1 Hale, P. C. 620; 2 East, P. C. 765; *R. v. Mallory*, 13 Q. B. D. 33; 13 W. R. (Cr.) 26; 25 W. R. (Cr.) 10; 9 Bom. L. R. 27=5 Cr. L. J. 63; 23 W. R. (Cr.) 16; 13 M. 426; the concealment or defacing of the goods after they passed into the possession of the receiver. If an ayah was to offer English jewellery, or a native servant was to offer English plate or wine for sale, and the articles were bought without any inquiry, or upon the strength of answers clearly unsatisfactory, I think the tribunal would have little difficulty in dealing with the case. (See, as to the fraudulent possession of stolen property by persons who cannot satisfactorily account for their possession of it, Madras Act, VIII. of 1867, s. 17) But the three essential ingredients of the offence must all co-exist. Receiving under an erroneous knowledge and belief that the property received was stolen property would not be an offence if in reality the article is not stolen property, *e.g.*, where it had really been obtained by cheating, *Ratanlal* 389.

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proved he had sold some of the jewels to a cloth-dealer and disposed of other jewels in an out-of-the-way place, the presumption raised was held not strong enough to sustain a conviction under s. 411, 10 C. W. N. 219=3 Cr. L. J. 195. In 3 M. L. T. 30=7 Cr. L. J. 30, where similar articles of jewellery were traced to the accused three weeks after the offence, the accused were convicted. In a similar case in 13 Cr. L. J. 140=13 Ind. Ca. 828, it was laid down that the proper presumption was not that the person in possession himself committed theft but that he was a receiver. As to which of the two presumptions should be drawn in any particular case would depend on the length of time, the proportion of stolen articles found in possession of the accused to entire bulk stolen, the circumstances which led to the discovery, etc. Where accused was found in possession the next morning after burglary, the presumption was that he was a thief, 11 A. L. J. 94=14 Cr. L. J. 124=18 Ind. Ca. 634. In cases of doubt accused have been known to come to the rescue of the prosecution theory. This was the case in Weir I. 471, where tracing of ordinary articles to the possession of the accused two months after the theft did not raise any strong presumption against him; but the accused denied altogether that he was ever in possession; and this plea having been found to be false, a conviction under s. 411 was sustained. A case very similar to this has been discussed at p. 633 *supra*, where possession was traced to the prisoner two years after the theft, but he asserted continuous possession for eight years which was found to be false, for the first six years at all events. It is, however, a question how far statements of accused persons made under s. 342, Cr. P. C., can be used against them to prop up a presumption which has become considerably attenuated by lapse of time. There are rulings to the effect that a gap in the prosecution evidence cannot be supplemented by the examination under s. 342. Would it not be contrary to the spirit of these rulings to use such statements to corroborative a mere presumption of fact? If it was proved that a house had been broken into at night, and a few days after the property was found in the

possession of a person who was in the habit of making miscellaneous purchases from all who offered to sell, the presumption would be that he had received the goods rather than stolen them. In all such cases charges for theft should be added to charges for receipt, and *vice versa*. A person found in possession of various pieces of stolen property, even though they were stolen at different times and from different persons, can only be convicted of a single offence under s. 411, unless it can be shown that he received them at different times. 28 A. 313; 12 Bur. L. R. 318, 5 Cr. L. J. 122; 1907 P. W. R. (Cr.) 4. see [1912] M. W. N. 362=11 M. L. T. 186=13 Cr. L. J. 475=17 Ind. Ca. 314; [1912] M. W. N. 529=13 Cr. L. J. 596=16 Ind. Ca. 164; 17 C. W. N. 1129=14 Cr. L. J. 571=21 Ind. Ca. 171; 13 Cr. L. J. 492=15 Ind. Ca. 492; 8 M. L. T. 418; 1887 A. W. N. 281; 12 C. P. L. R. (Cr.) 5; 5 Bom. L. R. 877. Each receipt is a single offence as to all the property then and there received. Possibly there might be different offences, if a thief, being possessed of different articles of property, stolen from different persons, made distinct bargains as to each with the receiver one after the other. 15 C. 511; 15 A. 317.

The question whether an offence can be committed under s. 411 in respect to the property of a husband received from the wife, *R. v. Kenny*, 2 Q. B. D. 307=46 L. J. (M. C.) 156, *Streeter*, [1900] 2 Q. B. 601=69 L. J. (Q. B.) 915; *R. v. Payne*, L. R. [1906] 1 K. B. 97=75 L. J. (K. B.) 115, depends upon the question already discussed, whether a wife can steal from her husband (*ante*, § 175 at p. 624.) A husband may be convicted of receiving

been
L. & C. 2. 3. 3. 1. J. 1. 1. C. 3. 3.
a wife might be convicted of receiving from her husband. The court might, of course, take the charitable view, that the wife was merely acting under the orders of her husband, and had no knowledge that she was committing an offence. 5 N. W. P. L. C. R. 120. Where with a single act band is convicted,

the wife has to be acquitted, *Archer*, [1826] 1 Mood. 143. But this will hardly apply to the law under the Indian Code. If the wife has received without the control or knowledge of the husband, it was held in *Dring*, [1857] D. & B. 329, the husband cannot be liable even though he accepts the wife's receipt; *Baines*, 19 Cox. 524; *Wardroper*, Bell C. C. 249. In India, however, the real question would be how far the managing member or other adult coparceners would be liable if stolen property is found in the common dwelling house, in a place easily accessible to every member of the household. It is certain there is no greater degree of presumption against the manager than against the other members, *Ratanlal* 184; 19 M. L. J. 301. But if knowledge that some property in his house is stolen could be attributed to the manager, that knowledge will carry with it legal possession and he can be convicted of retaining such stolen property, 6 B. 731; 15 A. 129; 22 A. 445; 29 A. 598=1907 A. W. N. 187=6 Cr. L. J. 23, though the same could not be said of a junior member. See also 1 Sind L. R. 66=8 Cr. L. J. 184 4 M. L. T. 415=9 Cr. L. J. 52; 10 M. L. T. 237=12 Cr. L. J. 549=12 Ind. Ca. 525; 8 C. W. N. 22; 1 Bur. L. R. 397. A similar class of cases usually met with is where property is taken out of an open cattle-shed or out-house which, either from the nature of the structure or owing to its being in a state of disrepair, is easily accessible from outside. Articles are often foisted in this fashion especially where the village is factious. An incriminating article found in such a place cannot be said to be in the possession of the owner or occupier, 1881 A. W. N. 43; 1883 P. R. (Cr.) 25; L. B. R. (1872-1892) 397.

Section 414 is apparently intended to apply to cases where there has not been such a possession as would support a charge against the accused, as a receiver under s. 411—per Plowden J. 1879 P. R. No. 31; 4 N. L. R. 71=8 Cr. L. J. 11. A person once convicted under s. 411 with respect to property taken on a particular occasion cannot be convicted under s. 414 in respect of the same property. 1881 A. W. N. 22 2 Cr. L. J. 207.

Where there has been such a possession the offence is complete. A charge under s. 414 would in many cases be advisable as an alternative charge, 10 Bom. L.R. 125; Ratanlal 449, but would not constitute a distinct offence where there was a conviction under s. 411, Ratanlal 553; 4 M. H. C. R., Appx. 13; 1881 P. R. No. 39; 1 Agra H. C. R. 9. Where a man conceals stolen property in another's house with a view to get the latter into trouble, he may be convicted both under s. 414 and for fabricating false evidence under s. 193, 1 A 379. But where the accused restored to the owner property stolen by his son with a view to save his son and subsequently denied all knowledge of the matter, he was held not liable under s. 414, as the word "*disposing*" in s. 414 has to be construed *ejusdem generis* with *concealing* and *making away with* 1910 U. B. R. (P. C.) 8=11 Cr. L. J. 493=7 Ind. Ca. 465.

A charge under s. 414 should contain details as to the nature of the property as well as circumstances under which it was concealed or made away with, 2 B. H. C. R. 130. It is not necessary that the owner should be traced. All that is needed is to prove the accused voluntarily assisted in concealing the property which he had reason to believe to be stolen. This latter fact may be proved from the accused's own conduct, as where a poor *Pathan* cooly had jewels usually worn by the wealthier classes, 14 Bom. L. R. 893=13 Cr. L. J. 793=1 Bom. Cr. Ca. 89=17 Ind. Ca. 537, 1887 A. W. N. 96; 1 B. H. C. R. 95 is no longer law on this point. The facts in 9 A. L. J. 370=13 Cr. L. J. 254=14 Ind. Ca. 606 are not fully set forth in the report.

185. Aggravated Forms of Receipt or Retention.—The offence created by s. 411 is liable to severe penalties under s. 412, if the property was known or reasonably believed to have been transferred by the commission of dacoity, or if, being known or believed to be stolen property, it was received from a person whom the accused knew or believed to belong, or to have belonged to a gang of dacoits. The essence of the offence under s. 412 is the special knowledge or belief

connecting the property with a dacoity or with dacoits. This must be specially made out, 18 W. R. (Cr.) 26; 26 M., 467 at 468; Ratanlal 756 & 184; 7 W. R. (Cr.) 73 [109]; 9 W. R. (Cr.) 16. The accused must be a person different from the dacoits. Ratanlal 312 & 34. A dacoit who retains the property he has obtained by his dacoity cannot be punished under s. 412 for an offence distinct from the dacoity. 1 W. R. (Cr.) 48. When the evidence against the prisoner is that he was apprehended soon after the dacoity with part of the plunder in his possession a charge in the alternative under s. 395 or s. 412 might be framed against him, 3 W. R. (Cr.) 10; 5 W. R. (Cr.) 66; 13 W. R. (Cr.) 42. The offence of the receipt or retention must be completed in British India. It is no offence under the Code to receive or retain in a Native State the proceeds of a dacoity committed in British India, 9 A. 523.

A further aggravation of the offence under s. 411 is created by s. 413, where the accused is shown habitually to receive or deal in stolen property. See, as to the apprehension and punishment of reputed thieves, Madras Act, VII of 1867, s. 23. It is difficult to say what sort of evidence will be admissible and sufficient to procure a conviction under this section. At the very least two acts of receiving or dealing in stolen property must be proved or presumed, and these acts must be at some little distance of time, otherwise they could not be taken as establishing a *habit*. In a case where a conviction under this section was set aside, the Court said: "We do not think that a man can be said to be habitually receiving stolen goods, who may receive the proceeds of a dozen robberies from a dozen different thieves on the same day, but, in addition to the receipt from different persons, there must be a receipt on different occasions, and on different dates. 19 C. 190. Where a man had been several times actually convicted this would be sufficient, and the previous convictions since having been proved by the production of the record. It is sufficient if the fact be certified by the clerk of the court, or other officer having the custody of the records of the court where the conviction was made." 19 C. 190.

tion took place, or by a certificate signed by the officer in charge of the gaol in which the accused was confined, or by production of the warrant of commitment (Cr. P. C. s. 511). When a man has been convicted on previous occasions there must be proof of some fresh receipt subsequent to the last conviction before he can be dealt with under s. 413, 10 B. 174; 12 C. 520. Where there have been no convictions the acts which are relied on as evidencing a habit must in general be proved, just as if each were the subject of a separate indictment. Sometimes this might not be absolutely necessary. If it could be shown that a man kept a shop which was frequented by persons who were, and who must have been known by him to be, thieves, if the nature of the goods which he purchased, the price which he paid, the precautions with which the goods were bought, kept, or disposed of, the contrivances employed in the premises for concealment, for rapid exit, and for preventing entrance, and other similar circumstances gave strong evidence of a general nature of the trade pursued, even a single instance of receiving brought home for the first time might be sufficient to warrant a conviction. But it would always be necessary to watch such evidence very narrowly.

Prisoners cannot be tried at the same trial for receiving or retaining under s. 411, and for habitually receiving or retaining under s. 413, these two offences not being offences of the same kind. The proper course would be to try the accused first for the offences under s. 411, and then, if he were convicted, to try him for the offences under s. 413, putting in as evidence the previous convictions under s. 411, and proving the finding of the rest of the property in respect of which no separate charge under s. 411 could be made or tried by reason of the provisions of the Crim. P. C., s. 233; 8 C. 634.

VII. CHEATING.

186. The offence of Cheating Analysed.—In order to make out the offence of cheating, it is necessary to establish (1) that some one was deceived, (2) fraudulently or dishonestly, or intentionally, and (3) that by means of

such deceit he was induced to change his position either by parting with property or by doing something to his own injury ; in the first of the above two alternatives, the inducing must be fraudulent or dishonest and in the second intentional, 9 C. W. N. 764=2 Cr. L. J. 422; 1908 P. W. R. (Cr.) 18; *per* Mookerjee, J., 2 C. L. J. 524=3 Cr. L. J. 160; 32 C. 775=1 C. L. J. 469=2 Cr. L. J. 388; 1883 P. R. No. 36. S. 420 provides for punishment when cheating consists in a dishonest inducing of delivery of property and s. 417 provides for cases of cheating whereby the person cheated is injured otherwise than by being induced to part with property. The second part of s. 415 not involving fraud or dishonesty is thus made punishable leniently as compared with the maximum sentence provided for the offence constituted by the first part of that section, 1889 P. R. No. 20, *following* 1876 P. R. No. 16. The ruling in *Ratanlal* 423 seems to be wrong in assuming that the second part of s. 415 also involves the element of fraud or dishonesty; there the accused falsely representing that his master was ill, induced the latter's brother to travel to a distant village. This would *prima facie* involve harm in one of the ways dealt with in the second part of s. 415. But the High Court quashed the conviction, it is submitted erroneously, on the ground no fraud or dishonesty had been made out. A similar view seems to have been taken in *Ratanlal* 635 also. It has to be remembered that s. 417 is a non-cognizable offence while s. 420 is a cognizable offence. The Legislature evidently contemplated different spheres for the two sections, *Ratanlal* 96; 1 L. B. R. 266; the offence described in the first part of s. 415 involving fraud or dishonesty being punishable under s. 420, while that described in the second part where there is also deceit, not accompanied by fraud or dishonesty, being punishable under s. 417. If this view is not accepted, one will have to attribute a deliberate redundancy to the legislature, and it will be a matter of good luck whether an information given to the Police is registered as a cognizable or non-cognizable offence. This view seems to be more reasonable than the one adopted in *Ratanlal* 2. Again, when cheating falls under part (2) of s. 415 and is not with reference to a

valuable security (s. 420) the accused may be given the benefit of s. 562, Cr. P. C., but this benefit he cannot have if the offence is one under the first part of s. 415 or is otherwise covered by the language of s. 420, 1908 P. W. R. (Cr.) 62=8 Cr. L. J. 455; 3 L. B. R. 95=12 Bur. L. R. 91=3 Cr. L. J. 21; 4 N. L. R. 18=7 Cr. L. J. 319; 1911 P. L. R. 155=12 Cr. L. J. 213=10 Ind. Ca. 114. The second part of s. 415 deals with causing harm to body, mind, reputation or property, which in the same as the term 'injury' as defined in s. 44, the omission of the word 'illegal' making no difference, 1888 P. R. No. 36. Where fraudulent or dishonest intention is alleged, its existence must be proved at the time of the commission of the act constituting cheating, *Weir* 1. 476 & 478; 9 B. H. C. R. 448; 13 Bur. L. R. 141=5 Cr. L. J. 478; 13 Bur. L. R. 268=7 Cr. L. J. 242; *Ratanlal* 312. Subsequent conduct will only be evidence of such intention at the time of delivery of property and to negative the theory of accident or mistake unaccompanied by any systematic fraud, if the defence were to rely upon any such theory,—see *per* Lindley J., in *Blake v. Albion Life Insurance Co.*, L. R. 4 C. P. D. 97 at 106; *R v. Pond*, [1906] 2 K. B. 389=21 Cox. 252; 5 W. R. (Cr.) 5. As to relevancy of evidence relating to subsequent conduct, see *Smith*, 20 Cox. 894=69 J. P. 71; *Ollis* [1900] 2 Q. B. 758; *Fisher*, [1910] 1 K. B. 149; 15 Cr. L. J. 89=22 Ind. Ca. 432; 1910 P. W. R. (Cr.) 26=11 Cr. L. J. 428=6 Ind. Ca. 964.

Evidence of Similar Acts—Where the question is, whether the defendant made the false statement with an intention to cheat, evidence that he had made similar false statements a short time previously or subsequently, and obtained money by them, is admissible, if it tends to show that on the occasion, which is the subject of inquiry, he was acting with a guilty knowledge; if not, it is inadmissible. For instance, where a prisoner was charged with obtaining money from a pawnbroker by the false pretence that a piece of worthless jewellery consisted of real stones, evidence that he had two days before obtained money from another pawnbroker on the pledge of a chain, which he represented as real gold when it was

not, was held to be rightly received. The Court said: "It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so more often than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last." *R. v. Francis*, L. R. 2 C. C. R. 128; *R. v. Rhodes* [1899], 1 Q. B. 77; 9 C. L. J. 610=13 C. W. N. 973=10 Cr. L. J. 91=2 Ind. Ca. 631; 36 C. 573; *Wyatt*, [1904] 1 K. B. 188=20 Cox. 462; *Walford*, 71 J. P. 215. And so, in a similar case, evidence of the same sort was received, and also of the fact that, when arrested, the prisoner was found to have in his possession twenty-six other chains of an equally worthless character. *R. v. Roebuck*, D. & B. 24=25 L. J. (M. C.) 101.

On the other hand, where the false pretence alleged was that the prisoner had authority to receive money, evidence that he had a few days before obtained another sum of money by a similar false pretence as to his authority was held inadmissible. *R. v. Holt*, 30 L. J. (M. C.) 11=Bell, 280. As Blackburn, J., remarked in *Francis'* case, L. R. 2 C. C. R. at 30. "There the alleged false pretence was an assertion of authority to receive the money, and the question was authority or no authority. The evidence was wholly irrelevant." The facts in the last case established that the prisoner had been expressly forbidden to receive the money, therefore no question as to guilty intention could arise. But if upon the facts it might have been doubted whether he did not really suppose that he was authorized to receive payment, then I imagine evidence would have been properly admitted to show that on a former occasion he had not only set up such an authority, but had given a false account of the mode in which the authority had been conferred on him." Evidence Act, s. 14; Act III. of 1891, s. 1; 11 B. H. C. R. 90; 2 W. R. (Cr.) 7; 5 W. R. (Cr.) 98; 16 W. R. (Cr.) 42. S. 11

of the Evidence Act applies only to cases where state of the accused's mind is in question, *i. e.*, where the accused could have done the act attributed to him either innocently or fraudulently, but one cannot conceive of a public servant obtaining a bribe innocently; there the guilt or innocence would depend upon actual physical facts as opposed to a mental fact, *viz.*, the accused's state of mind or feeling. Thus, where the license-clerk in a Municipal office was charged with receiving from three cartmen two annas in excess of the legitimate license fee, evidence to prove that he had cheated other cartmen was held inadmissible, 8 A. L. J. 1269=12 Cr. L. J. 611=12 Ind. Ca. 987, where 6 C. 655=8 C. L. R. 197 is *followed* and 36 C. 573 is *distinguished*. See *R v Fisher* [1910] 1 K. B. 149 and other cases relied on in 1910 P. W. R. Cr. 26=11 Cr. L. J. 423=6 Ind. Ca. 964.

1. *Deceit*.—Nothing can be more general than the language of the section upon the first point. All it requires is, that there should be a person who deceives, and another person who is deceived. A person is deceived who is led to believe that which is untrue; but a person cannot be sued or indicted for deceiving him, unless he leads the other to believe that which he himself knows to be untrue or does not believe to be true. *Derry v. Peak*, 14 A. C. 337, *per* Jervis, C.J., *R. v. Welman, Dears.* 188=22 L. J. (M. C.) 118. No attempt is made to define the nature of the deception, or the mode by which it is carried out, except that it must satisfy the other words of the section, by being fraudulent or dishonest or intentional as regards the person who uses it, 9 Cr. L. J. 261=1 Sind L. R. (Cr.) 20, and by being the operative cause which leads the person upon whom it is used to do the thing for which it is used. It is immaterial whether the person had means at hand of verifying the information given, as when a £1 note is tendered as a £5 note, *Jessop*, 7 Cox. 399=D. & B. 442. The real question is whether the false statement deceived the prosecutor or not, *Woolley*, 4 Cox. 193; *Dundas*, 6 Cox. 380; *Smith*, D. & B. 566; *Leonard*, 1 Den. 304; and whether the maker of the statement made it innocently, he himself having been deceived, *R. v. Dunleavy* 73 J. P.

56 or fraudulently. In general, cheating is effected by the direct assertion as a fact of something which is false. Under the Code, it is immaterial whether the fact so asserted is represented as existing, or is about to take place. [S. 115, illus. (f) & (g).] It is equally cheating if a man obtains credit by falsely representing that he has an estate, or that he is about to come into an estate; that he has a rich wife, or that he is about to marry a rich wife. *R. v. Howarth*, 11 Cox. 583; *R. v. Archer*, 6 Cox. 515=Dears 449. In many cases, however, the very nature of the transaction implies an assertion. If a shopkeeper sells goods by the pound, or the yard, or the quart, it is implied that the weight or measure conforms to the usage of the place, and it would be cheating to make use of a false weight or measure. 1 *East P. C.* 820; *Ratanlal* 386. So when a man buys goods, and pays for them by cheque; this is not equivalent to a statement that he has funds to that amount then at the bank because he may intend to pay in money before the cheque can be presented, or he may believe that his cheque will be honoured, even though his account is overdrawn; but it does amount to a representation that he has authority to draw upon the bank, and that his cheque will be paid. If these representations are false to his knowledge, he will have cheated the shopkeeper. *R. v. Hazelton*, L. R., 2 C. C. R. 134=44 L. J. (M. C.) 11; *Cosnett*, 20 Cox. 6=84 L. J. 800=65 J. P. 472; *R. v. Jackson*, 3 Camp. 370; *R. v. Parker*, 2 Mood. 51; *Dowey*, 11 Cox 115=37 L. J. (M.C.) 52; *Flint*, R. & R. 481; *Martin*, 5 Q. B. D. 34. The same principle applies where a flash note is passed off as a genuine one, *R. v. Coulson*, 1 Den. 592=19 L. J. (M.C.) 182, or where the note of a bank that has stopped payment is given in exchange for goods. In the latter case, however, it should be alleged as the deceit, that the note was represented as being of the present value for which it was tendered, as it may possibly turn out to have been of some value, if proved as a debt on the liquidation of the bank. *R. v. Smith*, 6 Cox, 314; *R. v. Evans*, Bell 187. When the inducement alleged is said to be the result of a series of statements made at different times, it is a question of fact whether those statements were so connected together as to constitute one deceiving

or pretence, *Martin*, L. R. 1 C. C. R. 56. Thus where a married man made a spinster understand that he was unmarried and proposing marriage to her induced her to part with money, promising to furnish a house therewith, he was held liable though the deceit consisted in long course of conduct, *R. v. Jennison*, L. & C. 157. If the deceit induces the delivery it does not matter there was an interval of time or other facts intervened after the complainant was deceived and before he delivered the property. Thus in *Greathead*, 14 Cox. 108, the accused by deceit got a cheque which was dishonoured owing to a material omission. The accused sent the defective cheque to the prosecutor and obtained a good cheque which he cashed. This was held to amount to cheating. It has to be remembered again that an inducement need not be directed to the party deceived, *Moseley*, 31 L. J. (M. C.) 24; *Hamilton*, 9 Q. B. 271; *Brown*, 2 Cox. 348; *Dent*, 1 C. & K. 249, though it must be shown that it was intended for and did induce him, *Rouse*, 4 Cox. 7. He may be induced through an innocent agent, *Butcher*, 28 L. J. (M. C.) 14. Again, several may take part in a concerted action and be liable, though it cannot be said that any one of them individually deceived, *Kerrigan*, 9 Cox. 441; *Oluyton*, 1 C. & K. 128; *Moland*, 2 Mood 276.

In many cases of sales the law implies an affirmation, upon which the purchaser is entitled to rely, and if he is deceived by its falsity he is cheated. A sale of goods implies that the seller has a right to dispose of the goods (Contract Act, s. 109). If a thief, or receiver of stolen goods, sells them to a *bona fide* purchaser, from whom they may be claimed at any moment by the real owner (*Ibid.*, s. 108, illus. (a)), he cheats him. A sale of goods by sample implies a warranty that the bulk is equal to the sample (*Ibid.*, s. 112) and if they are known by the seller to be inferior to the sample, he has cheated the purchaser, and it is not necessary to prove that they were not worth the price given for them (I. P. C. s. 415, illus. (e)) *R. v. Abbott*, 1 Den. 273=2 Cox. 430. The mere sale of an article implies no assertion that it is good of its kind, but it does imply

that it is the kind of thing which it is represented as being; for instance, that it is silver, and not merely a composition with some of the qualities of silver. *R. v. Roebuck, D. & B.* 24=25 L. J. (M. C.) 101. Thus where a milkman sells watered milk as pure milk he is liable, but not if a person is purposely sent to buy watered milk with a view to launch a prosecution against the seller, because there is no deceiving, 18 W. R. (Cr.) 61. Probably the seller may be liable for an attempt if he sells it as pure milk, 16 C. 310. Where the article has obtained a particular denomination, as *scarlet cuttings* in the China trade, it must be commercially saleable under that denomination (Cont. Act, s. 113), *Bridge v. Wain*, 1 Stark. 504; *R. v. Ball* C. & M. 249; *R. v. Steven*, 1 Cox. 83. Under Act IV. of 1889, s. 17, a sale of goods to which any trademark or description is applied, implies a warranty of the genuineness of the mark, and the truth of the description, unless some express statement in writing to the contrary has been delivered by the seller to the buyer. A person who simply sells an article does not undertake that it shall answer the purpose to which the purchaser intends to put it, or indeed any purpose. But if the purchaser stipulates that it shall be fit for a particular purpose, as, for instance, that a horse shall be fit to carry a lady, it would be cheating to sell him an animal which was known to be a runaway, or a buck-jumper. *R. v. Kenrick*, 5 Q. B. 49. So, if the very nature of the article indicates that it is intended for a particular purpose, as, for instance, copper sheathing for a ship, or a pole for a carriage, it must be reasonably fit for that purpose (Cont. Act, s. 114), *Randall v. Newson*, 2 Q. B. D. 102. And it would be cheating wilfully to supply sheathing that would corrode on the first voyage, or a pole that would snap on an ordinary emergency.

Much difficulty has been felt in England in consequence of the words of the statute 24 & 25 Vict., c. 96, s. 88, which requires that the property shall have been obtained "by a false pretence." These words have been held to mean a false affirmation of an existing fact. Accordingly, it has been decided that untrue praise of

an article intended to be bought did not come within the meaning of the statute, provided the affirmation is of what is mere matter of opinion, and did not amount to an assertion of a definite notable fact (Note N) On this ground a conviction was held bad, where the prisoner induced a pawnbroker to advance him money upon some spoons, which he represented as silver-plated spoons, which had as much silver on them as Elkington's (A well known class of plated spoon), and that the foundations were of the best material. The fact was that the spoons were plated with silver, but were, to the prisoner's knowledge, of very inferior quality, and were not worth the money advanced upon them. *R. v. Bryan*, D. & B. 265=26 L. J. (M. C.) 84=7 Cox. 312; *Levine & Ward* 10 Cox. 374. Where, however, the defendant, knowing that a particular piece of jewellery was only 6 carat gold, falsely represented that it was 15-carat gold, and thereby induced the prosecutor to purchase it, this was held to be a statement of a fact, and not of an opinion, and the conviction for cheating was upheld. *R. v. Ardley*, L. R. 1 C. C. R. 301; *Goss*, 8 Cox. 262. Cf. *R. v. Lee* 8 Cox. 233; *Sutor*, 10 Cox. 577. And so where he represented a packet as containing "good tea," when three-quarters of its contents was matter unfit to drink, and injurious to health. *R. v. Foster*, 2 Q. B. D. 301=46 L. J. (M. C.) 128.

It is probable that in cases under s. 415 the courts will consider, not whether the statement of the accused was an assertion of a fact or of an opinion, but whether the statement itself was false to the knowledge of the person making it, and, being false, was used for the purpose of deceiving, and did deceive. If a man sells nasty sweetmeats as exceedingly delicious there is no cheating as it is purely a matter of taste and there was nothing to prevent the purchaser tasting a portion before he parted with his money, 18 W. R. (Cr.) 61, though it may be otherwise if the portion offered for being tasted is not taken out of the bulk offered for sale. *Dark* 1 Den. 276; *Garlick*, 1 Den. 276; *Abbott*, 1 Den. 273; *Goss*, Bell C. C. 208; *Pratt*, 8 Cox. 334. But if he gilds a silver coin and sells it as a gold mohur, he

would certainly be liable, 29 A. 141=4 A.L.J. 43=1906 A. W. N. 308=4 Cr. L. J. 453. The remarks of Mr. Greaves, the learned editor of *Russell on Crimes*, upon the above distinction, though they cannot prevail in England against the weight of decided cases, may be considered with advantage when similar cases arise in India.

He says, 2 *Russ.* (17th Ed.) 1550n. "In order to bring a case within the statute, the following things are alone requisite: (1) A false pretence; (2) an obtaining of property by it; (3) an intent to defraud. And the correct way to determine whether any particular case falls within it is, not to consider each of these things separately, but to look at them all together; for no case is within the statute unless all of them exist in it. One error, in some cases, seems to have been to consider the pretence apart from the finding of the jury, that it was made with intent to defraud. One may extol an article innocently and another fraudulently in similar terms, but the latter alone is within the statute.

"As to the distinction between a representation that articles are better in point of quality, and a representation that they are entirely different from what they really are, there is nothing in the statute which warrants any such distinction. What the statute requires is, that there shall be a false pretence. [Bys. 415, a *deceiving*.] Then, is a representation as to quality a pretence? Possibly, where such a representation is made on the mere inspection of an article it may be rather a matter of opinion than a pretence. But where it is made with a full knowledge of the quality of the article, it is not opinion (for opinion must cease when knowledge exists), but an affirmation of a known fact—in other words, a pretence.

"As to the remark, that if extolling goods be within the statute, depreciating them must be so also, the answer is, that if a person

by that means obtained it at the price of a useless horse, with intent to defraud the owner, the case would clearly be within the statute."

In one respect the Code avowedly renders criminal a class of cases which are not so by English law, viz., where a party induces another to enter into a contract by a false statement as to his own intention to carry out its terms. (See illus. (j) & (g)) A man may be liable for making a representation of an existing fact

which is untrue to his knowledge, but it is quite another thing when he is sought to be made liable for *promising* to do something in the future. Criminal liability will arise only when it is established that at the moment of promise he had no intention whatever to fulfil the same, not if he had taken an extravagant or too sanguine view of his own capacity and resources, see *per Mellish, L. J. in ex parte Burrell*, L. R. 1 Ch. D. 537 at 552; *Vernon v Keys*, 12 East 632, *R v. Bancroft*, 26 T. L. R. 10; 1910 P. W. R. 26=11 Cr. L. J. 428=6 Ind. Ca. 964, 15 Bom. L. R. 297=14 Cr. L. J. 232=19 Ind. Ca. 238=2 Bom Cr. Ca. 48. This may create a great deal of difficulty. Whenever a contract is entered into, each party leads the other to believe that he intends to perform his own part. If he subsequently fails, there will be nothing to prevent an indictment being laid under this section, and the only question will be whether at the time of making the contract he intended to carry it out. In my opinion, the only safe rule to lay down will be, that mere breach of contract is not even *prima facie* evidence of an original fraudulent intention. [Affirmed by the Madras High Court, Cr. Pet. No 90 of 1863, and *per Scotland, C. J.*, in *R. v. Wilson*, 2nd Mad. Sess., 1870], acc 9 B. H. C. R. 448; 3 N.-W. P. H. C. R. 16 & 17. It will lie upon the prosecution to establish this intention affirmatively; as, for instance, by showing, in the case of a borrower, that he was hopelessly insolvent when he contracted the loan, and had no expectation of being able to repay it. See *ex parte Bayley*, L. R., 8 Ch., 244 Weir l. 478; in the case of a buyer that he had no intention whatever of paying the price, 4 Bur L. T. 14=12 Cr. L. J. 84=9 Ind. Ca. 458; in the case of a contract to deliver goods, that the person never had the means to deliver them, and never took any steps to procure them, 6 L. B. R. 33=4 Bur. L. T. 279=13 Cr. L. J. 50=13 Ind. Ca. 386. It must be recollected that where an act is in itself innocent, but may become unlawful by being done with a particular intention, or under particular circumstances, the presumption of innocence prevails till the facts which destroy it are proved (see *ante*, § 3). Thus where the accused received advances undertaking to lay it out in purchasing rice

for delivery to the complainant's firm and used the greater portion of the money for fulfilling the contract but a small portion to pay off his own debts, it was held no offence under s. 415 was made out, 10 C. W. N. 1005=4 Cr. L. J. 154. In India it is the usual practice for parties aggrieved by a breach of contract to resort to a criminal court with the primary object to getting reparation for the loss sustained thereby and if that end fails to have the advantage of a preliminary rehearsal before instituting a suit. In such cases, magistrates will do well to put the complainant to a searching examination under s. 200, Cr. P. C., instead of making the examination a purely formal affair as they very often do. A dismissal under s. 203 based upon such a thorough examination by the court itself has better chances of being sustained when challenged under s. 437, Cr. P. C., 1910 P. R. (Cr.) 33; 14 Cr. L. J. 524=20 Ind. Ca. 1004. It must also be remembered there can be no case for an investigation by a criminal court if on the facts alleged the complainant is not entitled to any relief in the civil court, 14 Bom. L. R. 503=13 Cr. L. J. 521=15 Ind. Ca. 793=1 Bom. Cr. Ca. 148. Where proceedings in civil and criminal courts were started simultaneously, proceedings in the criminal courts have been stayed pending adjudication in the civil court, 1911 P. W. R. (Cr.) 44. Unless the test of a clear intention to cheat at the time of the formation of contract is strictly insisted on, criminal courts will be flooded with every case of breach of contract under the guise of cheating, 1886 A. W. N. 262; 15 C. P. L. R. 97.

It is not necessary to show that the false representation by which a person is cheated was addressed to him individually, or even that his existence was known to the accused at the time, or that there was any special intention to defraud in particular. In a case where a person answered a fraudulent advertisement, it was laid down that a false pretence made to the public in general is addressed to all persons to whose knowledge it may come, and who may desire to act upon it; and if a particular person, after seeing or hearing it, acts upon it, and goes to the person from whom it proceeds, and, upon the

faith of it, parts with his money or goods, it becomes an advertisement to that particular person, who is one of the class of persons for whom it is intended. *Per* Lord Russell, C. J. *R v Stierlock* [1894], 2 Q. B. 766. And so, in a case against officials of an insolvent bank *Edge, C J*, laid it down to the jury, that if they published balance-sheets which were, and which they knew to be, materially false with the view of defrauding the shareholders or depositors by inducing them to leave their money in the bank, when they would otherwise have drawn it out, and if they succeeded in this object, this was the aggravated offence of cheating under s. 418 **16 A 83**. In **15 Cr. L. J 80=22 Ind. Ca. 432**, the directors, by false report and false balance-sheet, kept the bank open as a going concern after it had ceased to be solvent and induced depositors to make deposits. This was held to be an offence under s. 420. A statement of confident expectation of profits is something quite different from an assertion as to profits actually made, *Bellairs v Tucker*. L. R. 13 Q. B. D. 562, but the mere fact the directors pass an incorrect balance-sheet is not sufficient. Guilty knowledge cannot be presumed, but is a matter for inference from the nature of the false statements, the ease with which their falsity can be ascertained, the course of business of the Company and the position, experience and attainments of each individual director. **9 M. L. T. 20**. A manager of a fund may not be liable for false representations made by the proprietor of the institution or his agent when the custody and application of the funds are under the direct control of the proprietor, **5 M. L. T. 141=11 Cr. L. J. 189=4 Ind. Ca. 1106**.

The offence of cheating may be committed by conduct without any words. A well-known instance is that of the defendant who obtained credit in a university town by going into a shop in the cap and gown of an under-graduate. *R v Barnard*, 7 C. & P. 784. Similarly, a miner who placed a token upon a tub of coals to induce the manager to believe that it was he that was entitled to payment for having dug it up from the pit, *R. v Sowerby*, L. R. [1894] 2 Q. B. 173, and a

man who advertised for new-laid eggs giving the address of a farm in *Surrey* to which he had no right, and giving no name, thus inducing people to consign their eggs for which they never got payment, *R. v. Rhodes*, L. R. 1 Q. B. 77, see *R. v. Cooper* L. R. 2 Q. B. D. 510. In all these cases, if the conduct is innocent, it is for the accused to make out this plea. In *Barnard's* case the accused might have put on cap and gown with a view to take part in an amateur theatrical and then suddenly rushed off to buy something for immediate use. If his conduct is susceptible of the meaning attached by the prosecutor, that is sufficient to sustain a conviction, *King*, [1897] 1 Q. B. 214 at 219. And so, in a case where the defendant had pretended that he was a captain in the East India Service, Coleridge, J., said it would have been sufficient if he had merely appeared in uniform without saying anything about himself. *R. v. Wickham*, 10 A. & E. 34. So where the defendant, in the assumed character of a porter from an inn, delivered a parcel, as if it came from the country, with a printed ticket charging carriage and portage, which he received, and the parcel turned out to be a mock parcel, worth nothing, Lord Ellenborough, C. J., said: "I take the defendant to have uttered every word contained in the ticket which he brought with the parcel *R. v. Douglas*, 7 C. & P. 735, n (a). See also *Giles*, 34 L.J. (M.C.) 50=10 Cox. 44 & 32 C. 941=9 C.W.N. 1006=2 Cr. L.J. 764 followed in 1912 P.L.R. 114=1912 P. W. R. (Cr.) 10=13 Cr. L. J. 456=15 Ind. Ca. 88. Where the accused put the name of a painter upon a copy of one of his pictures in order that it may be passed off as the original, it was held to amount to cheating, *Gloss*, 7 Cox. 494. Similarly when the accused sent by post a cover purporting to contain currency-notes to the value of Rs 530, but really containing only waste paper and the complainant signed the usual postal receipt for an insured article as falsely described by the accused, this was held sufficient to constitute the offence of cheating under s. 417 though not under s. 420 as the receipt in question is not a valuable security within the meaning of that section, 1913 P. R. No. 10=14 Cr. L. J. 436=20 Ind. Ca. 596. Where, however, a man

sent the two halves of a currency-note by post to two different tradesmen and obtained goods from them it was held he was not liable for cheating, as there was no promise in either of the letters accompanying the halves that the other half would be forwarded, *Masterson*, 2 Cox. 100; *contra* *Murphy*, 13 Cox. 298, where it was held that such a promise was implied.

In the case of *Ward v. Hobbs*, 3 Q. B. D. 150 Bramwell. L. J., said at p. 157. "Before a man can complain of fraud he must show that there is something done intentionally to deceive him as an individual, or as one of a class, or as one of the public, and it is not enough that he shows certain conduct not done with that view or intent, but which may have that consequence." He put as an instance the case of an extravagant person, for the sake of display, wearing handsome rings and driving a brilliant equipage, and so obtaining credit with his tailor. This, of course, was not a fraud, as the tailor merely drew an inference as to his wealth, from conduct which had no other object than to gratify his own love of show. But if a swindler without any real means set up in a town, hired a handsome house, drove about in a handsome carriage, and lived in an expensive manner, and used the reputation for wealth which he acquired in this way, for the purpose of obtaining goods on credit, this would certainly be cheating, and would at all events be the best evidence, that he had from the first no intention of paying for what he bought. The mere fact that a person went into a restaurant, and ordered and ate a meal, knowing that he had no money, is not cheating, he having made no representations as to his ability to pay, and having been asked no questions. See *It. v. Jones* [1998], 1 Q. B. 119. But under the Code he has deceived and thereby induced the attendant to supply him with food to the detriment of his master, the deceit consisting in the fact that a person who walks into a restaurant and takes his seat and orders refreshments impliedly represents ability to pay. Under the Code the act would amount to cheating. Where a licensed vendor sells opium or postage stamps at rates higher than those fixed by Government, he may be liable for cheating, 4 Bom. L. R. 823. But a person who purchased rice from a famine relief officer on condition he should sell it only at a pound less was held not guilty for breach of the condition on the ground the rice having become his absolute property he could sell at whatever rate he thought fit, 22 W. R. (Cr.) 82.

Concealment of Facts.—By the Explanation to s. 415 it is declared that "a dishonest concealment of facts is a deception within the meaning of the section." By s. 24 a man is said to do a thing "dishonestly" when he

does it with the intention of causing wrongful gain to one person, or wrongful loss to another person. It seems to me, therefore, that no one can be said to have dishonestly concealed facts within the meaning of this Explanation, unless he has wilfully suppressed something which it was his *duty*, as between himself and the person with whom he is dealing, to disclose. In other words, it must be a concealment of which that other person has a right to complain, and for which he may obtain redress, either by an action for fraud, or by a suit for rescinding the contract. "Fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true, and which it was his duty to make known." *Per Bramwell, B., Horsfall v. Thomas*, 31 L. J. (Ex.) 322, at 328=1 H. & C. 90, at 100; 27 A. 561. The Explanation to s. 415 refers to the actual deception itself and not to the concealment of a deception by some one else, (1892-1896) L. U. B. R. 255. Apparently, then, the question in all such cases will be, has the defendant concealed something which it was his duty to make known? If not, the gain which he has obtained for himself is not wrongful gain.

Under the Transfer of Property Act, it is provided that on a sale of immovable property, and in the absence of a contract to the contrary, "the seller is bound to disclose to the buyer any material defect in the property, of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover." Further, "the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same." Conversely, "the buyer is bound to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest." Act IV. of 1882, s. 55, cls (1) (a), (2) & (5) (a). An omission to make the disclosures mentioned in cls. 1 (a) & 5 (a) is fraudulent, *ibid.*, cl. (6). The expression "material defect" includes

a defect in the title to the estate **20 B. 522**. Accordingly, a person who sold a house which was apparently in a sound condition, but which was really in a dangerous state; or a person who sold an estate as free of encumbrances, which he had mortgaged to another (*I P C s 415, illus (i)*), would commit a fraud if he concealed the defects in his property or title. But where the vendee, defendant, in a pre-emption suit compromised with the pre-emptor, plaintiff, without disclosing an encumbrance created by him after purchase, it was held such non-disclosure did not constitute cheating or there was no obligation on him to disclose a subsequent mortgage not binding on the pre-emptor. **27 A. 302=1904 A.W.N. 265=1 Cr. L. J. 1044**. The same would be the case with an ordinary vendor omitting to mention an encumbrance unless the sale was stated to be free from encumbrance or in reply to a question by the purchaser, he was assured as a matter of fact that there was no encumbrance, **27 A. 561=1905 A. W. N. 98=2 A. L. J. 268=2 Cr. L. J. 218; 1908 P.W.R. (Cr.) 5=1908 P.L.R. 311=7 Cr. L J. 272**. Similarly, when a sub-mortgagor did not disclose some defect in the title of his own mortgagor, it would be no cheating, **1910 P. W. R. (Cr.) 40=11 Cr. L J. 610=8 Ind. Ca. 256**. It will be observed that the clause as to the duties of a buyer, differs from that which relates to a seller. The facts which he is so bound to disclose are facts relating, not to the property itself, but to the nature or extent of the seller's interest in it. It seems to be still good law in India that a purchaser commits no fraud by buying a property at its ordinary agricultural value, without disclosing the knowledge which he has acquired that it contains a valuable mine. *Per Lord Thurlow, C, Fox v Mackreth, 2 Bro. C C. 420*. But he would be guilty of cheating if he bought from a reversioner his interest in the estate, without informing him that the intermediate life estate had just fallen in, and knowing that the vendor was ignorant of the fact

Under "The Transfer of Property Act," s 108 (a), "The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is, and the latter

not, aware, and which the latter could not, with ordinary care, discover." It is not clear how far this is intended to alter the law of England. Where a man takes a long lease of a house, he knows that he must for his own sake put it into thorough repair, and he is generally bound by express covenant to do so. In that process he usually finds numbers of defects which he had never anticipated, and which would render the house uninhabitable till made good. "In the ordinary case of lessor and lessee there is no implied covenant on the part of the landlord that the building shall be fit for the purpose for which it is let. *Searle v. Laverick*, L. R. 9 Q. B. p. 131, *per* Blackburn, J., *Lane v. Cox*, [1897], 1 Q. B. 415. On the other hand, where a person takes a furnished house for immediate occupation for a limited time, it is implied that it shall be fit for immediate occupation, and the contract is broken if it is not so; as, for instance if the house is infested with bugs, or if the drains are out of order. *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Finch Hatton*, 2 Ex. D. 336; see *per* Kelly, C. B. at p. 342; *Sarson v. Roberts* [1895], 2 Q. B. 395. There seems no reason why the same principle should not apply to an unfurnished house, where it was known that the new tenant intended immediately to move in his furniture, and commence residence. Such a case would certainly come within s. 108 (a). If a charge of cheating were founded upon this section, it would be necessary to consider very carefully what the intended purpose was, how far it was communicated to the lessor, what statements as to the condition of the house with regard to repair had been made on one side, and asked for on the other, and on whom the obligation to execute all necessary repairs was cast.

Several sections of the Contract Act relating to sales of goods have already been discussed, ss. 109—115. Upon the question now under discussion, s. 116 has an important bearing. "In the absence of fraud, and of any express warranty, the seller of an article, which answers the description under which it was sold, is not responsible for a latent defect in it. *Illustration*. A sells to B a horse. It turns out that the horse had, at the time of

the sale, a defect of which A was unaware A is not responsible for this." Suppose A knew that his horse had a spavin Would it be a fraud to sell it without calling attention to the fact? If so, it would seem to follow that he would be guilty of cheating. This is certainly not the law of England, and it would require much consideration before it was decided that it had become the law of India

The English and American law is laid down as follows by Mr Justice Story "The general rule, both of law and equity, in regard to concealment is, that mere silence with regard to a material fact which there is no legal obligation to divulge, will not avoid a contract, although it may operate as an injury to the party from whom it is concealed" "Although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold, since that would amount to a positive fraud on the vendee, yet, under the general doctrine of *caveat emptor*, he is not bound to disclose any defect of which he may be cognizant, although his silence may operate virtually to deceive the vendee." *Story, Contracts*, ss 511, 551, cited and approved by *Lord O'Hagan, 4 A. C., p. 26.*) Both branches of the rule are illustrated by two cases decided by Lord Ellenborough, C J In one a vessel was sold with all faults The seller knew of a latent defect which rendered it unserviceable, but no attempt was made to conceal the defect. It was held that the sale was effectual, and that the buyer had no ground for complaint *Baglehole v. Walters, 3 Camp. 154.* An opposite decision was given in an exactly similar case where the defect had been concealed *Schneider v Heath, 3 Camp. 506.* Both cases were relied on by Brett, L J, in *Ward v Hobbs 3 Q. B. D. at 161*, as establishing the proposition, "that the seller makes no representation as to the quality of the thing he sells by a mere offer of sale, and that he makes no representation that he himself does not know of a defect in the quality"

The whole law upon this subject was exhaustively discussed in the case of *Ward v Hobbs*, which was finally decided in the House of Lords, (2 Q. B. D. 331; 3 Q. B. D. 150; 4 A. C. 12). There the defendant

was owner of a herd of pigs, which was attacked by typhoid fever. Many of the herd died, and he then set the rest for sale in a public market. The conditions of sale stated that no warranty was given, and that the lots were to be taken with all faults. The pigs had no outward appearance of disease, but the jury found as a fact, which was the basis of the subsequent decisions, that the defendant knew that the pigs had a disease dangerous to life, and were worthless when sold. Almost immediately after removal, the pigs sickened and died of typhoid fever, and infected other pigs belonging to the purchaser, which also died.

On these facts it was held by the House of Lords, affirming the decision of the Appeal Court: *First*, that a sale made with the express condition that the article was sold without a warranty, and with all faults, negatived any suggestion of a representation by the seller that it was free from, or was believed to be free from, faults. *Secondly*, that no representation as to health could be inferred from the fact that the sale of diseased animals was made punishable by statute. *Thirdly*, that if express conditions of sale as above, are accompanied by a statement by the owner that, to the best of his belief, the article sold is free from some particular defect, and it is proved that he knew of such defect, then an action of deceit will lie for the false representation. Upon a further question, as to the effect of a mere sale in open market without any express condition that the article was to be taken with all faults, Lord Cairns, C., said:

"I observe that in a late case in the Queen's Bench, *Bulger v. Norwich*, 28 L. T. 441, Mr. Justice Blackburn seems to have thrown out an opinion that in a case of that kind, there being nothing on one side in the way of statement or negation, and there being simply the fact of a man sending diseased animals to a public market to be sold, that must be held to be a representation by conduct that the animals were free from disease, and that the person so sending might be liable for the consequences of that representation, if it turned out to be untrue. I repeat that I desire so far as I am concerned, to hold myself unpledged if such a case had to be considered." 4 A. C. p. 22.

Should such a case arise again, it will, no doubt, be urged with much force, that although an express statement that an article is to be taken with all faults is conclusive against a representation of quality, there is

no case in which such a statement has been held necessary. The principle is laid down generally, that except in the cases already stated (*ante*, pp 689 & 700), if a buyer wishes for a guarantee of goodness he must get it, and that none can be assumed where none is given. In a case exactly similar to that suggested by Blackburn J., where the owner of a glandered horse sent it for sale by public auction without notice of the disease, and as far as appears from the report, without any statement that it was sold with all faults, and it communicated the disease to other horses of the purchaser, an action against the seller which disclosed those facts was held bad on demurrer. *Hill v Balls*, 2 H. & N. 299=27 L. J. (Ex) 45. It would, of course be different where by any trade custom a certain degree of quality is understood, in the absence of a statement to the contrary. As, for instance, where it was found to be a custom in the tea trade, that where goods were sea-damaged, the fact should be stated in the catalogue of sale, and sea-damaged goods were sold without any such mention, the sale was held to be a fraud. *Jones v Bowden*, 4 Taunt., 846. So, if a buyer communicated to the seller his belief that he was purchasing an article of a particular quality, the sale to him without removing this false impression would be held to be a representation by conduct that it was well founded. *Hill v Gray*, 1 Stark. 434; *Keates v Cadogan*, 10 C. B., 591=20 L. J. (C. P.) 76. Nor has the doctrine of *caveat emptor* any application to the cases in which the law implies full confidence, as, for instance, contracts of insurance, or dealings between persons who occupy a relation of special confidence to each other, as solicitor and client, and the like. *Seaton v Heath* [1899], 1 Q. B. 782.

The above decisions at common law are in conformity with a later decision in equity. *Turner v Green* [1895], 2 Ch. 205. *Peck v Gurney*, L. R. 6 H L., at 377.

There an action was pending between two parties, and proposals for a compromise were made. Shortly before an interview between F, the plaintiff's solicitor, and the defendant and his solicitor to settle the terms of compromise, F received a telegram informing

him of the result of certain proceedings in the action favourable to the defendants, but did not disclose the information before the terms were agreed to. It was held that the settlement was not affected on the ground that a material fact was suppressed, there being no obligation on F. to disclose what he knew. The Court cited the language of Fry (*Specific Performance*, 3rd edit., s. 705). "*Mere silence as regards a material fact, which the one party is not under an obligation to disclose to the other, cannot be a ground for rescission, or a defence to a suit for specific performance.*" Also the words of Lord Campbell, L.C.: *Walters v Morgan*, 3 D F. & G. at 718. "There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge, which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to a legal fraud, however it may be viewed by moralists. But a single word, or, I may add, a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non existing fact, which might influence the price of the subject matter to be sold, would be sufficient ground for a Court of Equity to refuse specific performance of the agreement."

On the whole, it appears to me that s. 116 of the *Contract Act* was intended to reproduce the law of England, and that the illustration cannot be held to alter its effect, by rendering mere silence as to a known defect a fraud. In fact, the section exactly corresponds with the statement of the English law by Baron Parke in *Barr v. Gibson*, 3 M. & W. 390, at 399. "In the bargain or sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship does not imply any contract that it is then seaworthy, or in a serviceable condition. But the bargain and sale of a chattel as being of a particular description, does imply a contract that the article sold is of that description." If this is so, then mere silence as to a known defect would not be a deception within the meaning of s. 415, though an active concealment of it would be.

(2) *Fraudulent Intention*.—There must be a dishonest or fraudulent intention (see ss. 24, 25). The definition in s. 25 is imperfect, as it leaves undefined the word *defraud*. It is not every inducement by trick or lie

that is fraudulent. 32 C. 775=1 C. L. J. 469=2 Cr. L. J. 388 ; on the other hand, statements literally true may be fraudulent, if their general effect is to create, and if they are intended to create, a false impression, *Aarons Reefs v. Twiss* [1896] A. C. 273 followed in 5 Sind L. R. 95=12 Cr. L. J. 553=12 Ind. Ca. 641. Therefore, where a person who had agreed to sell land set out to register the conveyance, but fell ill on the way, and sent on the defendant, who, by personating him, had the deed registered in his name, it was held the defendant had committed an offence under s. 93 of the Registration Act, XX. of 1866, but that he was not guilty of cheating by personation under s. 419, 2 B. L. R. (A. Cr.) 25=11 W. R. (Cr.) 24. This ruling was followed in 32 C. 775 cited above where the manager of a family, who had to receive some money from the Collector on behalf of the family, was asked to produce the other members, to speak to their consent and he produced certain strangers, passing them off as junior members and received the money. Here, as the Collector was bound to pay, the act he was induced to do caused him no harm in body, mind, reputation or property. See also 19 M. L. J. 271=4 M. L. T. 324=8 Cr. L. J. 421. In *R. v. Stone* 1 F. & F. 311, a member of a Building Society obtained £30, alleging that he had completed two houses, but as a matter of fact the houses were incomplete and under the rules, if the true facts were known, he would have forfeited the amount. Held he was not liable as his intention was not to defraud but avoid a forfeiture. And so it has been held that a student who, by presenting a false certificate of character, induced the University authorities to allow him to appear at an examination, had not committed an offence under s. 415, inasmuch as his intention was not to cause wrongful gain to himself, or wrongful loss to any one. 19 C. 380, [over-ruled as to the meaning of the word 'dishonestly' by 25 C. 512.] If, however, the object of the false representation had been to obtain a certificate entitling him to anything which could not be obtained without it, such a certificate has been held by the High Court of Allahabad to be property within the meaning of s. 463, which is substantially the same as s. 417 and

therefore the act would be cheating. 15 A. 210, at 217, 28 M. 90 (F. B.) Where a man sat for an examination and answered the questions in the name of another candidate who was absent, it was held he had committed the offence described in s. 416, 12 M. 151, 13 B. 506. But where a servant purchased a stamp paper in the name of his master it was held though there was personation the elements of the offence of cheating were wanting, Weir I. 480; 1884 A. W. N. 87; 32 C. 775 = 1 C. L. J. 469 = 2 Cr. L. J. 388. In the case of a witness depositing in the name of another, it was ruled in 1 B. H. C. R. 89 he should be charged not for cheating by false personation but for an offence under s. 193, I. P. C. To describe the consequences of an act to be more serious than they are likely to be may deceive a person but would not amount to cheating unless done fraudulently or dishonestly. Thus to induce a son to pay his father's debts by taking advantage of his fear as to consequences is not cheating. 1864 W. R. (Cr.) 25; see also 4 W. R. (Cr.) 13.

Cases have occurred in which the defendant has committed an act, which admittedly came within the definition of cheating, in order to secure for himself, or someone else, some advantage, to which he considered that they were entitled.

In *R. v. Williams*, 7 C. & P. 354 the following curious state of facts appeared. The prosecutor owed the prisoner's master a sum of money, of which the latter could not obtain payment, and the prisoner, in order to secure to his master the means of paying himself, had gone to the prosecutor's wife in his absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away, upon which she delivered them up. Coleridge, J., told the jury: "Although, *prima facie*, everyone must be taken to have intended the natural consequence of his own act, yet if, in this case, you are satisfied that the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not guilty. It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt. You must be satisfied that the prisoner at the time intended to defraud the prosecutor."

This dictum was a good deal relied on in a case at Madras. There the prisoner had confessed the fact that he had introduced an

overcharge for coolies, and obtained money thereby. He attempted, however, to set up as a defence that he had paid certain money out of his own pocket on a contract for goods supplied to the Railway Company, that, through a mistake in his accounts, he had omitted to charge it at the proper time, and that afterwards, being afraid of incurring blame for this irregularity, he had adopted this indirect way of reimbursing himself. Hence, no fraud was practised upon his employers, the only result of the false pretence being that they had paid money for one thing which was really due for another. Bittleston, J., refused to receive the evidence, on the ground that it could form no defence. On the above case being cited, he distinguished it on two grounds: *First*, that, in the case quoted, the debt was admitted to be a just one, whereas here it had never been even brought to the knowledge of the Railway Company. *Secondly*, that in the former case it did not appear that the prisoner ever intended to deprive the owner permanently of his malt, but merely to detain it temporarily, as a means of putting the screw upon him, to make him pay. *R. v. Longhurst*, 4th Mad. Sess., 1858. See *Faylor*, 65 J. P. 437. Where a trader sends in a bill for articles supplied the mere fact some of the articles had been returned would not make him liable for cheating unless the fraudulent intention is otherwise established, 5 C. W. N. 235, 4 Bom. L. R. 442.

In a more recent case, the defendant was indicted for obtaining a carriage from the prosecutor by false pretence. He admitted the fact, but said the prosecutor owed him money, and that he got the carriage in order to compel payment. Bittleston, J., in charging the jury, said "I advise you not to convict unless you are satisfied that the prisoner obtained the property, intending absolutely to apply it to his own use. If you think he did not obtain it with the intention of keeping it, but of putting a screw upon the prosecutor, to make him pay the money due by him, then I think he is not guilty of the offence. The prosecutor admits that there was a debt due, and there is evidence of an arbitration between them as to a money dispute. If you think it was merely a trick resorted to for the purpose of pressure, then I recommend you to acquit. It is very dangerous to convict upon a criminal charge, where the case comes merely to a matter of civil dispute." *R. v. Sheikh Ahmed*, 4th Sess., 1860, Madras.

It will be remembered that the above indictments were under the English law. I am, however, inclined to think that all such cases would come under s. 415. The offence under this section consists of cheating a person into delivery of the property, and the mode in which it was intended to use it, or the length of time during which it was to be kept, seem to me to be immaterial. It is different under the English statute. There it

consisted in obtaining the article by false pretences "with intent to cheat or defraud any person of the same." It might fairly be said that there was no such intention if the possession of the article was not to be permanent, and if no loss in respect of it was ever to be inflicted upon the owner. Under the Code the test is the honesty of the means by which the change of possession was effected, not the object which the accused had in view. Even in England, it is no defence to a charge of cheating that the prisoner, when he got the goods into his possession by the false pretence, intended to pay for them, whenever it should be in his power to do so. *R v Naylor*, L. R. 1 C. C. R. 4=10 Cox. 149.=35 L. J. (M. C.) 61. It is no defence to say accused did not intend ultimately to cheat, *R v Hamilton*, 1 C. C. R. 244. See also discussion, *ante*, chap x. § 174 at p. 619.

(3) *Object of Fraud*.—The fraud must have brought about one or other of the results mentioned in s. 415. Where the object of the offence is to obtain the possession of property, it is immaterial whether the property belongs to the person cheated or not, or the property was in existence at the time of deceiving provided it was delivered under the influence of the deception, *Martin*, L. R. 1 C. C. R. 56. The word property will include money, 32 C. 22, an attachment warrant, 6 Bom. L. R. 375=1 Cr. L. J. 332 a lottery-ticket, 1 Bom. L. R. 76, but is confined to moveables 1882 A. W. N. 6; 2 W. R. (Cr.) 29, but the delivery must be with intent to part with ownership 1905 A. W. N. 9=2 Cr. L. J. 94, and the intention at the moment of delivery determines the offence. The fact the cheat afterwards returned the property would not exculpate him, 13 C. W. N. 728=9 C. L. J. 635=10 Cr. L. J. 437=4 Ind. Ca. 65. It is an offence to obtain land from a Revenue officer by falsely pretending that it is waste; 6 M. H. C. R., Appx. 12; to obtain money on promise of getting employment, knowing it was not in accused's power to get any such employment, 1910 P. W. R. (Cr.) 26, 13 C. W. N. 728 cited above; to obtain goods by pretending to be a commission agent for sale, 2 Bom. L. R. 621; and so it would be, if remissions of revenue were obtained by a false repre-

sentation that the crops were damaged. Where the offence charged consists in causing the person deceived to do or omit to do anything which he would not have done unless deceived, it is necessary to go further and show that the act or omission damaged him in some one of the ways specified in s. 415. For instance, to promise a man employment as a domestic servant but with the ulterior object of sending him off as a cooly to Assam is an attempt to cheat, 9 C. W. N. 764=2 Cr. L. J. 422; to represent an accomplice to be a very wealthy *Seth* who could easily be defeated if the complainant gambled with him while the accomplice was in reality a practised gambler, well-skilled in all the arts of gambling and the complainant lost all his property in gambling with him, 1905 P. R. (Cr.) 4=6 P. L. R. 452=2 Cr. L. J. 38; or to induce a high caste man to marry a low caste woman, by pretending that she was of a higher caste, is cheating by personation within the meaning of s. 416, 7 W. R. (Cr.) 55. & 51; 21 W. R. (Cr.) 41; Ou. Dig. 1123; 2 A. 694; 1882 A. W. N. 237; 5 W. R. (Cr.) 98 Ratanlal, 301. But without referring to these cases, it was decided in 1904 P. R. No. 13=1904 P. L. R. 410=1 Cr. L. J. 449, that obtaining money by describing a Brahmin woman as *Kirari* is not cheating by personation and the accused is liable not under s. 419 but under s. 420. As stated in the explanation to s. 416 the offence under s. 419 consists

A. W. person and
not to a 7=1903 P.
L. R. 149; to personate means to pretend to be a particular person, *Hague*, [1864] 33 L. J. (M. C.) 81 Where the accused in the assumed name of *Sims* represented to the secretary of an Athletic association that his previous performances were of a modest character and that he had never won a prize before and thus obtaining long starts tried to obtain a competition prize, he was held liable for attempting to obtain property by false pretences corresponding to the offence described under s. 416, I. P. C. *Button*, [1900] 2 Q. B. 597=69 L. J. (Q. B.) 901. Similarly where the accused published advertisements of a book as if the author was one *Wilson*, a fictitious personage and wrote a letter to the

postmaster in the fictitious name of *Wilson* asking that money-orders may be paid to *Wilson's* clerk *Seshagiri Rao* and signed receipts in the name of *Seshagiri Rao* the deception practised upon the postmaster was held to amount to the offence of cheating by false personation, 13 M. 27. Where, however, a person who wanted to get into the police, falsely represented that he belonged to a different district, in order to evade the rule which prohibited the enlistment of residents of the district, it was held that he had not committed the offence of cheating; the act done by the person deceived could not damage him in mind, body, reputation, or property, 6 A. 97; 25 M. 726. The damage or harm must be the necessary consequence of the deceit practised and not a bare possibility, 17 C. 606, followed in 2 C. L. J. 524=3 Cr. L. J. 160. But if the forbidden results are obtained by the fraud, it is immaterial that the prisoner had promised to do something which was absolutely impossible as, for instance, to procure something that was desired by means of witchcraft. *R. v. Giles*, L. & C. 502=34 L. J. (M. C.) 502=10 Cox. 44; *Bunce* 1 F. & F. 523.

The second part of s. 415 deals with deceit with a view intentionally to induce the person deceived to do some act likely to cause harm to the doer in body, mind, reputation or property. A fraudulent or dishonest intention is not an essential ingredient of this offence. Thus, when the accused went to a lawyer and induced him to write a letter to a firm on behalf of the complainant's firm by falsely representing the accused was a member of the complainant's firm, but before the letter could be despatched, the lawyer came to know of the deceit practised upon him, the accused was held liable for an attempt at cheating as, if the letter had been despatched, it would have cost the pleader harm in reputation, mind and probably in his profession, 12 C. W. N. 75)=7 C. L. J. 375=7 Cr. L. J. 342. But where an accused produced before a Tahsildar a certificate of having passed an examination, while the real holder of the certificate was another man of the same name as the accused, his attempt to obtain a kurnam's post thereby in no way

was calculated to cause harm to the *Tahsildar* in body, mind, reputation or property. But the offence, if at all, would only be one under s. 182, I. P. C., 19 M. L. J. 271 = 4 M. L. T. 224 = 8 Cr. L. J. 421; 11 B. 59, 1907 P. R. No. 1 = 1906 P. W. R. (Cr.) 9 = 4 Cr. L. J. 355; the facts in 4 L. B. R. 315 (F.B.) = 9 Cr. L. J. 15 are rather curious. There a registered opium consumer got a licence to purchase in one of his names and a similar licence in the other of his names and thereby obtained more opium than he could have otherwise got. It was held this amounted to cheating. Similarly where the accused conspired to obtain a passport from the Foreign office for use in Russia by false representation intending that it should be used by some other person, *K. v. Brailsford*, [1905] 2 K. B. 730. But where a man with a view to escape prosecution, gave a wrong name and address to a Sanitary Inspector, it was held that the intention of the accused was not to induce the Sanitary Inspector to prosecute anyone with the false name and address, and in any event it could not be said the result of the accused's act was to injure the reputation of the Sanitary Inspector, *Ratanlal* 635. Where the accused induced one *Gundappa* to withdraw a charge against him on the pretence that the accused would withdraw a charge brought against *Gundappa* and others and it was found that the accused had no intention at any time of acting up to his promise, held though the accused deceived *Gundappa* and induced him to do something, viz., the withdrawal, yet it could not be said that *Gundappa* suffered in body, mind, etc., and the suggestion that *Gundappa's* reputation for cleverness had suffered was too far-fetched to sustain a conviction, *Weir* 1. 477. Similarly, where a person not having passed the Matriculation Examination of the Madras University applied for a duplicate certificate in the name of another by enclosing a forged certificate from the headmaster of a school, it was held no offence was made out as it could not be said the University or the Registrar suffered any harm in body, mind, reputation or property. As for the certificate itself, the University had the benefit of a fee of three rupees paid for the certificate, 25 M. 726. The correctness of this decision was very much called in question in 28 M. 90

(F. B.). It was held to be not cheating when a clerk in a public office purchased at an auction a quantity of waste paper in an assumed name, 1903 A. W. N. 231; 1902 A. W. N. 151, the same result followed when the accused, a rival sweetmeat seller, deluded a customer on his way to complainant's shop and sold to them his own wares at fair price so as not to injure the customer in any way, 1904 P. R. No. 25=1904 P. L. R. 62=2 Cr. L. J. 126. No offence is committed if a third person on whom no deception has been practised sustains damage or harm in consequence of the deceit. Again where a company having collapsed, the accused, its manager and secretary, got up a false resolution of the shareholders sanctioning his resignation and forwarded a copy of the same to the Registrar of Joint Stock Companies, he was held not liable for cheating, as his sole object was to escape the inconvenience and annoyance caused by the importunate inquiries of panic-stricken shareholders and not to cause harm in body, mind, reputation or property to anyone, 4 B. & M. L. R. 440.

Fraud must be effectual.—Finally, it is necessary to show that the person practised on was really deceived, and that it was in consequence of being so deceived, that he did the act desired. If the party is alleged to have been deceived by a number of letters written by the accused it is a question of fact whether the prosecutor was likely to have been influenced thereby, *R. v. King* [1897] 1 Q. B. 214. If the deceit contributed to the party deceived parting with property, it need not be shown that the inducement was wholly due to the deceit, *Hewgill, Dears*, 315; *English*, 12 Cox. 171; *Lince*, 12 Cox. 415. But if property is delivered quite independently of the deceit as when a man after cashing a stolen note gave a false name to the shopkeeper, *Weir* l. 479, he would not be liable. For other cases where the inducement offered by deceiving was held to be too remote to be connected with delivery of property, see 33 C. 50, and the English cases of *Larner*, 14 Cox. 497; *Bryan*, 2 F. & F. 567; *Gardner*, D. & B. 40=25 L. J. (M. C.) 100. The offence would not be committed, if he saw through the fraud, and handed over the property in order to prosecute the prisoner;

R. v. Mills, D. & B. 205=26 L. J. (M. C.) 79, or if he did not rely upon the statement which was made being true, but believed that in any case he would be paid his money; *R. v. Dale*, 7 C. & P. 352, or if he exercised his own judgment upon the statement made by the defendant as to the value of the article offered to him, and advanced him the money, because he considered that the article was worth it, and not because the defendant said it was *R. v. Roebuck*, D. & B. 24=25 L. J. (M. C.) 101. In all such cases, however, though a complete offence has not been committed under s. 415, the prisoner might be convicted of an attempt to commit it, under s. 511. *Hensley*, 11 Cox. 570; 16 C. 310. On questions of attempted cheating see 8 A. 304, 15 A. 173 & 310; 2 A. L. J. 718=2 Cr. L. J. 788; 17 C. W. N. 294=14 Cr. L. J. 120=18 Ind. Ca. 630; 12 M. 114; 8 C. W. N. 278 (F. B.); 12 B. H. C. R. 11; 1914 P. W. R. (Cr.) 13; 15 Bom. L. R. 563=2 Bom. Cr. Ca. 80; 1906 P. W. R. (Cr.) 9; 1863 P. R. No. 6; for abetment, see *Ratanlal* 470 following 3 M. 4; as to distinction between attempt and abetment, see 2 B. L. R. 55, & 7 C. 352; 1905 P. R. No. 4=1905 P. L. R. 125=2 Cr. L. J. 38; 1908 P. W. R. (Cr.) 37=8 Cr. L. J. 75; 1884 P. R. No. 9. Of course no offence at all has been committed, if the prisoner has managed to effect his object without making any false statement to anyone, as when a man merely travels in a railway carriage without a ticket. 20 A. 95. It would be cheating for a person to pass into a railway carriage, or an Exhibition, by falsely pretending to the official in attendance that he had a proper ticket but if he managed to get in unobserved, he would have made no pretence, and committed no offence under the Code. 1 B. H. C. R. 140; 6 B. H. C. R. (Cr. Ca.) 6. And if when challenged, he produces a forged pass which does not deceive the authorities, he would be guilty of only an attempt, 21 M. L. J. 743=12 Cr. L. J. 46=11 Ind. Ca. 590; 11 C. W. N. 100=5 C. L. J. 47=4 Cr. L. J. 439. It is no offence for a traveller having more than the free amount of luggage to evade payment of railway fare for over-weight by getting his co-traveller blessed with no luggage to carry some of his 1903 P. R. No. 25.

When an offence under the first part of s. 415 has been completed by the deceit proving successful in its objective, it is punishable under s. 420 as when a clerk reports prices as higher than the market-prices of the day and dishonestly gets his master to pay more to tradesmen, **8 A. 201**, or pretending to be a commission-agent for sale obtains property for sale which he pawns the very next moment; but when a man pretending to be an employee under the Calcutta Corporation obtained a subscription from the Health officer for a charitable object to which he made over the money, it was held the offence was not made out as the element of dishonesty was wanting in spite of the fact the Health officer was cheated in the sense he would not have paid the subscription into the hands of the accused but for the representation that he was an employee under the Corporation, **33 C. 5 = 3 Cr. L. J. 244**; see **1910 M.W. N. 510**. S. 420 deals also with one special class of offences described in the second part of s. 415, viz: those cases where the doing is intimately connected with a valuable security, **23 W. R. (Cr.) 43**. As to what constitutes valuable security, see notes to s. 30 in Part I. p. 14. A document purporting to be a cheque but not made payable to bearer or order and not stamped is not a valuable security, *Yates*, **1 Moody 170**. But a pay order signed by the president of a burial society was held to be a valuable security and the fact that the society was not registered, did not render the order invalid. *Greenhalgh*, **Dears. 267**.

VIII. FRAUDULENT DEEDS AND DISPOSITION OF PROPERTY.

SS. 421-424, I. P. C., dealing with fraudulent deeds and dispositions of property, have been considered at length in Ch. VII. § 125, pp. 401-407.

IX. MISCHIEF.

187. Mischief.—This offence may be committed with reference to both moveables as well as immoveables. But as regards the former, if one of the offences already considered under the preceding heads I to VIII of this chapter

has been committed either in obtaining possession or in appropriating or converting the same, it is not an additional offence wilfully to destroy the property or do something to affect it injuriously. Thus one who has stolen a sheep cannot be charged with mischief if he changed the sheep into mutton by killing it, *Weir* L. 497; (*contra* *Ratanlal* 430), *Ratanlal* 129, 5 Bom. L. R. 460, (1892-1906) I. U. B. R. 241; 1900 P. J. L. B. 633. But where mischief precedes theft as in cutting and carrying away a tree, a double conviction was maintained, 2 B. H. C. R. 392. See also 11 B. H. C. R. 13; 6 W. R. (Cr.) 5; 1866 P. R. No. 37.

The offences punishable under ss 426—440 vary according to the character of the objects injured, and the amount of damage caused, but they are all governed by the definition given in s 425. The essence of every such offence is that it should have been caused wilfully. Wrongful, therefore, to stray into cattle shable under special 425. 10 W. R. (Cr.) 29; followed in 8 Bom. L. R. 857 & 549, *Ratanlal* 185, 187; 189, 199, 1904 P. R. No. 23=1 Cr. L.J. 1097, 6 B. L. R. Appx. 3=14 W. R. (Cr.) 31; 7 B. 126; 29 A. 565=1907 A. W. N. 170=6 Cr. L. J. 13, 5 Sind. L. R. 263=13 Cr. L. J. 536=15 Ind. 808, 9 B. 173; 6 M. H. C. R. Appx 37; 6 Bur. L.R. 80. *A fortiori* damage resulting from mere accident or stupidity on the part of the accused could not be attributed to mischief as the gist of the offence lies in intention or knowledge. Thus in *Ratanlal* 88, a country cart-driver seeing a big Saheb driving furiously did his best to get his cart out of the way. But the Saheb prosecuted him saying he pulled the bullock in the wrong direction thereby bringing the pole of the yoke against the foot-board of the Saheb's carriage causing a damage of Rs 20 to 30. The first class magistrate convicted the accused, fined him and instantly made over the whole of the fine to the Saheb. But the High Court for obvious reasons had to set aside the conviction though they felt themselves powerless to make the

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The offences punishable under ss 126—140 vary according to the character of the objects injured, and the amount of damage caused, but they are all governed by the definition given in s 125. The essence of every such offence is that it should have been caused wilfully and with a knowledge that it was wrongful, therefore mere negligence, such as allowing cattle to stray into adjoining premises, though punishable under special acts, is not an offence within s. 125. 10 W. R. (Cr.) 29; followed in 8 Bom. L. R. 857 & 549, *Ratanlal* 185, 187; 189, 199, 1904 P. R. No. 23=1 Cr. L.J. 1097, 6 B. L. R. Appx. 3=14 W. R. (Cr.) 31; 7 B. 126; 29 A. 565=1907 A. W. N. 170=6 Cr. L. J. 13, 5 Sind. L. R. 263=13 Cr. L. J. 536=15 Ind. 808, 9 B. 173; 6 M. H. C. R. Appx 37; 6 Bur. L.R. 80. *A fortiori* damage resulting from mere accident or stupidity on the part of the accused could not be attributed to mischief as the gist of the offence lies in intention or knowledge. Thus in *Ratanlal* 88, a country cart-driver seeing a big Saheb driving furiously did his best to get his cart out of the way. But the Saheb prosecuted him saying he pulled the bullock in the wrong direction thereby bringing the pole of the yoke against the foot-board of the Saheb's carriage causing a damage of Rs. 20 to 30. The first class magistrate convicted the accused, fined him and instantly made over the whole of the fine to the Saheb. But the High Court for obvious reasons had to set aside the conviction though they felt themselves powerless to make the

Sahab refund the money illegally paid to him. See also 5 M. H. C. R. Appx. 40, 25 W. R. (Cr.) 65. Where intention is absent there must at least be a distinct finding as to knowledge, Ratanlal 690. Even as regards allowing cattle to graze, if accused intentionally allows his cattle to graze on Government waste land while adequate provision has been made otherwise for the grazing of all village cattle, on distinct proof of destruction of any property, such as grass, accused would be liable for mischief. Weir I. 432 distinguishing 4 M. H. C. R. Appx. 15; 5 M. H. C. R. Appx. 29; 6 M. H. C. R. Appx. 36; 2 L. B. R. 158; Weir I. 495. If the owner was present when cattle was doing damage and refrained from taking steps to prevent their doing so, he would be liable, Ratanlal 318 & 357. A mere rash act, such as furious driving, would be punishable under 279 I. P.C., but not as mischief, even where harm has resulted 1900 P.R. (Cr.) 13, 14 W. R. (Cr.) 32. Further it is not sufficient that the act should have been intended to cause some wrongful damage; it must have been intended to cause that particular form of damage which consists in injuriously affecting property. If a man throws a stone, or fires a shot at another, and the missile injures property, he has not committed mischief, unless he aimed in such a direction that he must have known that the natural consequences of his act would be to do the damage complained of; although that was not his wish, yet if he was reckless whether he did it or not, and mischief has followed, he is answerable for the result. *R. v. Pembliton*, L. R., 2 C. C. R. 119, at 122=43 L. J. (M.C.) 91. Nor is damage punishable under s. 425 when it is committed in the *bona fide* exercise of a right, reasonably supposed to exist, 3 B. L. R. (A. Cr.) 17=12 W. R. (Cr.) 1; 2 A. 101; Ratanlal 432, 745 & 465; 1903 P. R. No. 6; 10 C. 408; 8 Bom. L. R. 549=4 Cr. L. J. 93; 11 Cr. L. J. 566=8 Ind. Ca. 128, 25 W. R. (Cr.) 65; 1882 A. W. N. 209; 1887 A. W. N. 101; 16 W. R. (Cr.) 62 [72], Weir I. 438, 439 & 490; 7 C. W. N. 859; 21 W. R. (Cr.) 38; 8 M. L. T. 246 & 385; *Armstrong v. Mitchell* 88 L. T. 870=67 J. P. 329; *Matthews* 14 Cox. 5; *James*, 8 C. & P. 131; *Miles v. Hutchings*, [1903] 2 K. B. 714; but when a man

wantonly destroys crops raised by another, a *bona fide* assertion of the right to the land would be no answer to a charge of mischief Weir I. 491 10 Bur. L. R. 126= 1 Cr. L. J. 668. But the agent of a decree-holder who assists a bailiff to break open the door of a room in a house tenanted by the debtor cannot be made liable as the bailiff merely acted, though mistakenly, in what he supposed to be his duty and the agent had neither the requisite intention nor knowledge, Ratanlal 949; 3 C. 573. But the exercise of a supposed right must be reasonable. Thus when a chestnut tree on the side of a road had its branches over-hanging the road up to a few feet of accused's house on the opposite side of the road and he cut off its branches asserting a supposed right to abate a nuisance caused by stone-throwing by boys at the blossoms and the branches obstructing free light and air to his house, it was held he was liable, *Hamilton v. Bone*, 16 Cox. 437 *cf* 1878, P. R. No. 9; 1881 A. W. N. 158; 6 C.W.N. 34; where a right is set up in defence, the test would be whether the defendant has done more damage than he could reasonably suppose to be necessary for the assertion or protection of that right *R v. Clemens* [1899], 1 Q. B. 556. Thus if a trespasser left his watch in my room, that would not justify me in smashing the watch and throwing it into a well and there could be no *bona fides* in such a case. Thus when a tenant on the expiry of his term continued in possession and attorned to a rival landlord litigating with the original lessor, the latter's entry upon the property and wanton destruction of moveables found therein was held to be an offence, 7 Bom L. R. 86=2 Cr. L. J. 55. In all such cases the primary and not the remote intention should be looked at, 19 C. 380, 8 A. 653 at 661, 3 C. 573. The word *cause* in s. 425 must mean the immediate cause of the result and not *causa causans*, 1 Cr. L. J. 488. Thus a road at a railway level crossing is a highway only when the gates are kept open, if a man opens the gates while shut and goes over and a passing train smashes the gates he may be liable for mischief if it is found as a fact the damage is a natural and reasonable consequence of his act *R v. Strange*, 16 Cox. 552. Similarly when people finding their field flooded cut a channel across the

railway, the knowledge required by s. 426 must be attributed to them quite apart from their motive and they would be liable. 16 C. W. N. 623=13 Cr. L. J. 138=13 Ind. Ca. 826. On the other hand, a mere claim of right is not sufficient, if the facts so clearly negative the claim as to make the assertion of it to the injury of another an additional wrong. 1 M. 262; 2 Bom. L. R. 349; 1881 A. W. N. 64; 10 B. 183 or when he had previously set up the same claim unsuccessfully. 11 C. W. N. 467=5 Cr. L. J. 278. "It is the duty of the Criminal Court to determine what was the intention of the alleged offender, and if it arrives at the conclusion that he was not acting in the exercise of a *bona fide* claim of right, then it cannot refuse to convict the offender, assuming, of course, that the other facts are established which constitute the offence," *per* Turner, J., 2 A. 101, at 103. It is also necessary to show that the subject-matter which was injured was, at the time, the property of some other person, otherwise no one can be damaged, and no one can be wronged. 15 C. 388; 17 C. 852; 11 M 145; 1904 P. R. (Cr.) 5=1904 P. L. R. 308=1 Cr. L. J. 501. See *ante* § 174 at p. 609. The effect of Explanation 1 to s. 425 was considered in 28 A. 204=2 A. L. J. 826=1905 A. W. N. 255=2 Cr. L. J. 801. There the accused put up certain dams in a river the property of Government with the result a considerable stretch of the stream became dry thus causing the loss of large quantities of mature and immature fish. Held he was guilty of mischief for having changed the condition of the river-bed the property of Government, thus causing damage to the *Dehra Dun Fishing Association* which had the right to fish in the river with a rod or line. Mischief may, however, be committed in respect of property which is valueless for its primary purpose, such as a document evidencing an immoral agreement which is absolutely void as a security, provided it can be used for any purpose, as evidence of any collateral matter, so as to be of some use to its owner. 5 M. 401.

It is not necessary to the offence of mischief that the damage done to the property should be of a destructive character. Where goods were in process of removal,

and the accused came and threw them out of the cart upon the road, a conviction under s. 425 was maintained. The Court said that the inconvenience caused to the owner of the goods, by the unlawful change of their situation, did diminish their utility, as goods on their way to their destination. " We think it is not necessary that the damage required by the section should be of a destructive character. All that is necessary is, that there should be an invasion of right, and diminution of the value of one's property caused by that invasion, which must have been contemplated by the doer when he did it " 12 C. 55. But the property itself must be injured. To cut a crop that is grown for the purpose of being cut is not causing such a change in the situation thereof as diminishes its value or utility unless it has been cut while unripe ; nor could it be said to affect it injuriously because it renders pilfering easier, 18 W. R. (Cr.) 10, 7 C. W. N. 713. But walking across a field of long grass is causing damage to it. *Gayford v Chouler*, [1898] 1 Q. B. 316.=18 Cox 702=67 L. J. (Q. B.) 404. And watering milk would be causing change in the property so as to diminish its utility, *Roper v Knott*, L. R. [1898] 1 Q. B. 868. But to cause a Company's shares to fall in value by spreading false reports about the Company is not within this section, 15 C. 388 at 400. Throwing a shoe among persons who were eating was held not to be mischief, even though, in the estimation of the persons eating, their food was thereby polluted, and rendered unfit for use 24 A. 155. The section is confined to physical injury resulting from a physical cause, as when a man throws stones on the back part of the wall of a house when there were no people moving about, 5 L. B. R. 100 (F. B.)=11 Cr. L. J. 552=4 Ind. Ca. 293. The word *property* in this section is used in a narrow sense and is confined to tangible property so that where the accused destroyed certain stairs over which the complainant had a right of easement, by pulling them down, the Bombay High Court held the act did not amount to mischief since the bare right of climbing up the accused's stairs did not constitute property in the complainant within the meaning of s 425, *Ratanlal* 387 Similarly as regards a right to catch fish in

a public river, 15 C. 388, or the customary right observed for years of taking a deity under a tree owned by a private individual, Weir I. 496. In this last case, that such a right cannot be property within the meaning of s 425, seems to have been admitted by advancing the argument that the tree must have been deemed to be dedicated to the deity or the public, but this was overruled. But a postal receipt for a registered article has been held to be property and wilful destruction of it will amount to mischief, 1905 P.R. No. 24=1905 P. L. R. 71=2 Cr. L. J. 242. Similarly when a man cut a channel on his own land so that the fish and water in a gill on the adjoining owner's land were drained away, he was held liable and the objection that he was only cutting on his own land was overruled. 7 C. W. N. 663; 3 M. L. T. 147=7 Cr. L. J. 133. A graveyard would be property though not the corpses buried therein; so that a man digging up graves and removing stones placed thereon was held liable under s 426 Weir I. 496. But in 4 Bom. L. R. 463 it was held otherwise when the tombs stood on complainant's own lands.

Mischief may be committed by a joint owner of property, where the act is in its nature malicious and wanton, and one which could have had no other object than the injury or destruction of the property to the detriment of the other joint owners. 3 B. L. R. (A. Cr.) 17 at 20. It may also be committed in respect of a man's own property, where another person has an interest in it which the owner is bound to protect. "This damage need not, necessarily, consist in the infringement of an existing present and complete right, but it may be caused by an act done now, with the intention of defeating and rendering infructuous a right about to come into existence." Accordingly, where an estate had been sold for arrears of revenue, and the usual deposit had been paid, and the owner, with a view to cause loss to the purchaser, cut down fruit trees before the expiration of the sixty days, when the certificate of sale would be granted, it was held that he was properly convicted under s. 425. 12 C. 660; 25 W. R. (Cr.) 46. And so it would be in the case of a Hindu

widow, in respect of her husband's estate, for, though she is the full owner of it, she is not entitled to commit waste. It would be otherwise as regards the male owner of an absolute and unrestricted estate even though the estate is under the management of the Court of Wards. This was so held in 15 C. W. N. 224=11 Cr. L. J. 532=7 Ind. Ca. 812, where it was said that a man who damages his own estate, although he had then only a qualified interest, could not be alleged to have caused loss or damage to the trustees in possession whose only object is to preserve the estate for the benefit of the owner. He would not commit mischief even if he destroyed it wantonly, for the purpose of injuring the prospects of the contingent heir. Such an act would not be wrongful, for the heir has no right to anything except what is in existence at the death of the owner. He is entitled to step into the shoes of the owner, but the owner is not bound to leave him any shoes to step into. This was the principle on which a curious case was decided in Bombay. The owner of a dead bullock buried the carcass. The magistrate found that it was a recognized custom for the *Mahar* to take, as his right, the skin of any deceased bullock of the village, and that the accused had buried the bullock with the express object of destroying the skin and preventing the complainant from getting it. He therefore convicted him of mischief. West, J., in reversing the conviction, said: "The owner asserted his right to the carcass when dead, and, being in possession, might retain such possession, it supported by any colour of right, until a better title was made to the property. This being so, the act was not one to be dealt with under the criminal law, but one for which the remedy was to be sought in the civil court." 8 B. 295. Still less is it mischief to do, without payment, any act which the defendant has a right to do on payment. The injury consists, not in the result of the act, but in intercepting the money payable for doing it. 5 M. H. C. R. Appx. 30.

The Madras High Court has held in two cases that an act, which is not mischief when it is done, does not become mischief because, to the knowledge of the doer, it will probably cause wrongful injury to someone

else. In one case the act consisted in damming up a river, which would probably cause the prosecutor's lands to be inundated. In another case it consisted in opening up a sluice, so as to divert to the defendant's land water which ought to flow to the land of the prosecutor. 4 M. H. C. R. Appx. 15; 7 M. C. R. Appx. 39; (contra, apparently, 6 W. R. (Cr.), 59.) In neither case had any actual loss happened to anyone at the time of the charge, and of course no offence was committed. In each case, apparently, the only property that was actually changed was the land of the accused, and, so far as the situation of the water was altered, that water, if it was the property of anyone, was the property of the defendant, so long as it was on his own land. But as soon as the act complained of did cause an injury to the prosecutor, of the nature described in s. 425, I think the offence charged would be committed, provided the damage was one which the doer had contemplated at the time he did the act, and which was in itself wrongful. There are numerous cases in which a man has a perfect right to do a particular act upon his own land, and no one can complain of it, until some injurious consequence follows from it. As soon as such a consequence follows, the injury, and not the original act, becomes a cause of action. *Backhouse v. Donomi*, 9 H. L. Ca. 503; *Darley Main Colliery Co. v. Thomas Wilfred*, 11 A. C. 127. In such a case the mischief would consist, not in making the bund, or in opening the sluice, but in flooding or withering up the prosecutor's crops.

Disputed claims are often sought to be settled by laying a complaint of mischief. Magistrates would do well in entertaining complaints to see that they are not called on substantially to decide disputed civil rights, 6 W. R. (Cr.) 59; *Weir*, l. 505.

188. Mischief by causing diminution of water for agricultural purposes.—The offence punishable under s. 430 is one of very frequent occurrence and the section applies equally to irrigation channels as to other sources of irrigation as tanks, ponds, etc. The offence is—

plainant must prove that he had legal right to the water intercepted. Otherwise his loss would not be wrongful to bring it within s 425, 1 Cr. L. J. 663; 4 L. B. R. 149=7 Cr. L. J. 448, nor would it be damage. Again, the act must be done with the intention or knowledge specified in s 425 so that when the accused cut a dam to save their own crops and the act did not cause any diminution of water supply and they did not know it was likely to cause any such diminution, a conviction was set aside, 8 C. W. N. 370=1 Cr. L. J. 245; 11 Cr. L. J. 168=5 Ind. Ca. 160. As laid down in 1 M. 262, the physical requisites of the offence are, (1) the doing of an act, (2) which causes, or to the doer's knowledge is likely to cause, a diminution of the supply of water, (3) with the intention or knowledge specified in s 426. Where the complainant was found to be the exclusive owner of a water course, and the accused had no manner of claim to it, it is an additional wrong to assert a claim, **Ratanlal 216**; but where no damage accrued by a temporary stoppage of water, courts sometimes deal with the case as one of simple mischief under s 426, **Ratanlal 217**; 10 B. 183. Thus when a dam was put up across a channel set apart for the irrigation of complainant's village with a view to divert water to accused's lands the intention or knowledge on the part of the doer was assumed and it was further held that actual loss need not be proved, **Weir I. 503**, but on this latter point, a contrary ruling was given in 10 Bur. L. R. 122. The unjustifiable damming of the channel causes a change in it affecting it injuriously so as to diminish its utility, **Weir I. 504**, so also if the bund of a tank is cut 35 C. 437. But where there was a genuine dispute between two parties in regard to a channel and one party was charged with mischief for closing the channel it was held in **Weir I. 505**, no offence was made out. Similarly when a Zemindar stopped a channel running over his own land, on the complainant's refusing to pay the rent demanded, 3 A. L. J. 142n; see 8 Mad. Jur. 528; for other *bona fide* acts not amounting to an offence, see 8 C. W. N. 370=1 Cr. L. J. 245; [1913] M. W. N. 179=14 Cr. L. J. 209=19 Ind. Ca. 305. Where the accused acting under the authorisation of

Public Works authorities cut the bund of an irrigation tank, but kept the breach open for six hours longer than the authorised period, they were held liable as they were guilty of an illegal omission, and ss. 430 & 426 when read with s. 32 rendered the omission one likely to cause a diminution of water-supply, *Weir I. 536*. The principle of this ruling was followed in [1911] 2 M. W. N. 349=12 Cr. L. J. 551=12 Ind. Ca. 527, following the full bench ruling in 1 M. 262, which overrules 7 M. H. C. R. Appx. 39. *Cf.* 1909 P. R. (Cr.) 14=1909 P. W. R. (Cr.) 34=11 Cr. L. J. 65=4 Ind. Ca. 863. In *Weir I. 536* also the High Court laid down that actual damage need not be proved though the Allahabad High Court in 34 A. 210=9 A. L. J. 162=13 Cr. L. J. 141=13 Ind. Ca. 829, was inclined to the view there should be evidence of actual diminution of water for agricultural purposes. See also 1908 A. W. N. 55=5 A. L. J. 159=7 Cr. L. J. 296; (1897-1901) U. B. R. I. 349. Any taking of water to which the accused is not entitled must diminish the supply to other ryots who are entitled, *Weir I. 537*. But when water is not specially appropriated to the use of another to the exclusion of the accused mere diversion by the accused of water passing through his land would not constitute an offence especially in the absence of any evidence that the complainant suffered any loss thereby, *Weir I. 537*. Criminal courts have thus necessarily to go into the question whether the complainant had a right to the flow of water uninterruptedly. It is true the finding of the criminal court would in no way determine the civil rights of the parties nor would it even be evidence of their rights in a civil suit; criminal courts have still authority to decide the point as a conviction of mischief involves the determination of the question whether the loss, if any, to the complainant was wrongful loss, *Weir I. 538*. Where the complainant unauthorisedly stored water on Government Poramboke land by putting up a bund and the Government raised no objection to what he did, but the accused wilfully cut the bund not to protect their own interest but to cause loss to the complainant, it was held, the fact the complainant had no authority to store water on Government Poramboke land

was no defence to the mischief committed by the accused, **Weir** 1. 510. To sustain a conviction under this section, it is not necessary that the accused must know that certain lands are being actually irrigated by the channel which they obstruct. It is enough if they may reasonably be expected to know that their act is likely to be attended with one of the consequences contemplated in the section. This knowledge may easily be attributed if the watercourse is an artificial one **35 C. 437=12 C. W. N. 534=7 Cr. L. J. 367.**

X. CRIMINAL TRESPASS.

189. Criminal Trespass.—This offence is defined in s. 441. The first clause of this section says nothing as to the character of the entry upon property, which, coupled with the intent, converts it into a criminal trespass. If a man armed with a warrant of delivery enters the wrong premises, he may not be guilty; but if he, after the mistake has been pointed out by the occupier, persists in staying there, abusing and insulting the latter, he would be liable. **2 Ou. Ca. 65.** The second clause, however, obviously draws a distinction between the lawful entry, which subsequently becomes unlawful, and an original entry of a different character. This clause of the section must be limited to cases where the entry is in itself part of the unlawful act, and is either expressly or impliedly against the will of the owner of the property. See *per* **Straight, J., 2 A. 465 at 466.** For instance, suppose a man were to go upon the premises of another with intent to steal his money, to abduct his daughter, to lame his horse, to cut down his trees, **11. W. R. (Cr.) 46,** or the like, here the entry would be inseparably connected with the offence aimed at, and would be against the will of the owner. If a man unlawfully enters and is convicted under s. 447, his continuing to remain on the land in spite of the conviction would not be a fresh offence. **4 L. B. R. 276=8 Cr. L. J. 474.**

Of course, an authority to enter may be revoked, either expressly or by implication. No authority to remain can be assumed to last after the person who was authorized to enter for one purpose proceeds to

employ this opportunity in the commission of an offence, **Weir I 528.** Therefore, if a guest, who was invited to an entertainment were to secrete himself in the house when it was over, for the purpose of committing theft, this would be an "unlawful remaining in the house with intent to commit an offence," and, therefore, would be "house trespass." But if he employed himself, in conjunction with the proprietor, in illicit coining, this would be indictable as a substantive offence, but the mere continuance, in the house could not be called "an unlawful remaining" in it, since of itself it was not unlawful. It must also be remembered every unlawful act is not an offence, and an intention to commit an unlawful act need not itself make a trespass penal. **1882 P. R. No. 29;** on the other hand cases of criminal trespass can easily be conceived where a man is punished under s. 447, though he could not be held civilly liable for the same act. *Pollen v. Brewer* **7 C. B. (N. S.) 371.**

It is not necessary that the person in possession of the property should also be the complainant. A lessor is entitled to prosecute a trespasser even during the continuance of the term, **Weir I. 517.** There is no authority, nor anything in the section, to take the offences of mischief and criminal trespass out of the general rule which allows any person to complain of a criminal act. **21 B. 536, following 13 B. 600.** But the offence under s. 447, being compoundable under s. 345, Cr. P. C., by the person in possession of the property trespassed, the parties would be at a disadvantage if the prosecution is started by anyone else. See **22 C. 123** at 130.

The offence of criminal trespass is only committed where some criminal intent is present to the mind of the person charged, and, under some sections of this group (ss 449, 451, 454, 457), the punishment varies according as the prisoner is convicted of intending to commit one crime or another. Of course, there must be circumstances in the case which lead to the presumption that the prisoner had any criminal intent, or the

particular intent with which he is charged, as no criminal intent can be assumed in the absence of proof. **19 M. 240.** In this case, it was laid down (that unlike other sections, where the *mens rea* consists in intention or knowledge) s. 441 deals with intention only, and therefore, no conviction under s. 447 could be sustained, unless an actual intention within the meaning of s. 441 is found independently of any inference from accused's knowledge. See also **Weir I. 524; 8 M. L.T. 246=11 Cr. L. J. 623=8 Ind. Ca. 318.** The entry may be made, knowing that it is likely to cause annoyance, or insult, but s. 441 is so worded that we have nothing to do with accused's knowledge except in so far as it would go to define his intention. The accused in **10 M. 126** surely never had the intention to wound the feelings; hence his act was not an offence under s. 447, but since he had the knowledge, which s. 297 takes into account, he was held liable under that section. See **6 M. L. T. 262; I. L. B. R. 355; 40 C. 548=17 C. W. 534=14 Cr. L. J. 117=18 Ind. Ca. 677.** Thus, a woman entering the compound of an assistant superintendent of police, during the latter's absence was held not guilty, when her entry was found to be not with intent to commit any offence. **Weir I. 518.** When the accused were in execution of a civil decree, dispossessed of land, whether their subsequent entry to cut the crop standing thereon is an offence or not, would depend upon good faith, *i.e.*, whether they honestly believed they had a right to cut and carry away the crops, or entered to commit mischief, theft or to intimidate, insult or annoy the decree holder. **Weir I. 516.** When a conviction of attempt to steal fish from a tank fails on the ground that the nature of the tank is such the fish is not in the possession of the owner, the conviction cannot be altered to one under s. 447, as the intent to commit the specific offence of theft has been negatived. **Weir I. 519 & 520; Ratanlal 4.** Similarly, when the charge specifies the intent to steal, but the evidence discloses an intent to commit adultery with some person other than the complainant's wife, **1886 A. W. N. 42.** But it must not be assumed that for this purpose it will always be necessary to adduce independent evidence different from that which makes out the

substantive offence. For instance, if a man is found in the middle of the night in another's house, this of itself is ample evidence to convict him, not merely of house-breaking by night, but of doing so with intent to commit theft. The actual use of criminal force is not a necessary ingredient of the offence. 12 M. L. J. 447. On the other hand, independent circumstances might lead to the conclusion that his object was to commit adultery, or even murder. So, if a party were found enjoying themselves at a picnic upon another man's land, this would not be even *prima facie* evidence of a criminal trespass. But if it was shown that they had gone there in open defiance of a previous prohibition, that might be taken as evidence of an intent to insult or annoy. 16 C. 657; 24 W. R. (Cr.) 58; 6 C. 579; 22 C. 391 & 994; as to the evidence necessary where the alleged intent is to commit adultery, see 19 A. 74; 23 A. 82. The section contemplates actual entry by the accused, so that sending a servant to plough up land cannot be construed as entry by the master. 3 L. B. R. 278=5 Cr. L. J. 415. But the servant may be liable if he has the necessary intention. Thus in 16 C. 715, during the pendency of a civil suit, plaintiff's men entered on defendant's holding for making a survey: and, in the absence of their master, when the defendant's servants objected, they persisted in their trespass and tried to overcome opposition by making false statements as to their authority to enter. Under these circumstances, they were held liable under s. 417. The master may be liable for abetting the offence. But by the mere fact that by a conveyance a vendor purported to include lands he was not entitled to, he cannot be held liable as an abettor if the purchaser enters on the land thus illegally conveyed to him. The mere execution of a document cannot be said to aid either the entry or the taking, and it, by itself, is consistent with the intention that the purchaser shall assert his claims thereunder in due course of law. Weir I. 48.

An entry upon land which a man believes to be his own will not be a criminal trespass, though the land

was in the possession of another, if the object really was to assert a right over it, and not to intimidate, insult, or annoy the other, as where an auction purchaser enters upon the property purchased by him for acquiring possession, 4 C. W. N. 47; or a zemindar wrongfully enters on a tenant's holding on the pretext that the tenant has left the village abandoning the holding, 26 A. 194=1 Cr. L. J. 362; 27 A. 293=1 Cr. L. J. 919; 7 W. R. (Cr.) 28; 9 W. R. (Cr.) 1; 14 W. R. (Cr.) 25; 2 A. 101; 2 N.-W. P. H. C. R. 82, 2 L. B. R. 319; (1892-1896) 1 U. B. R. 264. 5 N. L. R. 69=9 Cr. L. J. 561=2 Ind. Ca. 249; 5 Sind L. R. 13=13 Cr. L. J. 27=13 Ind. Ca. 219; 1912 M. W. N. 395=13 Cr. L. J. 477=15 Ind. Ca. 317, 1882 P. R. N. 29; 1905 P. L. R. 128; 1882. A. W. N. 236; 2 A. 465, unless under circumstances which amount to the offence of unlawful assembly. See s. 141, *ante* Ch. V, § 99, at p. 314, *et seq.* 3 C. 573. And so, where a man had been exercising a right of fishery for a considerable time, alleging a prescriptive right, the mere fact of continuing to do so after a notice of prohibition is not criminal trespass 9 B. L. R. Appx. 19=18 W. R. (Cr.) 25. The mere fact that the accused had been previously warned would not by itself raise a presumption as to the existence of the intention required by s. 441, though intention is to be gathered from circumstances, 1 L. B. R. 95.

The words "intimidate" and "insult" refer, I suppose, in general, to such criminal acts as are defined by ss. 503 and 504 of the Code. See *per* Straight, J., 2 A. at 466. It has been suggested by Mr Collett (Commentaries on the Penal Code, 134), that upon this construction the words are superfluous, since criminal intimidation and insult are already provided for by the former words, "with intent to commit an offence." It is, no doubt, possible to conceive cases in which insult or intimidation, which was obviously wrongful, as being without any apparent legal excuse, would fall short of the definitions in Chapter XXII. This is apparently the case in 1888 P. R. (Cr.) 18; where a police officer entered a house to surprise a gambling party, caused them to disperse

thoroughly enjoying their alarm and confusion, but he was held answerable for criminal trespass, notwithstanding he meant the whole thing as a practical joke, because he could not have his amusement, except by intimidating the persons surprised, and the entry therefore necessarily involved an intent to intimidate. Such cases, when coupled with trespass on possession of property, may perhaps have been contemplated by the framers of the Code, but would be very rare. The word "annoy" obviously cannot be limited to cases within s. 510, which presupposes a state of intoxication. Any proceeding by which a person wilfully intrudes upon the property of another, with the intention of disturbing his privacy, or setting at defiance his right to exclude trespassers from his house or land, would come within the term, even though the annoyance necessarily caused by the act, was not the object for which the act was done. 26 B. 558=4 Bom. L. R. 280. But this view is not the one accepted in 4 C. 837 and 19 M. 240, which afford no support for the doctrine of presuming intention from knowledge. In 21 M. L. J. 161=9 M. L. T. 283=2 Cr. L. J. 30=9 Ind. Ca. 152. Benson, J., adopted the Bombay view, but Sankaran Nair, J., followed 19 M. 240 holding the section is so worded *intention* has to be made out quite apart from knowledge. See also 1908 P. R. (Cr.) 17=1908 P. W. R. (Cr.) 89; 8 Cr. L. J. 488; 26 A. 194; 27 A. 298; 10 Cr. L. J. 384=3 Ind. Ca. 828. In 16 C. W. N. 1007=13 Cr. L. J. 783=17 Ind. Ca. 415, it was laid down, though the placing of haystacks and manure on complainant's land may be annoyance in fact, in the absence of a clear finding, *the accused intended it to be an annoyance* a conviction cannot be sustained; 5 Sind. L. R. 29=12 Cr. L. J. 148=9 Ind. Ca. 895; when the accused entered the complainant's premises with intent to peep into the apartments occupied by the ladies of the household, he was held not liable under s. 447, 1882 P. R. (Cr.) 6. Further, "the word 'annoy,' in s. 441, must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual." *Per Straight, J.*, 2 A. at 467. See *per Bowen, L.J.*, in *Tod Heally v.*

Benham, 40 Ch. D. 80 at 98. In 6 M. H. C. R. Appx. 25 where the accused had enclosed and commenced to cultivate a portion of a burial-ground, but no specific intent such as is mentioned in s 411 was established, it was held that the offence of criminal trespass was made out, since there was evidence of his intention to annoy the portion of the public entitled to use the burial-ground; "for the intent of the defendant must be inferred from the nature of his acts. And it is scarcely possible to conceive acts more calculated to cause annoyance, especially to superstitious people attaching sanctity to the relics of mortality, than the act of ploughing up a burial-ground. One would imagine that the intent which the law would infer from cultivating another man's land would be merely an intent to procure wrongful gain for one's self, and that a further intent to annoy would have to be made out by something like special evidence. In *Ratanlal* 390, where the accused put up a hut on another man's land, it was held that the intention to annoy must be distinguished from an intention to obtain improper gain and the former cannot be inferred from the intent to obtain land unlawfully, but must be established by independent evidence. See 13 C. L. R. 212. Where a ratepayer forced his way into a room where Municipal Commissioners were sitting, in order to urge them to review an assessment made upon him, it was held that, however annoying his entrance might be, it could not be treated as having been effected with any of the intents necessary to constitute a criminal trespass, and further the Municipal Commissioners could not be said to be in possession of the room into which the accused effected an entry, 22 C. 123. The Punjab Chief Court held in 1906 P. R. No. 12 (F. B.) = 1906 P. L. R. 54 = 4 Cr. L. J. 293 (Rattigan, J., dissenting), even though the primary desire of the accused was not to annoy, if the circumstances of the entry are such, that persons in occupation would be annoyed, intent to annoy may fairly be attributed to the accused. See also 1881 P. R. (Cr.) 42; 1883 P. R. (Cr.) 14. The intention to annoy

Thus, . . .
residen . . .

one of her paramours into the house may be with intent to annoy the former, (1892-1896) I. U. B. R. 264. See **Weir** l. 535; 1898 P. R. No. 12 and (1897-1901) I. U. B. R. 350, where intent to annoy was inferred from circumstances, on the ground a man may be said to intend the inevitable consequences of his act, 1908 P. R. No. 17; 19 A. 74; 23 A. 82; 22 C. 391. But when a woman accompanied by a *Sowar*, went into the lines of Poona horse without taking the permission of the officer commanding, to enable soldiers to commit adultery with her, and was convicted for having annoyed the commandant, the High Court set aside the conviction, **Ratanlal** 328.

Under s. 40 of the Code, the word "offence," when used in s. 441, denotes a thing punishable under this Code, or under any special or local law, when, in the last-named case, the act is punishable with imprisonment for a term of six months, whether with or without fine. "in the lock-up contrary to s. 42 of the Prisons Act, 1899, and not exceeding six months, such an act is an offence within the meaning of s. 441, and the entry would be punishable (*contra* 2 A. 301). But if a person enters the reserved forest with intent to commit an offence under rule 10 of the Forest Rules, 1885, such an entry constitutes an offence within the meaning of s. 441 (see s. 40), unless the mischief is treated as one under the Code and not the special law. When a person who had made over a famine child to be brought up by the complainant, entered his house to recover the child which had been wrongfully withheld, it was held no offence under s. 441 was made out, 1885 A. W. N. 53.

An act which is merely unlawful, in the sense that it is forbidden by civil law, and that redress can be obtained for it by damages, is not an offence within the meaning of the section. **Ratanlal** 380; 1882 P. R. 28; 1905 P. R. No. 13=1905 P. L. R. 81=2 Cr. L. J. 83. Therefore, entry upon land with intention to do that which

the civil law will prevent or punish does not constitute criminal trespass. For instance, the cultivation of Government waste land without permission, 4 *Mad. Jur.* 235=*Weir* I. 512 (but not where such waste land is devoted to village communal purposes, 5 *M. H. C. R. Appx.* 17), or the re-entry upon land from which a person has been ejected by civil process, 6 *M. H. C. R. Appx.* 19, or the entering of an Exhibition building without a ticket, 6 *B. H. C. R. (Cr. Ca.)* 6, or a market through the fencing, with a view to elude the vigilance of the contractor who was sitting at the front gate to collect a fee from all sellers, 5 *M.* 382, or breaking open a door at an illegal hour for the purpose of effecting an arrest or a distraint, 2 *M.* 30, or following game upon land for the purpose of killing it, even in defiance of previous warnings, 4 *C.* 837, (in this case the boundary was disputed) are not acts which of themselves, and without proof of any further intent, are punishable under s. 441, or under any other section of which a criminal trespass forms an essential part. See 2 *A* 465. Circumstances from which criminal intent may or may not be inferred from an entry on land by a person claiming it are defined in *Weir* I. 516. See 10 *Bur. L. R.* 353. But if a decree-holder obtains possession and that possession is maintained by an order under s. 145 *Cr. P. C.*, there would *prima facie* be an absence of *bona fides*, in an entry by one claiming under the judgment-debtor who has been dispossessed. *Weir* I. 515; 1902 *A.W.N.* 6; 1 *C. L. J.* 104=2 *Cr. L. J.* 161; 1904 *P. L. R.* 138=1904 *P. L. R.* 434=1 *Cr. L. J.* 1068. But possession is essentially a question of fact. The mere fact a decree has been passed against the accused would not determine the question of possession, unless there is further proof that he has been put in actual physical possession by proceedings in execution of the decree and retained possession until the trespass complained of (1892-1896) 1 *U. B. R.* 262. An act which is not in itself an offence may, however, become one under s. 188, if committed in disobedience to an order lawfully made by a public servant; and the mere entry upon land, with a view to the doing of something forbidden, will be a criminal trespass without proof of any further intent.

5 M. H. C. R. Appx. 17. But, when a man drove his cart across an open green, in contravention of an order issued by municipal commissioners, who had no power to issue the order, he was held not liable in **5 M. H. C. R. Appx. 38**; see **1909 U. B. R. (P. C.) 25=11 Cr. L. J. 57=4 Ind. Ca. 826**. Though the proposition enunciated in **5 M. H. C. R. Appx. 17** is sound, the decision itself is open to objection, as the order of the revenue officer would not support a prosecution under s. 188. See Chapter VI, § 110, at p. 349.

Possession.—Magistrates will do well not to investigate questions of title during a period long anterior to the act of trespass. The offence is in respect of a person's possession, even though the possession might not have originated in right. **11 W. R. (Cr.) 11**. Thus where the accused asserting a *bona fide* claim entered land with intent to stop its ploughing by the complainant, who had possession, the entry with intent to commit an offence under s. 341, made them liable under s. 417, in spite of their assertion of a *bona fide* claim based on title. **Weir I. 520 & 522**. But an actual encroachment on Government land by building a pial thereon was held in **Weir I. 521**, not to be an offence, as there is no proof of the intent specified in s. 441. Thus a plea of *bona fide* claim of right is not always a valid defence, and is capable of being rebutted by proof of the intent specified in s. 441. **7 C. 26**; **11 C. W. N. 467=5 Cr. L. J. 278**; **7 C. L. J. 238=7 Cr. L. J. 312**; **1905 P. R. (No.) 13=2 Cr. L. J. 83**; **1893 A. W. N. 188**; mere superior title in the accused will not justify a trespass if the complainant is in possession otherwise than as a recent trespasser, **11 C. W. N. 171=5 Cr. L. J. 14**. But where the accused took possession of a house in the occupation of the complainant, during her temporary absence, and established there a boy, alleged to be the adopted son of the complainant's father, it was held the house trespass was not criminal but only civil. **7 C. L. J. 175=12 C. W. N. 269=7 Cr. L. J. 108**, and similarly, where two days after delivery of vacant possession by the civil court, the judgment-debtor, who was ousted, regained possession and continued in peaceful occupation for 19 months

thereafter, and the decree in the civil court was obtained on a technical point, the justice of which an ordinary litigant in Burma could not well appreciate, the intent to annoy was negatived and the conviction quashed. 4 L. B. R. 242=8 Cr. L. J. 60; for cases where a trespasser's possession has been protected where it has continued for a long time, see *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Doe v. Dyeball*, Mood & M. 346. But length of possession is only material as showing acquiescence. See 1934 P. L. R. 484. The property wrongfully entered upon must have been at the time in the possession of another. A lessee holding over after the expiration of his term cannot be treated as trespasser, even though the tenancy has been determined by express notice to quit, *the land continues in his own possession until evicted*. An unfounded claim for compensation for improvements cannot make any difference. 1878 P. R. (No.) 28, (1897-1901) I. U. B. R. 352; a permissive occupation by the complainant need not necessarily amount to deprivation of a possession of the owner so as to make the latter liable for trespass. Weir I. 521. But when immoveable property is attached by a magistrate, acting under s. 146, Cr. P. C., the parties must be deemed to have been dispossessed, so that their entry, while the attachment continues may amount to trespass. 8 M. L. J. 253; Weir I. 143. The word 'possession' in s. 441 means an actual (2 A. 545 followed in 12 A. L. J. 151=14 Cr. L. J. 633=21 Ind. Cas. 681) not a merely constructive possession, such as might be set up by a person who claims property which he has vacated, or from which he has been ousted, 8 B. L. R. Appx. 62=17 W.R. (Cr.) 47, or who is one of a number of persons who have a right to be in a particular place at a particular time, 22 C. 123. It must be such a possession as is contemplated by s. 145, Cr. P. C. *Per Straight, J.*, 2 A. at 467, not necessarily a bodily possession, but a possession by means of a servant or a tenant, who holds the whole of the property of which possession is claimed by authority of, or under a title derived from, the person claiming to be in possession, not the possession of a trespasser, 6 W.R. (Civ. Ref.) 21 at 23; 6 M. H. C.R. Appx. 13 or of a licensee. Thus a

thief who stores crops harvested on the village thrashing floor cannot be said to have possession of the thrashing floor so as to make the act of entry on the part of the lawful owner, to take the crops, penal under s. 447. 3 N. L. R. 177=7 Cr. L. J. 49. A mere symbolical possession, by entering upon the land and setting up a tent upon it, or by affixing a notice, or demanding possession, is not sufficient. 18 W. R. (Cr.) 11; *ex parte Fletcher*, 5 Ch. D., 809; 3 C. 320. So, where a person is entitled to do certain acts, such as mining, at any points which he may select over a large territory, he has no possession except at the particular spots which he has begun to work upon. 28 W. R. (Cr.) 45. Similarly with regard to fishing. The infringement of an exclusive right of fishery in a public river, or in a public tank, can never be a criminal trespass, as the river or tank cannot be in the exclusive possession of anyone, and a right of fishery is not property, of which anyone can be said to be in possession, within the meaning of s. 441, (2 C. 354; *Weir* I. 519) which in scope is restricted to tangible immoveable property. Thus, a person infringing the right of ferry by plying a boat at a spot three miles from a public ferry cannot be charged with an offence under s. 447, I A. 527.

The Madras High Court in 6 M. H. C. R. Appx. 25 supported a conviction for criminal trespass upon a burial-ground saying "the person (corporate) in possession of the burial-ground is the portion of the public entitled to use the burial-ground." Of course there are many cases where a burial-ground is undoubtedly in the possession of an owner, as for instance a churchyard, or when it belongs to a Cemetery Company or a Municipality. When, however, an unoccupied piece of land in a village is appropriated by long usage or common consent to the purpose of burial, it is doubtful whether, in accordance with the above decisions, it can be in the possession of anyone, and matters are not advanced by calling the public a corporation, which it is not. Possibly each individual grave might be said to be in the possession of the individual who appropriated it, or of his

representatives In another case, where the alleged criminal trespass was upon a public footpath, the same court held the conviction bad, because the accused was himself entitled to the use of the footpath. Had he not been so entitled, the Court appears to have thought, on the authority of the last case, that the offence would have been committed **6 M.H.C.R. Appx. 26**. It is difficult to see how a public footpath or highway can, as such, be in the possession of anyone. The soil generally belongs to the owner of the adjoining land, subject to an easement for the benefit of the public, who can use it for no other purpose. All public roads are vested either in the Government, or in a local authority. An encroachment thereon with intent specified in s 441 has been treated as offence, **Ratanlal 393**.

Ordinarily, a member of a Joint Hindu family cannot commit criminal trespass, by an entry upon joint family property. But, an entry into a room, exclusively occupied by another coparcener may be an offence **15 W.R. (Cr.) 6**; or, one co-owner may make himself liable when his intention is destruction or waste of common property or to oust a co-owner from occupation **3 M. 178. Jacobs v. Seward, 5 H. L. C. 464 at 478. Cubitt v. Porter, 8 B. & C. 257**. An entry by an excommunicated wife into her husband's house, to demand maintenance cannot be treated as criminal trespass. Law does not recognise loss of social status arising from excommunication as of itself depriving a wife of the right to joint enjoyment of her husband's property, **Weir 1. 523; 4 M. 243**. A joint owner, if ousted cannot claim to recover joint possession, by forcible re-entry **10 Bom. L. R. 285=7 Cr. L. J. 309**. An entry by leave and license of one coparcener, being lawful entry, cannot be treated as an offence by other coparceners, unless such entry subsequently becomes unlawful by operation of the second clause of s 441 **6 B. L. R. Appx. 80**. When a mortgagee has been in peaceful possession by himself and his assigns, a relation of the mortgagor ousting him on the ground that the mortgagor had no title, and that he, the trespasser, was entitled to share in the land under the Hindu Law, is guilty, as the offence under s 447 is primarily an offence against possession, **1902 A. W. N. 42**.

Cases of some difficulty have arisen in India under sections corresponding to s. 145, Cr. P. C., and s. 9 of the *Specific Relief Act*, where a dispute as to possession has taken place between the trespasser and the rightful owner, or between two persons claiming under conflicting titles. As similar questions might arise under s. 441, I P. C., the first requires some examination.

A mere trespasser cannot obtain what is known in law as possession, by the act of entry, or even by the continuance of that act, so long as the act is disputed and resisted.

This is well illustrated by the case of *Broome v. Dawson*, 12 A. & E., 624 at 629. There the trustees of a school, who had the right to dismiss the master, but were bound to give him notice, turned him out without notice, and therefore wrongfully. He might have re-entered the school, but did not do so, and gave up his room. The trustees then opened the room, and gave him notice to quit, and on the 11th ejected him. He brought an action of trespass, founded on his last possession, the trustees relied on their previous possession. Whichever party could establish possession between the 1st and 11th of July was entitled to succeed. It was held that the plaintiff must fail. Lord Denman, C.J., said: "A mere trespasser cannot by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession."

Here, by the acquiescence of the plaintiff, the defendants had become peaceably and lawfully possessed as against him. He had re-entered by a trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on the 1st of July, he could as little have done on the 11th, for his tortiously being on the spot was never acquiesced in for a moment, and there was no delay in disputing it."

Accordingly, in a possession case under s. 145, Cr. P. C., the High Court of Bengal ruled that the ouster by one person of another who was in lawful possession of property can give the former no right to be kept in possession. "The magistrate must look back to possession which may be termed peaceful. He must go back to the

tune when the dispute originated, not to the result of the dispute itself " 4 C. 417; 6 M. H. C. R. Appx. 13; 7 B. H. C. R. (A. C.) 82, in reference to s 15 of Act XIV. of 1859, which corresponds to the Specific Relief Act, s 9. This is now expressly provided for by the first proviso to sub-section (4) of s 145 Cl. P. C. Where, however, the possession has been obtained peacefully under a *bona fide* claim of right, the legality of the possession does not depend upon the goodness of the title, where possession or no possession is the only question at issue 6 B. H. C. R. (Cr. Ca.) 30.*

The effect of possession re-taken by the rightful owner is completely different

"As soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of these two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser. They differ in no other respect. *Per* Maule, J., *Jones v Chapman*, 2 Exch. 821

This statement of the law was cited and followed by Lord Selborne in *Lows v Telford*, 1 A. C. 414, at 426, 427.

Lows was the mortgagee in fee of a house, which the mortgagor had leased to Telford, who took possession. By English law this lease was absolutely ineffectual against the mortgagee, who was entitled to take possession whenever he chose, without legal process. Lows proceeded to the house by night, broke into it, and took possession, in the absence of the lessee. Immediately afterwards, Telford, with others, made his way in by the window, and tried forcibly to resume possession. He was indicted for a forcible entry, and the question in the subsequent civil suit was, whether he was properly so indicted, which again turned upon the question whether Lows was in lawful possession. It was held that he was. Lord Selborne said "He had the legal title. He had (when no one was present to oppose him) effected an actual entry

* The head-note of this case is misleading. See the text of the Judgment which fully supports this proposition.

into the premises, beyond all doubt for the purpose of taking possession, and he, by himself and his servants, had already acquired such a dominion and control over the property when the lessee first came upon the ground, that the respondents could not enter it without putting a ladder against the house, and getting in through the window. I cannot doubt that the possession was legally complete and exclusive, and that it was forcibly disturbed by the respondents."

In the particular case, the mortgagee was able to recover possession peacefully, but Lord Selborne treated that point as immaterial, and referred, with approval, to the language of Parke, B., in *Harvey v. Bridges*, 14 M. & W. 442, where "it is pointed out, that so far as relates to the fact of possession, and its legal consequences, it makes no difference whether it has been taken by the legal owner forcibly or not." 4 A. C. at 426; see per Erle, C. J., *Blades v. Higgs*, 30 L. J. (C. P.) 346=10 C. B. (N. S.) 713; 2 M. H. C. R. 313; 1 L. B. R. 358. It must be remembered that this doctrine only applies to the effect of the change of possession for civil purposes. In India, as in England, the forcible dispossession of another, even by the lawful proprietor, may be punishable under s. 141 of the Code. And in India, differing from the law of England, the result of such a dispossession may be frustrated, if the person so dispossessed, otherwise than in due course of law, brings a suit within six months from the date of the dispossession to recover possession. Act I. of 1877, s. 9; 9 W. R. (Civ.) 602; 5 B. 446. Unless the latter course be adopted, the person who has regained possession retains all the advantages legally attaching to that possession. 5 B. 387. As to the legal value of possession against all persons except the true owner, see 24 A. 157.

"If a person enters upon the land of another and holds possession for a time, and then without having acquired title under the statute abandons possession, the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place." *Trustees Agency Co. v. Short*, 13 A. C. 793. On the same principle if the wrongdoer loses possession, as for instance by the submergence of the land, the pos-

session of the rightful owner returns, and when the land rises again he, and not the person who had it before the submergence, will be considered to be in possession. If the wrongdoer seizes possession again in either of the above cases, he cannot add his former period of possession to his subsequent possession, for the purposes of the statute of limitation L. R. 29 I. A. 104=29 C. 518 *over-ruling* 6 C. 725.

Where a person who is not entitled to take possession enters upon property, he gets possession of nothing except that over which he exercises actual physical control, as he has no other title to which his possession can relate *Per Mellish, L.J., ex parte Fletcher*, 5 Ch D. 809. Conversely it would seem to follow, that a person who has a legal title, and who takes possession by virtue of that title, would get possession of everything to which that title extends, unless some effective resistance limited the possession.

This section does not appear to include any cases of trespass to movable property. The language is inconsistent with such a construction, particularly the words "having lawfully entered into or upon such property, unlawfully remains there." The provisions of the Code dealing with trespass are liable to be abused quite to the same extent as the sections dealing with criminal breach of trust, cheating and mischief *Plowden, J.*, observed in 1894 P. R. 1. "Hasty resort to the criminal courts to invoke their aid against persons who have inflicted a civil injury is not to be encouraged . . . If the complainant was injured by the act of the defendants in taking forcible possession of property, which they claimed by right of inheritance, he had two complete civil remedies, by a summary suit under Act I of 1877 for recovery of possession, and a suit for damages, if he had suffered any, by the trespass." See also 1905 P. R. (Cr.) 13=2 Cr. L.J. 83, 1905 P. L. R. 461=2 Cr. L. J. 695, 4 L. B. R. 242=8 Cr. L. J. 60, 1882 P. R. No. 29, 1885 P. R. No. 11 & 11n.

190 House trespass—This offence is defined in s. 442. In a country like India where a considerable

fraction of the people live in the open air, and a still larger proportion live in structures not worth more than the labour of a day or two and a few rupees for thatching materials, it is difficult to define a 'dwelling', with the same precision as Esher, M.R., did in *Moir v. Williams* [1892] 1 Q. B. 264. It was held in *Weir* 1. 523, that the mere surrounding of an open space of ground by a wall or fence would not make it a building, within the meaning of s. 442. So a compound is not a building, 1882 A. W. N. 224; *Ratanlal* 484, 4 L. B. R. 24 = 6 Cr. L. J. 134, nor a cattle fold or pen with a thorn hedge round it, 1887 P. R. (No.) 57; see also 1880 P. R. (No.) 16; 1901 P. R. (No.) 14; 1905 P. R. (Cr.) 28 = 1905 P. L. R. 118 = 2 Cr. L. J. 420. The term 'building' has already been dealt with in connection with s. 380, in § 176 at p. 627 *supra*.

There must, however, be an entry into the house; merely getting upon the roof is not sufficient. 1887 P. R. (Cr.) 9; 1890 P. R. (Cr.) 9; 1900 A. W. N. 15. But the Bombay High Court in *Ratanlal* 188 seems to have taken the view that when the occupants of the upper story of a house removed a plank or a trapdoor, separating their flat from the one immediately below, an attempt to commit house trespass has been made. This view is sound, because if any portion of the body had been introduced through the opening, the offence itself would have been complete, provided the necessary intent has been made out. See 37 B. 553 = 15 Bom. L. R. 564 = 2 Bom. Cr. Ca. 76 = 14 Cr. L. J. 451 = 20 Ind. Cas. 611, which follows *R. v. Cheeseman*, 31 L. J. (M. C.) 89 = 9 Cox. 100, where Blackburn, J., said "if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt", cf. 1907 P. R. (Cr.) 15 = 1908 P. L. R. 56 = 1907 P. W. R. 44 = 6 Cr. L. J. 444. See also 1887 A. W. N. 290 under the Explanation to s. 442, it would be sufficient to put in a hand, *Gibbon's case*, *Foster*, Cr. L. 107, 108, *R. v. Brian*, 4 Cox. 398; or a finger, *R. v. Davis*, R. & R. 499, *R. v. Bailey*, *ibid* 341; or to put a foot over the threshold.

The only part of the section which is likely to cause difficulty is the phrase "used as a human dwelling." There is no difference, as to the penalty, whether the place is used for a human dwelling or for the custody of property, and any doubt will generally be solved by framing two charges, in which the place is differently described.

Human Dwelling ---The essence of a human dwelling is that it should furnish a residence for the owner of the premises, or his family, or servants, or some other person who occupies for that purpose, with his permission. Its primary purpose may be to supply a place for carrying on some trade or occupation, as if a tradesman lives in his shop, or a lawyer lives in his chambers, but, incidentally, it must be a place in which somebody lives, not a place to which he resorts occasionally, or by day only, and then goes away at night. Lord Hale says that if the shopkeeper, or his servant, usually or often lodge in the shop at night, it is then a dwelling house, in which a burglary may be committed, but it would be otherwise if he never lodges there, but only works or trades therein in the daytime, and he or his servants never lodge there at night. *1 Hale, P. C. 553*. This was so decided in the case of *R v Eggington, 2 East, P. C. 494*. There a large pile of buildings consisted of a centre building and two wings, owned by one *Boulton*. The centre building was used by him as a manufactory, with the necessary counting houses, storehouses, and the like. The wings were occupied as residences by *Boulton*, his partner, and one of his subordinates. There was no internal communication between the central building and the wings. The centre building was broken into and plundered. It was held that it was not the dwelling house of *Boulton*, or of anyone else. Nor does a house become the dwelling house of another, because he passes the night there for some special purpose, as when he is put in there to watch over the property, and not merely as a place to sleep in. *2 East, P. C. 407, 496*.

It is not necessary that the residence should be continuous. If a man has several residences, and passes

from one to another; or if he leaves his residence, for some temporary purpose, as business or a journey, it is still his dwelling house, though no one is left behind. *1 Hale, P. C. 556; R. v. Murray, 2 East, P. C. 496.* If, however, the owner has quitted his residence without any intention of returning, and has left none of his family or servants behind, it has ceased to be his dwelling house. *R. v. Nutbrown, Foster, Cr. L. 76.* On the same principle, if a man has bought or hired a house as a residence, but has not yet begun to live in it himself, or any of his family or servants, this is not his dwelling house, though he has put his furniture or goods into it. See cases cited *2 East, P. C., s. 12, p. 497; 1 Hawk. P. C. 133.*

The term dwelling house includes not only that portion of the premises which is used for purposes of habitation, but also the out-houses, such as barns, stables, cow-houses, dairy houses, and the like, if they are part of the principal messuage, belonging to it and used with it, and as appurtenant to it. It is not necessary that they should be connected with the principal building. If they are within the curtilage or fence of the principal building, that is conclusive as to their being parts of the dwelling house; but the absence of such a fence is immaterial, if in fact the outlying portions are adjoining to the mansion, and occupied with it. Whether they are portions of the dwelling house is a question of fact, and must be found affirmatively. *1 Hale, P. C. 558; 1 Haul, P. C. 134; 2 East, P. C. 492.*

Where house-trespass is charged as having been committed in respect of a dwelling house, the name of the owner should be alleged. Upon this East says:

"If the rule by which to ascertain this ownership may be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person, there, if he inhabits it either by himself his family, his servants, or even by his guests, the indictment must lay the offence to be committed against his mansion. And so it is, though he let out apartments to inmates, who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But

if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicile there, without any interference on the part of the proper owner; or if they be only in possession of parts of the house as inmates to the owner, and have a distinct and separate entrance; then the offence of breaking, etc., their separate apartments must be laid to be done against the mansion-house of such occupiers respectively " *2 East, P. C. 500*. The cases upon which this rule is based will be found in pp. 500—507; *1 Hawk P. C. 111 135*.

Any error or mistake in alleging the ownership of the dwelling would be properly amended under ss 226, & 227 of the Cr P C

Police officers, or other public servants have no more right under common law to enter the houses of others, however unpretentious these structures may be. Ordinarily, the right of a public servant is no more than the common law right of the subject, unless the statute law has expressly modified the same, for the protection of public servants. Thus, a constable has no right to enter the house of a suspect, to ascertain if he was in his house. His entry and knocking at the door must have been done with intent to cause annoyance, if not insult to the inmates of the house, **27 M. 52=1 Cr. L. J. 274**.

When the offence is charged as having been committed in a place used for the custody of property, the place must be one which can be properly described as a building. A large, detached, circular receptacle for grain, constructed of straw, with an opening at the top, and situated in a backyard, was held not to be "a place for the custody of property" within the meaning of this section. Therefore, the offence of housebreaking could not be committed in respect of it. The offence really committed was the dishonest breaking open of a closed receptacle containing property, under s 461.

Further varieties of the offence of house-trespass consist of lurking house-trespass (s 443), the essence of which is its clandestine character, and housebreaking (s 445). The various modes in which the latter offence may be committed, are so minutely described and illustrated that further comment would be unnecessary. It

will be observed by the Explanation that the breaking into, or out of any out-house or building occupied with a house, will only be considered as a breaking of the principal house, if there is an immediate internal communication between the two. Where, however, the outlying house is itself used as a human dwelling, or as a place for the custody of property, the absence of such communication is immaterial. It is only important where the house actually broken into does not come within the definition in s. 442, except constructively, as being an adjunct to the principal house.

Further aggravations of all these offences are provided for by ss. 449—460, according to the heinousness of the offences contemplated by the trespasser, or the degree of violence prepared for or actually inflicted. The special offences punishable under ss. 458, 459, and 460, are only committed if the house-trespass or housebreaking has actually been completed. An attempted offence, as, for instance, where the accused was detected while making a hole in the wall of the house, does not enable the increased penalty to be inflicted, **8 A. 649**. A burglar, having been interrupted, took to his heels, but when overtaken and seized, he forcibly resisted his capture, he was held not liable under s. 459, especially as the section has not defined when the act of housebreaking should be deemed to commence or end, **13 C. P. L. R. 125; 26 C. 863**.

By s. 460, if one of several persons who are jointly committing lurking house-trespass by night, or house-breaking by night, shall voluntarily cause, or attempt to cause, death or grievous hurt to any person, every person jointly concerned in the house-trespass or house-breaking shall be specially punished.

The liability under s. 460 becomes absolute upon every person jointly concerned in the house-trespass or house-breaking, even though death, or grievous hurt, was neither the common object of the offenders, nor contemplated by them as likely to result. **11 B. L. R. 347 at 355 = 20 W.R. (Cr.) 5**. But all of them must have con-

pleted the offence under s 444 or s 446. When some people attempted to commit house-breaking by night, but were interrupted by the inmates, one of whom was killed, it was held this section will not apply as the offence under s. 445 was only attempted but not completed, 8 A. 649; 1874 P. R. No. 16, 1880 P.R. No. 12 *explained in* 1891 P. R. No. 12; and death or grievous hurt must have been caused or attempted not prior or subsequent to the completion of the offence under ss. 444—446, but at the time of their commission, 1882 P. R. No. 2; 1876 P.R. No. 17; 2 W. R. (Cr.) 52. The person who actually kills or abets the killing will be liable under s 302 *supra* independently of this section, if the killing amounts to murder, 8 A. L.J. 574=12 Cr. L. J. 395=11 Ind. Cas. 579.

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regularly to supply copper to the *Nawab of Lahuru* who turned them into round pieces, and had them stamped but not so as to resemble any known coin. These pieces were sold in British India by weight and also used as money. It was held, having regard to the definition in s. 28 that the pieces of copper were not counterfeit coin. But where a genuine sovereign had been clipped so as to reduce its weight by 1/4th part, it was held to be counterfeit in *R v Hermann*, L. R., 4 Q. B. D. 284. But to restore a coin to its original state as by taking a ring out of a coin which formed part of a necklace would not be counterfeiting, 23 A. 420.

The same definition provides that it is not essential to counterfeiting that the imitation should be exact. And this provision is, of course, peculiarly necessary in this country, where the ignorance of the people might enable even a clumsy imitation to prove successful, while the low state of coining science renders it probable that no counterfeit will be minutely accurate. Accordingly, a trifling variation from the real coin in the inscription, effigies, or arms was held under the corresponding English statute not to remove the offence out of the statute, *R v Robinson*, 34 L. J. (M. C.) 176=L. & C. 604, *contra Weir* l. 219. And so it was held in another case, where the ingenious device was adopted of making coins without any impression whatever, in imitation of the smooth, worn money then in circulation. *Welch's case*, 1 East, P. C. 164. But it will still be necessary to show that the article produced, or partly produced, was a counterfeit, that is, that it was such a resemblance as might be received as the coin for which it was intended to pass, by persons using the caution customary in taking money, 30 A. 93=4 A. L. J. 776=6 Cr. L. J. 395=1907 A. W. N. 289, the ruling in 1884 P. R. No. 9 does not appear to be sound where it was held making a half-anna piece resemble a rupee by quicksilvering it was not an offence. In 30 A. 93 the error, if any, seems to have been in the opposite direction. There the accused was asked to make imitations in German silver of a current *Nepalese* coin with hooks attached for purposes of ornament and display. The accused was held guilty for having delivered

the coins without the hooks, though it was conceded there was no intention to deceive. This caution, of course, will vary according to the class of persons among whom it may be supposed that it was intended to pass. Accordingly, where the prisoner had counterfeited the resemblance of a half-guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was, the judges held the offence to be incomplete. *Varley's case*, 1 East, P. C. 164; 23 A. 420. Nor is a mere medal a counterfeit coin, though fraudulently represented to an ignorant person as being money. .

The absence of apparent resemblance may possibly arise merely from the process being imperfectly carried out. If that be so, there will still be an offence under this section. And even if the metal in which the counterfeit was made was completely different from that of the coin represented, it would still be a question of fact whether this difference did not arise merely from the manufacture having been interrupted in an early stage. *Weir* l. 219. Copper or lead may be washed over so as afterwards to bear a sufficiently strong resemblance to silver or gold. But I conceive that no conviction could be supported where it was plain that the thing actually made was never intended to result in a coin, but was merely an experiment as a step towards future productive efforts.

It is seldom possible, and never necessary, to show that the defendant has been caught in the act of counterfeiting. The act will generally have to be inferred, from such evidence as the possession of tools, dies, or metal necessary for the purpose; or from finding some coins finished, and others unfinished, or different coins in a different state of completion. *R. v. Roberts*, *Dears* l. 539= 25 L. J. (M. C.) 17. The mere possession of counterfeit coin by a person who has had nothing to do with its manufacture may be an offence under subsequent sections (237—243), but is not punishable under s. 231.

The offence constituted by s. 231 consists in the fact of the counterfeiting. It is not necessary to show

that the coins were uttered, or that there was any attempt to utter them. Making a counterfeit coin, to see whether it would answer the purpose, or even as a specimen to put in a cabinet, would be sufficient. *1 East, P. C. 165. R. v Roberts, ub. sup.* Intention to circulate is not necessary. 1899 P. R. No 4. But a distinction must be drawn between a deception practised for show merely and one practised for wrongful loss or gain. 1868 P. R. No. 26.

Making or selling any die or instrument for the purpose of being used for counterfeiting coin is punishable under ss. 233 and 234. A person who is employed by a coiner to make coining instruments, and who informs the authorities, and, in concert with them, proceeds in the execution of the task to effect the detection of the offender, is, of course, not guilty. The person who employed him would be punishable as an abettor. *R. v Bannen, 2 Moody, 309. R. v Harvey, L. R., 1 C. C. R 284.* It is not necessary that the instrument should be capable of turning out an entire impression of a coin, *David Foster, 7 C. & P. 494.* The fact that the instrument made has to be used in conjunction with other instruments not made would not avail as a defence, *Moore, 1 Moody 122=2 C & P 235*

Under s. 235 it is an offence to be in possession of any instrument or material for the purpose of using it for counterfeiting coin, or with the knowledge or belief that it was intended to be so used. Mere possession of a false coin, say with intent to foist it on an enemy is not an offence, nor could it be said that when a police informer makes false coins with a view to introduce them into the house of his enemy he is liable either under s. 232 or under s. 235, if he is liable at all, it would be only under s. 195 for fabricating false evidence. 1912 P. L. R. 43=1912 P. W. R. (Cr.) 17=13 Cr. L. J. 252=14 Ind. Ca. 604. Under s. 235, it will be a question whether the instruments or material were such as could and would be used for such criminal purposes. The rudeness of the contrivance is of no importance, if the object is found as a fact. *Ridgeley's case, 1*

East, P. C. 171; R. v. Moore, 1 Moody 122=2 C. & P. 235. Under s. 489D, which corresponds with s. 235, it was held by *Abdur Rahim and Sundara Iyer, JJ.*, that the crown must prove the purpose or intention of the accused, that the instrument or material was for the purpose of counterfeiting. If it merely proves that he desired to be able to counterfeit, was acquiring knowledge for that purpose, and trying to equip himself with the necessary materials, it would be insufficient to support a conviction, *21 M. L. J. 766=10 M. L. T. 108=12 Cr. L. J. 377=11 Ind. Ca. 241.* It must be shown by the prosecution that the mould or instrument is capable of producing counterfeit coin, *Weir I. 219.* Where a man is convicted under s. 232 it is illegal to convict him separately under s. 235 for being in possession of instruments which enabled him to commit the offence under s. 232, *1904 P. R. No. 14=1904 P. L. R. 404=1 Cr. L. J. 946.* See *23 A. 266 & 6 N. W. P. H. C. R. 39* for analogous instances. In *1904 P. L. R. 14* it was held, when a conviction was sustained under s. 232, it is improper to convict also under s. 233.

Coming instruments or materials will be in a man's possession when they are in any box or place which is under his control, and whether they are used for his benefit or not, provided it is shown that he is aware of their existence and character. And the same article may be in the possession of several persons, if they are acting in concert, and each of them have a guilty knowledge of the character and existence of the thing in question.

In one case, a prisoner, named *Wicks*, was indicted with four others for having unlawfully in their custody and possession a coming mould. It appeared that the police entered the prisoner's house in his absence, and there found the other prisoners, two of whom attacked the police, while the two others, one of whom was the wife of *Wicks*, snatched up something from the table and threw it into the fire. This was found to be the coming mould, which formed the subject of the indictment. Other implements and materials suitable for making moulds were found in other parts of the house. The prisoner came back to the house after the capture was made. It was proved that he had passed off a bad half-crown thirteen days before. The jury found *Wicks* guilty of

being knowingly, and without lawful excuse, in possession of the coining mould, and the Court affirmed the conviction, saying, "We are all of opinion that there was sufficient evidence to be left to the jury on the charge of felony. In order to prove the guilty knowledge, evidence was admissible of other substantive felonies committed by the prisoner." *R. v. Weeks*, 30 L.J. (N. C.) 151 = L. & C. 18. See also as to what constitutes possession *R. v. Dwyer* 4 Cox 272; per Batty J. (*Ixton, I. Contra*) in 6 Bom. L. R. 887 = 1 Cr. L. J. 960, following 6 B. 731. Where incriminating articles were found in a box, to which several members of a joint family have access, a conviction of one of them was annulled in 1901 P. L. R. 14 = 1 Cr. L. J. 40. *Anglo. Amer. Oil Co. v. Manning* L. R. (1908), 1 K. E. 535. But where the accused when pursued on suspicion he had uttered a false coin, threw away a yellow bag which contained several instruments and materials for counterfeiting, it was held he was rightly convicted under this section 1892 P. R. No. 10.

The "other substantive felonies" which are admissible to prove guilty knowledge, must, of course, be crimes of a similar character, see Ev. Act, s. 15, and not too remote in point of time. The fact that a man has committed a robbery is no proof that he is a coiner, though the fact that he has passed off a leaden rupee a few days previously would be. Nor would the circumstance that a man has passed off a false rupee a year ago be any evidence, that another now found in his possession was known to be counterfeit. For any man through whose hands money passes might meet with such accidents at such distances of time. But the possession of other pieces of base coin, or the fact that base coin has been passed off by the same defendant at other times, either before or after the offence charged in the indictment, will be evidence of such a guilty knowledge. *R. v. Wylie*, 1 Bos. & P. (N. R.) 92; *R. v. Harrison*, 2 Lewin, 118. *R. v. Foster*, Dears. 456 = 24 L. J. (M. C.) 134 = 6 Cox. 52; 8 B. 223.

There are three classes of offences created by ss. 229—243. *First*, passing off coin known from the first to be counterfeit. *Secondly*, passing off such coin which was for the first time discovered to be counterfeit after its receipt. *Thirdly*, being in wrongful possession of coin known all along to have been counterfeit. Further subdivisions of classes *first* and *third* arise, according as the counterfeit coin is the King's or otherwise. In *Weir I.*

221 it was held that counterfeit coin need not necessarily be counterfeit of current coin, and knowledge on the part of the accused will be presumed from the fact that he was a goldsmith.

With regard to ss. 239 & 240, it has been held "that the offence for which punishment is provided is not the offence committed by the coiner. The words 'which at the time he became possessed of it he knew to be counterfeit' point to a person other than the coiner, that is to say, the person who procures, or obtains, or receives counterfeit coin knowing it to be counterfeit. **23 W. R. (Cr.) 4; 5 C. P. L. R. (Cr.) 5.** It is against such a person that the section is directed. **3 N.-W. P. H. C. R. 150; 1892 P. R. N. 10; 1900 P. L. R. (Cr.) 14.**

The delivery must be "fraudulently, or with intent that fraud may be committed". A person delivers false coin fraudulently if he cheats the person to whom it is delivered, he delivers it with intent that fraud may be committed, if he puts it in the power of that person, whether he is an accomplice or an innocent agent, to pass it off upon someone else who may lose by it. It was held in England that no offence was committed by giving a counterfeit half-crown to a woman who asked for charity, as she was not defrauded by it. *R. v. Page*, **8 C. & P. 122.** This decision is obviously doubtful, as the woman would necessarily have tried to get someone else to take the coin as genuine. Accordingly, in a later case, where the prisoner had given a counterfeit coin to a girl with whom he had connection, the offence was held to be complete. The former decision was cited, and distinguished by the judges as a case of mere charity, but they doubted its being sound law. *R. v. Anon*, **1 Cox. 258.** In a later case, Alderson, B., said that it had been *overruled*, and that the intent to defraud would be inferred by law from the passing off a false coin as a good one. *R. v. Ion*, **2 Den. 484.** Nor does it make any difference that the person to whom the coin is tendered refuses to receive it. *R. v. Welsh*, **2 Den. 78** **20 L. J. (M. C.) 101.** *R. v. Franks*, **2 Leach. 644.**

The offence under s. 241 consists in trying to pass off as genuine a coin which the accused has honestly received, but has subsequently found out to be counterfeit. To sustain a conviction under s. 243 it must be proved the accused knew the coin to be counterfeit when he came by it, but under s. 241 the knowledge at the time of uttering is enough. Hence, where a false coin was tendered and refused on the ground it was false, a subsequent tender would be an offence under s. 241, but not under s. 243, unless there is other evidence to make out the necessary knowledge required by s. 243. 4 Bur. L. T. 9=12 Cr. L. J. 79=9 Ind. Ca. 449. The first refusal imputes to the accused the necessary knowledge. It has also been held where the accused gives a story as to how he came by the coin and this story is found to be false, knowledge that he knew the coin to be false when he got possession may be presumed, 23 W. R. (Cr.) 4. No offence is committed where the coins are not delivered as genuine *It. v. Byrne*, 6 Cox. 475 (Ir.) A vagrant entered a shop for drink. The shopkeeper, supposing that he had come to commit theft, shut the door and called for a watchman. The vagrant ran away, and meeting one *Munglee* put some coins into his hand, and told him to keep them for him. The coins turned out to be counterfeit. A conviction under s. 241 was set aside, as it did not appear that he had passed the coins as genuine, or induced *Munglee* to receive them as genuine. 4 N.-W. P. H. C. R. 62.

The mere possession of counterfeit coin is an offence under ss. 242 and 243, even though no attempt is made to pass it off, provided it can be shown that it was kept for a fraudulent purpose, and was originally obtained with a guilty knowledge. To sustain a conviction under s. 243 the guilty knowledge must be specifically set out in the charge and found as a fact, *Weir* I. 222; 1902 P. L. R. 69. A person having four counterfeit rupees but uttering only one of them cannot be separately convicted under s. 240 regarding that one rupee and under s. 243 regarding the other three. The offence under s. 240 involves one under s. 243 and by uttering only one

rupee he could not be in a worse position than if he had passed off all the four together, *Ratanlal* 202, *R. v. Sherrit*, 2 C. & P. 427. See 31 C. 1007=8 C.W.N. 717=1 Cr. L. J. 714, where it was held that a conviction under s. 243 was no bar to a subsequent trial under s. 240. The mere fact of a single base coin being found in a party's possession would not, without further evidence, be sufficient to create a presumption that he knew it to be counterfeit when he obtained it, and intended to make a fraudulent use of it. But where a considerable number of base coins is found in any man's possession, the presumption of guilt would be sufficient to make a conviction lawful, unless the possession could in some manner be explained or accounted for.

Similar provisions as regards currency notes and bank notes are found in ss. 489A to 489D.

II FORGERY.

192. The offence of Forgery Analysed.—In order to establish the charge of forgery, it is necessary to show (1) that the accused has produced something which is a "false document" (s. 464) and (2) that he has done so with some of the intents described in s. 463. Knowledge that the document might injure is not enough, 10 C. L. R. 184, as the definition in s. 463 takes no account of knowledge but confines itself to intention. The word '*makes*' in s. 464, is used in its technical sense, signing or sealing with a name of a person who did not in fact sign or seal it, *per* Garth, C.J., 7 C. 352 at 355. The making does not consist in writing it without doing anything further towards its execution. (1892-1896) U. B. R. 279.

The term "document" is defined by s. 29 in a manner which seems to include every substance upon which any letters or marks are inscribed, in a manner capable of conveying an idea to the mind of a person who is able to understand them. A picture inscribed with the name of an artist, and thereby purporting to be painted by him, would be a document within s. 29, and might be a false document within s. 464. [The contrary has been

held in England, upon the narrower construction given there to the word "document," *R. v. Gloss*, D. & B. 460 = 27 L.J. (M. C.) 54, *cf. R. v. Collins*, 1 Cox. 57.] See as to a forged telegram, *R. v. Riley* [1896], 1 Q. B. 309. It is not necessary that the document should be legal evidence of the matter expressed in it. It is sufficient if it was intended to be evidence. That is, if it was put forward by the person making or using it, as containing statements upon which the person to whom it is submitted might and ought to rely, 2 B. L. R. (A. Cr.) 12 = 10 W. R. (Cr.) 61. Thus, forging a deed will amount to this offence, although a statute requires the deed in a particular form, or to comply with certain requisites, and the forged deed is not in that form, or does not comply with those requisites. *Thomas Lyon* (1813) R. & R. 255. *James Macintosh* (1800) 2 Leach, 883.

(1) *False Document* — A document is a false document if it purports to be signed, sealed, or otherwise authenticated by a person who did not so execute it, and who did not authorize anyone else to execute it on his behalf. In general, no forgery could be committed by a person who, with the authority of another, signs the name of that other. Thus where a son signed his father's name, and there was no evidence that he acted fraudulently and without the father's authority it was held no offence was committed 4 L. B. R. 45 = 6 Cr. L. J. 283. Authority may be implied. *Smuth*, 3 F. & F. 304, *Beardshall*, 1 F. & F. 529; *Heartshorn*, 6 Cox. 395. If, however, the nature of the transaction involved a representation that the document was actually signed by the person whose signature it bore, and if the signature by any other person would be a fraud, then the signature of that person's name, even without his authority, by another in order to help him in committing that fraud, would be forgery. So it was held, where the accused personated a student at an examination, in collusion with him, and signed his name to an examination paper, 12 M. 151, and where a decree holder signed a *vakalat* in the name of his co-decree holders and instructed the vakil to enter up a certificate of satisfaction of the entire decree, 6 W. R. (Cr.) 78; see *Dickson's* case, 2 Lew. 378.

It is essential for a document to be a false document within s. 464, that "the false document when made must either appear on its face, to be, or be in fact, one, which, if true, would possess some legal validity, or, in other words, must be legally capable of effecting the fraud intended, *per* Rivaz, J., 1895 P. R. No. 12.

A document is also a false document although the signature is genuine, if the contents of the document which are authenticated by the signature are, by means of some fraud, different from that which the executing party intended them to be. This may be effected, either by altering a document which has already been executed, or by fraudulently inducing a person to sign a document containing matter different from that which he supposed it contained. In either case, it is evident that the words of the name are no more an authentication of the matter above them, than if they had been cut off a letter and pasted upon the document. To bring such a case within the third clause of s. 464, there should be evidence of active deception; where the accused inserted a false paper, in a mass of genuine papers, put up for signature, it was held, no offence was committed, because no deception was practised so as to make the signing officer forget the responsibility of his own position. He is not entitled to treat himself as a mere substitute for a rubber stamp. If he was entitled to be solely dependant on his clerk, his own signature might have been dispensed with and the clerk might have been asked to sign on his own responsibility. The officer signing has to satisfy himself, and there is no deception if he is careless or negligent. 9 W. R. (Cr.) 20; 20 W. R. (Cr.) 49. A question has been raised whether the same rule applies to a mere non-feasance; as where a person who is employed to draw up a will designedly omits one of the legacies. The English lawyers apparently hold that the mere omission does not constitute a forgery, unless such omission makes a material alteration in other parts of the will; as where, by the omission of a prior life-estate to A, a present fee is passed to B, instead of a remainder, as was intended. 1 Hawk., P. C. 265; 2 East, P. C. 556. Such a case,

however, appears clearly to come within the third clause of s. 464. The document which the testator executes is not his will, inasmuch as it does not carry out his wishes; and so I conceive it would be, if the draughtsman, for some fraudulent purpose, left out part of the testator's estate, leaving it to pass by intestacy, instead of according to his will. As Serjeant Hawkins says "In this case the first inquiry should be, with what intention the omission was made "

It is not forgery for a man to make a deed which contains a false statement, such as a recital that he was an adopted son of some one, even though the recital is made as a self-serving piece of evidence to bolster up a false claim in future **32 M. 90=4 M. L. T. 463=9 Cr. L. J. 85.** The false document must be made with one or other of the five intents specified in s. 463, and where the intent is to cause injury, the connection between forgery and injury must not be too remote **Weir I. 539.** It must be remembered fraudulent preparation of a deed of sale with intent to cause injury (e.g., sale by the managing member of a family without receiving adequate consideration and for no family purpose) would not be forgery unless the document itself be a false document, **5 W.R. (Cr. L.) 5;** but it is forgery for him to make a false deed, as, for instance, by ante-dating a document, "to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have." *3 Bac Abr, 745* affd *R v Ritson, L. R., 1 C.C.R. 200; 5 W.R. (Cr.) at 64; 10 W.R. (Cr.) 23; Ratanlal 772* When a man wrote on a bill on the 25th of *Jaistea* "17th *Jaistea* through B, Rs 501," and at his trial produced account books to show the payment was made on 17th, but that he then failed to make the endorsement, and subsequently on the 25th, made good the endorsement, held there was nothing to justify the inference that the endorsement was made by the accused with the intention of causing it to be believed that it was made on the 17th and not on the 25th when it was actually made. **8 C. W. N. 278=1 Cr. L. J. 124.** The mere fact that a document bearing a certain date is

written on paper bearing an embossed stamp with a figure denoting a later date, is not sufficient to support a charge of forgery. There should further be evidence that the paper could not have been manufactured or issued to the public at the date of the document. It is necessary to let in such evidence in all cases where receipt stamps of a later date are unwittingly used for forged receipts. *Weir* L. 540. It is also forgery for a man to sign his own name to a document, in order that it may be supposed to be, and that it may take effect as, a document executed by another person of the same name. For as regards him, the document is an absolutely false document. *Mead v. Young*, 4 T. R. 28. It is not forgery to execute in one's own name, at the request of another, a document different in its operation from that which the other expected, unless there is something in the document which binds the other. As, for instance, where a debtor was asked by his creditor to enter in the creditor's account-book an acknowledgment of indebtedness, and he entered, in a language unknown to the creditor, a statement that he had discharged the debt in full. The offence really committed was that of attempting to cheat, or fabricating false evidence. 12 M. 114; 1895 P. R. No. 12; *Ratanlal* 595. But, when a man writes in his own account books a false entry that he paid a sum of money to his creditor, he has been adjudged guilty of forgery, 1 Mad. Jur. 11; 1. In. Jur. (N. S.) 46; 4 B. 657.

Signing a document with the name of a fictitious person may or may not be a fraud, and if it is a fraud, it may or may not be a forgery. If a person for any purpose is passing by a false name, and in that name writes an order for goods, or for the payment of money, intending to pay for the goods, or expecting that his money order will be honoured, this is neither a fraud nor a forgery, even though in the result the goods are not paid for, and the order is not cashed. Where, however, a person signs a fictitious name with a fraudulent purpose, this will generally be cheating, and may, but not necessarily, be forgery. In *Dunn's* case, 1 Leach. 57; 2 East

P. C. 961, 962, the judges laid down the following principles

"First, that if a person give a note or other security as his own note or security, and the credit thereupon be personal to himself without any relation to another, his signing such a note with a fictitious name may indeed be a cheat, but will not amount to forgery; for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view. But, secondly, that if a note be given in the name of another person, either really existing or represented so to be, and in that light it obtain a superior credit, or induce a trust which would not have been given to the party himself, it is then a false instrument, and punishable as forgery."

Accordingly, when the prisoner, Robert Martin, gave a cheque drawn in the name of William Martin, a fictitious person, upon a bank in which there was no account answering to that signature, but the prosecutor took the cheque believing that it was drawn in the prisoner's name, the Court, following the ruling in *Dun's case*, held that no forgery had been committed *R. v. Martin*, 5 Q. B. D. 34. Where, however, the prisoner has written an endorsement or receipt on a bill of exchange in a fictitious name, either in order to add to the apparent value of the document, or to avoid being traced as the person who had negotiated it, this is forgery, and it makes no difference that the bill itself is perfectly genuine, and that, being already endorsed in blank, no further endorsement was necessary, if, as a matter of fact, the prisoner could not have got it cashed, without writing upon it what was supposed to be his real name. *Bolland's case*, 2 East, P. C. 958, *Taft's case*, *ibid* 959, *Taylor's case*, *ibid* 960, 13 M. 27. But where certain persons appeared before a magistrate as bail to an accused person and gave wrong names, and signed the bail bonds in such assumed names they were held not guilty, as they did not intend to cause the magistrate to believe that the bond was signed by any person real or fictitious other than the accused themselves, [1910] M. W. N. 232=8 M. L. T. 124=11 Cr. L. J. 440=7 Ind. Ca. 176.

The fabrication of that which purports to be a true copy, and which is intended to be used as such, but

which is really a false copy, is a forgery within the meaning of s. 463. *Per* Peacock, C.J., **Marshall 270 = W. R. (F. B. Vol.) 71 = 2 Hay 236; 6 W. R. (Cr.) 41**. But the preparation of a draft of a document, which is about to be forged, and which is never itself intended to be used for any other purpose, is neither a forgery, nor an attempt at forgery. When the books in the registration office were tampered with, and the accused used a genuine copy of a document, as it was made to appear in the Registrar's books, it was held in **20 M. L. J. 534 = 7 M. L. T. 428 = 11 Cr. L. J. 401 = 6 Ind. Ca. 776**, that the person who so used was not liable, as the copy that he used was a genuine copy. **6 W. R. (Cr.) 41** is distinguishable, as in that case, after the production of the genuine copy of a forged document, the accused under the directions of the court, produced the forged original itself. **Ratanlal 12** was the converse of the Madras case; where the copy used contained only a portion of the original. A conviction could not be sustained in the absence of proof that the portion omitted was extant in the original at the time the copy was prepared. The decision in the Madras case, where no reasons at all are given, would seem to be wrong especially in the light of the observations of Aikman J., in **28 A. 402 = 1906 A. W. N. 71 = 3 A. L. J. 190 = 3 Cr. L. J. 255**, though **Ratanlal 583** lends some support to it. Where, however, there was no proof that the original from which the accused prepared a true copy was to their knowledge tampered with before that copy was prepared, it might, under certain circumstances, be charged as an abetment of a forgery, if committed in conjunction with others. **3 M. 4**. The mere fact that a person presents a document with a genuine endorsement upon it, and obtains cash by representing that it is his endorsement and that he is the person entitled to the money, would be cheating, but is not forgery, though so eminent a judge as Ashurst, J. once thought it was forgery. *Herey's case*, **2 East, P. C. 856 = 1 Leach, 229**.

In charging a forgery under either of the special sections, 166 or 167, it is well to add a count describing the document simply as a false document, so as to guard

against the possibility that the document may turn out to be something different from what is alleged. 1 W. R. (Cr. L.) 9. For instance, although it is not necessary that a forged bank-note should be an accurate resemblance of a genuine one. (see s. 28, Expls. 1, 2) it is necessary that it should be such a document as would have been a bank-note, if the signature had been genuine 1 Hale, P. C. 181; 2 East, P. C. 950, R. v. Jones, 2 East, P. C. 881

It must be remembered the making of a document untrue in several particulars is not necessarily the making of a false document, as that expression is defined in s. 464, which involves the mental element, viz., the making was with an intention which may be expressed as dishonestly or fraudulently. When a person made out a *pattah* relinquishment application in the name of a deceased person, and wrote the countersignature of the *Kurnam*, and also certain attesting signatures, it was held his intention was to deceive the Tahsildar by leading him to believe that the application has been made by the actual *pattahdar*, and that the document has been attested and countersigned by the *Kurnam*. But an intention to deceive is altogether insufficient to constitute the document a false document. There must be a further intention to defraud, or to cause to anyone wrongful loss or wrongful gain Weir I. 542. If a man concocted a false receipt to serve as a defence when sued upon a false bond, he commits fraud in order to counter-act fraud, but this would not be a valid defence, thus when genuine documents have been withheld from the rightful owner by an act of fraud, he cannot justify the concoction of false documents to render the former inoperative—Per Plowden, J., 1885 P.R. No. 4; 1895 P.R. No. 6. Similarly, when a clerk to whom arrears of pay were long overdue, was entrusted with a blank cheque for the purpose of ascertaining the exact amount due on a bill and then meeting the same by filling in the cheque, he would be guilty of forgery if he filled up the cheque for an amount equal to what was due on the bill, plus the arrears of pay due to himself and thus realised his own pay, R. v. Wilson, 1 Den. 284.

(2) *Fraudulent Intent*.—Assuming the document to come within the definition in s. 464, it is further necessary to show that it was made with some one of the dishonest intentions specified in s. 463. It is not, however, required, in order to constitute in point of law an intent to defraud, that the person committing the offence should have present in his mind an intention to defraud a particular person, if the consequences of the act would necessarily, or possibly, be to defraud any person; but there must, at all events, be a possibility of some person being defrauded by the forgery, *if successful*—*Per Cresswell, J., R. v. Marcus, 2 C. & K. 356; Trenfield, 1 F. & F. 43; Mary Mazagora (1815) R. & R. 291*. I add the last two words, which are not in the judgment quoted from, because the intention of the accused must be judged by the result which he expected, not by that which took place, or which could have taken place. It is the failure to keep this distinction in view that one finds in the dissenting judgements in **23 M. 90=2 Cr. L. J. 283**. Thus, if a man makes a false acceptance on a bill of exchange, and negotiates it intending to take it up and does take it up before presentation for payment at maturity, he would still be liable for forgery. *R. v. Geach, 9 C. & P. 499*. The same would be the result if he obtains credit by pledging a forged bill, though the prisoner had no intention to defraud anyone. *Birkett, R. & R. 86*. When a *Thugyi* obtained agricultural advances substituting two men for two others, who had been recommended for such advances, himself stood as surety and spent the money as he pleased, but regularly repaid the advances to the Government, held that he was properly convicted of the abetment of an offence under s. 467. (1892-1896) **U. B. R. 276**. Therefore it is no answer to an indictment for forgery that the instrument was invalid, or that it described the estate which it professed to convey by a wrong name, *1 Haick, P. C. 265; Crooke's case, 2 East, P. C. 921*, or that it purported to be the will of a person who was still living, and was therefore wholly inoperative. *Crogan's case, 2 East, P. C. 948*. And so, in a case where the prisoner was charged with forging a transfer of railway shares held by one Handstock, and it appeared that his name

was upon the register, but that it was probable he had no title to the shares, the conviction was held good. Maule, J., said "The Recorder seems to have thought that, in order to prove an intent to defraud, there should have been some person defrauded, or who might possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act." As an illustration, he put the case of a person forging the name of another to a cheque upon bankers where he had no account *R v Nash*, 2 Den. 493=21 L. J. (M. C.) 147. The mere fact of the damage or fraud affecting the person committing it as well as others is immaterial, *e. g.*, forgery by a partner. 6 E. m. L. R. 553=1 Cr. L. J. 757. And so it has been held in Calcutta, that forgery is committed by a man who fabricates a false document at the request of another, who with fraudulent intent is merely laying a trap for him, and where the document would never have been used at all 14 C. 513; *Hillman*, 1 L. & C. 343, or when the document is made to support a claim for which purpose it is found to be superfluous, *per* Norris, J., 9 C. 53 at 60 See 1885 P. R. No. 16; or alters the date of a document, even though the alteration was not required to save the bar by limitation 1881 P. R. No. 14. But, the addition of a name to a list of attesting witnesses of an instrument which need not be, in law, attested was held in 14 C. W. N. 1076=12 C. L. J. 277 at 289=11 Cr. L. J. 505=7 Ind. Ca. 629, not to amount to making a false document as explained in 17 C. W. N. 354=14 Cr. L. J. 129=18 Ind. Ca. 881. Admitting that an attesting witness' name is a fictitious name, and the document is false to that extent, it would not be a false document within the meaning of s. 464, unless the falsity has some material effect on the transaction. Thus, a mere surplussage, even though fictitious, could not invalidate a deed, as it cannot be said to have been made dishonestly or fraudulently, though circumstances are conceivable, where such an act would amount to fabrication of false evidence. Similarly, when the words *on demand* were interpolated in a promissory note which expressed no time for payment, it was held to be not

forgery, as the alteration only expressed the legal effect of the document as it originally stood, and was therefore immaterial. *Aldous v. Cornwall*, L. R. 3 Q. B. 573, see *Engleton v. Gutteridge*, 11 M. & W. 465, where the addition of a party's Christian name was held not to be a forgery. The result would be different if the alteration had been in a material particular, provided the alteration is made dishonestly or fraudulently. When a clerk, having lost documents in his charge, fabricated and produced false documents with a view to screen himself he was not liable for forgery, as the documents were not fabricated with any of the intents specified in s. 463; 5 A. 553; 4 B. 657, 14 K. L. R. 143=1 Cr. L. J. 718; 2 N.-W. P. H. C. R. 11. Of course there can be no intention to defraud where no wrongful result was intended, or could have arisen, from the act of the accused. Accordingly, in 5 A 217, it was held that it was not forgery to alter the number by which land was wrongly described on a deed of sale by substituting the right number, and that using the deed so altered as evidence in a suit was not punishable under s. 471. Also that it was not forgery to fabricate receipts for rent, in place of genuine receipts which had been lost. 7 A. 459; or for the manager of an estate to sign the name of the proprietor to a petition to the *Mamlatdar*, requesting his summary assistance under Reg. XVII. of 1827, for the recovery of rent from the tenants of the proprietor. 11 B. H. C. R. 3. In this case the manager probably considered honestly that he had authority to sign the name of the proprietor and avoidance of litigation is no wrongful loss to Government. The case in 1905 A. W. N. 93=2. Cr. L. J. 234 is somewhat curious. A *mukhtar*, appearing for plaintiff in a rent court, took the plaint from the records in open court and added one more field to the list of lands claimed by plaintiff. This was held not to amount to forgery, though the act was done without the permission of the court, and it did not appear that the plaintiff was or was not entitled to eject the defendant from that field. Probably, the act must have been done at an early stage of the suit. Surely such an act would amount to a forgery, if the interpolation had been made after judgment as prayed for, but before

the formal decree was drafted There, the fraudulent or dishonest intention would be patent : see 1895 P. R. No 6

Upon this question, as to what is a fraudulent intent, there have been various decisions in India, founded on the strict language of s 163, and of the defining sections 24 and 25, which are not always consistent with each other, and which, perhaps, would not have been anticipated by the framers of the Penal Code It is admitted that the fabrication of a document, which is part of the machinery by which a fraud is carried out, is itself a forgery As, for instance, where a postmaster misappropriated the value of a money order, and forged a receipt purporting to have been granted by the payee. "There was clearly an intention to cause wrongful loss to Government, by conveying the false impression that the receipt contained an acknowledgment of payment by the payee, and the fact of misappropriation, in our opinion, merely shows that there was an intention to cause wrongful gain to himself A debtor who forges a release to screen himself from liability to pay the debt, cannot be said not to be guilty of forgery, because he intended, by the forgery, to cover a dishonest purpose ' 11 M. 411. On the other hand, we have a series of decisions to the effect, that where an offence has been completed, the falsification of public records, in a manner which, in other respects, comes within the definition of forgery, wants the necessary ingredient of fraud, because the intention of the accused is merely to screen himself from punishment ; and this intention does not come within the words " fraudulently or dishonestly " as explained by the Code 2 N.-W. P. H. C. R. 11 ; 6 N.-W. P. H. C. R. 56 ; 5 A. 221=1882 A. W. N. 236 ; 5 A. 553=1883 A. W. N. 133 ; 13 C. 349 ; 22 C. 313 ; 1902 P. R. No. 10=1902 P. L. R. 75 ; 5 P. L. R. 15=1 Cr. L. J. 41 ; 1876 P. R. No. 15. A different view as to liability under such circumstances under s 477A. was taken in 35 C. 450=12 C.W.N. 581=7 Cr. L. J. 378, where Woodroffe, J., said " even if the intention with which the false entries were made was to conceal a fraudulent and dishonest act previously committed, the intention would be to defraud,

and the case would fall within s. 477A, I.P.C.," and this view was adopted in (1907-09). U. B. R. (P. C.) 29=11 Cr. L.J. 185=4 Ind. Ca. 1089, where the previous authorities are discoursed, as also by the Bombay High Court in 37 B. 666=15 Bom. L. R. 708=2 Bom. Cr. Ca. 105=14 Cr. L. J. 518=20 Ind. Ca. 998, where it is said to conceal a fraud, and to make the party defrauded believe that no fraud has been committed is itself a fraud, and that any document made with the intention of advancing any such purpose is made fraudulently, and with intent to commit fraud, within the meaning of ss. 464 & 477A. See also 15 Cr. L. J. 153=23 Ind. Ca. 729; but Jenkins C. J., in 36 C. 955=14 C. W. N. 82=10 Cr. L. J. 581=4 Ind. Ca. 416, said in such cases, "the real purpose was not to defraud, but to remove the evidence of crime;....it would apparently be, if at all, under s. 201, that such a charge could be framed." See also 6 Bom. L. R. 94=1 Cr. L. J. 105. In a charge of forgery, the prisoner's immediate and more probable intention, and not his remoter and less probable intention, should be attributed to him. 8 A. 653=1886 A. W. N. 264; 1892 A. W. N. 243. But if a false document is made with two intents, such as (i) to escape liability for a criminal prosecution, and (ii) to obtain wrongful gain, the fact that one of the intentions is not covered by s. 463, would not make his act any the less a forgery. 15 Cr. L. J. 221=22 Ind. Ca. 1005. But when a Superintendent of Police ordered that Rs. 2 per month should be stopped out of a constable's pay to be paid over to a creditor of his, and the constable, to counteract this illegal order, produced a forged receipt purporting to have discharged the entire debt, it was held the real intention of the accused was to induce his superior officer to refrain from the illegal act of stopping a portion of his salary and the court in a criminal case ought not to speculate as to some other intent over and above this that might have presented itself to the accused. 7 A. 403. On the same ground, it was held not to be forgery to alter the date of a document which was too late to be registered, so as to make it appear that it was in time; 6 C. 482; or to concoct a sunnud purporting to be granted by a native rajah, conferring a title of dignity

upon the accused, which he used for the purpose of inducing a settlement officer to recognize his title to that dignity; 10 C. 584; or when a beat constable wrote in his note-book the signature of a headman whose village he had not visited. (1897-1901) I. U. B. R. 356.

In 13 C 349, the accused was held to be properly convicted under s 464, where, being candidate for a clerkship in the sub-divisional office at Budruck, he first forged a letter of recommendation from the sub-divisional officer to the Collector, and then forged another letter from the Collector to the sub-divisional officer, stating that the Collector had selected him for the post. The Court said "Whether or not, under the circumstances mentioned above, the appellant may be said to have fabricated these documents 'dishonestly,' it is clear to us that he fabricated them fraudulently within the meaning of the definition of that word given in the Indian Penal Code. His object was to obtain the vacant post in the sub-divisional office at Budruck. His intention, therefore, in making these two false documents was to obtain some pecuniary advantage by deceiving the sub-divisional officer as well as the Collector."

This case no doubt, came expressly within the words of s 463, and illus (k) to s 464, but is important as showing the view taken of the word "fraudulently." In 1907 P. R. No 15=1907 P. L. R. 32=1906 P. W. R. (Cr) 9=4 Cr L. J. 355, on similar facts the offence was held to be an attempt to cheat. See also 1895 P. R. No 2.

In 15 A. 210, a candidate for admission to the Queen's College, Benares, twice presented a false certificate, purporting to be granted by the Principal of the Canning College, Lucknow. The first time he succeeded by means of it in obtaining permission to attend a second course of lectures at Benares, without attending the previous course. On the second presentation, when the fraud was detected, he would have obtained a certificate which would have entitled him to attend an examination for pleadership at Calcutta. The Court held that the document was a forgery, and that on each presentation the defendant had committed an offence under s 471. Edge, C J, said, in reference to illus (k), s 464, "We can see no difference in principle between the case of a man making a false certificate in order to obtain employment, and the case of a man making a false certificate in order to obtain admission to a law class. In each case the intention is to deceive another person, and thereby to obtain an advantage, or a privilege, which without such deception could not have been obtained. We are consequently of opinion that the document in question was a false document within the meaning

of s. 464 of the Indian Penal Code." He then expressed the opinion of the Court, dissenting from that of Norris, J., in 19 C. 380, that the word "claim" in s. 463 was not limited to a claim to property, but might be a claim to anything, as, for instance, to a wife or child, or to be admitted to attendance at a college class, or to an examination at a University. Also, that the certificate which was sought on the second presentation was "property" within the meaning of the same section; and finally, as regards every part of the transaction, "that the document in question was made with intent that fraud might be committed."

Taking ss. 463 and 464 together, all that is required for the crime of forgery is, that a man should fraudulently make a document, whose contents profess to be authenticated by a person who did not authenticate them, with intent to commit fraud. The word "fraudulently" is only defined by s. 25, as the act of a person who does it with intent to defraud. No definition is given of the terms "fraud" or "defraud." All the High Courts have, with reference to ss. 463 and 464, accepted the statement of Le Blanc, J., in *Haycraft v. Cresay*, 2 East, 92 at 108 that "by fraud is meant an intention to deceive, whether it be from any expectation of advantage to the party himself, or from ill-will towards the other, is immaterial. 13 B. 506 at 514; 15 A. 210 at 218. This subject was fully considered in 28 M. 90=2 Cr. L. J. 283, where the accused, to gain admission to the university matriculation examination, produced a false certificate of character and age. The university authorities who were very wide awake at the time, were not deceived and prosecuted him for forgery. A very strong Bench of five judges were called upon to interpret the expressions '*with intent to commit fraud*' in s. 463 and '*fraudulently*' in s. 464. All the judges were agreed that the two expressions were of identical import. But while three of the judges took the view that the intention of depriving the person deceived of property is not essential to constitute an intent to commit fraud, the other two (Subrahmanya Iyer and Davies, J.J.) were of opinion that to deceive must be superadded an intention to cause *loss or risk of loss* to the party deceived. On the other hand, the majority (White, C. J., Benson and Boddam, J.J.) held, that fraud means something more than deceit, and an intention to obtain by means of

deceit, any advantage or benefit to the loss or detriment of the party deceived is sufficient to constitute an intention to commit a fraud. While *following* the Full Bench decision in 25 C. 512=1 C. W. N 255 (which *overruled* 19 C. 380), they *overruled* the earlier Madras decision in 25 M. 726 and *followed* the Bombay rulings in 13 B. 506, 515n & 22 B. 768 and the Allahabad rulings in 15 A. 210, already considered above, and 21 A. 113 See. 28 A. 358=1906 A. W. N. 48=3 A. L. J. 149=3 Cr. L. J. 249; 2 L. B. R. 316=1 Cr. L. J. 1124, 1893 P. J. L. B. 52; 5 Ou. Ca. 232. See also 5 C. W. N. 897, where it has been laid down deprivation of property, actual or intended, is not of the essence of fraud contemplated in s. 463 or s. 471. The learned Chief Justice, in the Madras Case was further of opinion that the false document in question was also one made with *intent to support a claim or title*, and that the word 'claim' is not limited either to a proprietary claim or a claim enforceable at law. The ruling in *Ratanlal* 627 must now be considered obsolete. As to nature of claims held to be within this section, see 6 M. L. T. 266=10 Cr. L. J. 367=3 Ind. Ca. 736, where the false document fabricated to confirm a title to property which had already existed, was held to be a forgery, and 6 C. W. N. 382, *not followed*. Now, looking at the above cases, there can be no doubt that a gross fraud was perpetrated by the accused in 28 M. 90, etc., upon the authorities (who had to consider his fitness for the position he claimed, whether they were justified in registering his document, in furnishing him with a duplicate to which he was not entitled, or in according to him a title of dignity, or in admitting him to the benefit of a university examination) by his supplying to them, as the materials for their decision, documents which were absolutely untrue. It cannot be doubted that in each case the accused sought an advantage for himself which he valued, and would have purchased, at a sum infinitely above, say, Rs 10? If, then, it would have been an undoubted forgery if the document had been fabricated for the purpose of obtaining Rs 10, how can it be less forgery because the object sought was something not measurable by money, but of far greater value? If each of these cases was not a fraud, the English language

has ceased to have any meaning. But if it was a fraud, then the requirements of ss. 463 & 464 are satisfied. This is the view now taken by all the High Courts. In 22 C. 313, where an agent had paid into the collectorate a smaller sum than he had received as Government revenue, and then altered the receipt given to him, so as to make it appear that he had paid in the full amount, he was held liable. See also 1909 U. B. R. (P. C.) 20=11 Cr. L. J. 185=4 Ind. Ca. 1089. In 25 C. 512, where the accused had produced a forged certificate of competency for the purpose of obtaining a situation, he was held to have committed an offence under s. 471, and the decision in 19 C. 380 was overruled. Similar rulings were given by the High Courts of Allahabad and Bombay. 21 A. 113; 22 B. 768.

The mere fact the false document is in favour of the accused is insufficient to support a charge of forgery. But, courts have often convicted such accused, of abetment on the ground, the document is not likely to have been brought into existence without his connivance. 33 M. 264=20 M. L. J. 84=7 M. L. T. 79; 17 C. W. N. 354=14 Cr. L. J. 129=18 Ind. Ca. 881; 21 A. 113, 10 W. R. (Cr.) 7. In such cases the *onus* will be heavily on the accused that the document came into existence without his knowledge. It will also depend upon the benefit he had under the document. When a person consented to act under a "*Mookhitearnamah*" and attached his name in token of such consent, he was held not liable when the document was proved to be a forgery. 5 W. R. (Cr.) 70; 25 C. 207. To prepare in conjunction with others, the draft for an intended false document, to buy stamp paper for execution and to collect information as to facts to be inserted in the document would not constitute the substantive offence of forgery or an attempt, but would amount to abetment. 3 M. 4.

Publication of a forged document is a separate offence under s. 471, but is no part of the offence created by s. 463. Weir I. 538. The very making, with such fraudulent intent, and without lawful authority, of any

instrument which is the subject of forgery, is of itself a sufficient completion of the offence even before publication, and of consequence before any actual injury sustained. "for though publication be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence" 2 *East*, P. C 855; *Pro. Mad H. C 7th April, 1866*; 2 B. L. R. (A. Cr.) 12=10 W. R. (Cr.) 61.

Joint Acts—Where several persons join in the concoction of a forged document, each of them is guilty of the offence of forgery, if he has the knowledge and intention which is required by the Code, and where each of them takes a distinct part in the fabrication, as where one makes the paper, another engraves the plate, a third fills in the contents, and a fourth imitates the signature, it makes no difference in the guilt of any one of them, that he does not know how or by whom the remaining portion of the forgery is to be effected *R v. Bingley*, R. & Ry. 446; *R v. Dade*, 1 Moody 307; *R. v. Kirkwood*, 1 Moody 304; s. 37 I P C,

193 Using False Document as Genuine.—The use contemplated by (s 471) is such use as causes wrongful gain or wrongful loss or is tantamount to a fraud. The section applies to the case of a person who appears before some other person or before a Court with a document and endeavours to induce that person or Court to do some act which he or it would not do if it was known to be forgery, but the bare statement by an accused person in the course of an enquiry under s 202, Cr. P C, into the genuineness of a document that the document was not forged, but genuine, is not such a use of the document as is contemplated by the section, as the accused never used the document at all, 11 C. W. N. 838=5 C. L. J. 454=5 Cr. L. J. 351; followed in 13 Cr. L. J. 46=13 Ind. Ca. 286; 8 W. R. (Cr.) 61. To support a charge under s 471 the prosecution must prove as a step in the case that the accused himself put in the forged document, *Weir* I. 550, though it is not necessary that it was put in either as evidence in a Court of Justice or used for the purpose of obtaining money or other property, *Weir* I 550.

If, however, he had forged the document, he cannot receive additional punishment under s. 471 for using it as genuine; 23 A. 84=1900 A. W. N. 205. This view has been followed in 1901 P. R. (Cr.) 26 & 1913 P. R. (Cr.) 4=1913 P. L. R. 52=14 Cr. L. J. 183=19 Ind. Ca. 183; *contra* 10 A. L. J. 473=13 Cr. L. J. 861=17 Ind. Ca. 797. In a similar Madras case, Benson, J., observed the fact that the person charged under s. 471 was himself the forger is no reason why he should not be dealt with under s. 471 especially when he cannot be charged under s. 467 owing to that offence having been committed beyond the jurisdiction of the court, 13 Cr. L. J. 862=17 Ind. Ca. 798, nor can there be double conviction and sentence under ss. 471 & 474, 6 N.-W. P. H. C. R. 39, followed in 17 C. W. N. 94=13 Cr. L. J. 449=15 Ind. Ca. 81. The two may be joined in the alternative but not cumulatively. Similarly, when the act which constitutes forgery is the same as the act which amounts to fraudulent destruction or defacement or cancellation of the document, he cannot be convicted of separate offences under ss. 467, 471 & 477, 1913 P. R. (Cr.) 4=1913 P. L. R. 52=14 Cr. L. J. 183=19 Ind. Ca. 183.

The document must, previous to its use, possess all the qualities of a forged document. 12 C. W. N. 1113=8 C. L. J. 317=8 Cr. L. J. 418; 2 N.-W. P. H. C. R. 202. Suppose a person fabricated a document as in 7 A. 433 or for the purpose of using it in some manner which the Court would hold not to be fraudulent within the meaning of s. 463, and were afterwards to use it for a clearly fraudulent purpose; or suppose a person were to amuse himself by forging a friend's signature to a cheque, and throw it aside, and that it was then picked up by someone else, who presented it for payment, would an offence under s. 471 have been committed? The case has never arisen, and never may arise. When it does, it would be well to add a count for attempting to commit the offence, upon which the prisoner would certainly be convicted.

Any use of a forged document, which involves a representation by the accused that it is genuine, coupled with

a knowledge on the part of the user that it is not so, will satisfy the section, if the act is done fraudulently or dishonestly. When, however, a document is produced in Court in obedience to a *subpoena duces tecum*, it was held in [1912] M. W. N. 3=10 M. L. T. 563=13 Cr. L. J. 35=13 Ind. Ca. 275, such involuntary production of a document cannot be said to amount to any user of it. Under such circumstances, unless the party having the knowledge that it is forged discloses his knowledge at the time of producing the document, there is no reason why he should not be liable. Otherwise, s. 471 can easily be defeated, by taking out a summons, whenever a forged document is sought to be produced in evidence, the Court having no information in issuing the summons, that it is really compelling the production of a forged document. The same Bench of the Madras High Court reiterated the same view in 36 M. 392=22 M. L. J. 181=11 M. L. T. 21=[1912] M. W. N. 455=13 Cr. L. J. 46=13 Ind. Ca. 286. The presentation of a forged document for registration, and obtaining registration, would be "using" it within the meaning of s. 471. 11 W. R. (Cr.) 15. And so would be the presentation by a pleader's clerk of the copy of a decree with the endorsements relating to the preparation of the copy altered so as to cover his own negligence. Weir I. 551. The view in 35 C. 820=8 Cr. L. J. 398, that mere production in Court of a forged document without its being openly tendered in evidence is not a user within the meaning of s. 471 has not been accepted as correct. A later decision of the Calcutta High Court in 13 Cr. L. J. 6=13 Ind. Ca. 99, having expressly *dissented* from this view, held such filing would in any event amount to an attempt to commit an offence under s. 471. See 13 Cr. L. J. 19=13 Ind. Ca. 211 where the judges in a Madras case on a similar point differed. The case in 35 C. 820 was explained in 39 C. 463=16 C. W. N. 623=15 C. L. J. 509=13 Cr. L. J. 201=14 Ind. Ca. 201 & 17 C. W. N. 94=13 Cr. L. J. 449=15 Ind. Ca. 81, by stating what was produced in that case was not the forged document itself but only a list of documents. And Holmwood, J., remarked that the head-note to that decision was entirely wrong. Where, therefore, a document was produced

during the cross-examination of the adversary's witness and the witness asked about its genuineness and the document was initialed by the Magistrate, it was held there was sufficient user within the meaning of s. 471. To constitute using, manual tradition out of the hands of the accused is not necessary. Thus, in the last case, if the pleader put a question after reading out a portion of a document and after eliciting an answer, handed back the document to his own client, it would amount to using within the meaning of s. 471. In *R. v. Radford*, 1 C. & K. 707, when a creditor pressed for payment, the debtor merely showed a receipt of discharge signed by his predecessor without actually delivering the same. This was held to be '*uttering*' in English Law. Or a man may make use of the hand of another, as where a party to a suit files a document through his pleader, where if the party had the requisite knowledge he would be liable though not the pleader, 26 C. 863; 1887 A. W. N. 195.

Where a person has used as genuine a document which he knew to be forged, and the case is one in which its acceptance as genuine would cause a fraud, the Court is bound to assume that he meant to defraud. *R. v. Hull*, 8 C. & P. 274; *R. v. Cooke*, *ibid.* 582. The use of a forged document will be fraudulent under this section, even though the document itself was unnecessary for the case of the party who uses it, and though in fact he has a perfectly good title without it. It is evident that a person who produces forged documents in support of a good case, is trying to gain by fraudulent means an advantage which he fancies he would not gain without such means. 9 C. 53; 1885 P. R. No. 16. Where a prisoner forged receipts for the payment of rent in lieu of genuine receipts which had been lost, and then used the forged receipts as genuine, the High Court of Allahabad annulled a conviction under s. 471, on the ground that the document had never been a forged document, not having been made with any fraudulent or dishonest intent. 7 A. 459. A similar decision was given in 7 A. 403, in the following circumstances. The creditor of a police-constable applied to the district superintendent

to order a monthly deduction from his pay till the debt was satisfied. The superintendent made the order, which he had no right to do. The constable then forged a receipt for the debt, and produced it as an answer to the deduction. The Court held that as the direct object of using the forgery was to prevent an illegal deduction from his pay, there was no reason to infer that any further use was intended to be made of the receipt, and therefore that no offence under s. 471 had been committed. It is obvious, however, that such cases must be very rare, and require very close scrutiny. If, in this instance, the Court had arrived at the less charitable opinion, that the constable intended to use the receipt in answer to any steps which the creditor might take towards enforcing his debt, it is probable that justice would not have been unduly strained.

Guilty Knowledge—Whether the person who makes use of a forged document knew it to be forged is a mere question of fact. Where a forged document is put forward in support of, or in resistance to, a claim, there can hardly ever be any doubt that the person immediately instrumental in putting it forward knew it was forged, though this can never be presumed as a matter of law. If when the forgery was discovered he immediately withdrew his claim his conduct may be evidence of his lack of knowledge, 17 C. W. N. 94=13 Cr. L. J. 449=15 Ind. Ca. 81; 14 Cr. L. J. 667=21 Ind. Ca. 907; see also 7 W. R. (Cr.) 23. Where, however, the party directly interested is a woman, especially a *purdahnashin* lady, or a minor, or a person whose affairs are managed by agents, the presumption need not be very strong that such person was actually cognizant of the fraud practised on his behalf. When the person who actually produces the document is an agent or pleader, the fact that he knew that the document was a forgery must be conclusively proved, and the circumstance that the document bore a suspicious appearance is not even *prima facie* evidence of a guilty knowledge, 22 B. 317; 17 W. R. (Cr.) 32. A party who gives a pleader a forged document for the purpose of being used in the trial of a suit is guilty not of an attempt but of the actual offence.

under s. 471, 26 C. 863, 1887 A. W. N. 195; 5 C. 717. In the case of mercantile documents which pass from hand to hand, the person who uses them may be perfectly ignorant of the forgery. Here the rule of the Evidence Act becomes important, that "when there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant." Ev. Act, s. 15, illus. (c) (as amended by Act III of 1891, s. 2). See *Makin v. Atty.-Gen. for N. S. Wales*, [1894] A. C. 57 and Ch. X, § 186, at p. 685 *supra*." Accordingly, where a man was charged with uttering a forged bank-note on the 16th of June, evidence was received that on the 20th of March he had uttered another bank-note, forged by the same hand, in the same manner, and with the same materials, and that other similar bank-notes, with the prisoner's endorsement upon them, were found in the files of the bank, as having been presented and paid, though the dates upon which they were so paid could not be proved. It was held that the evidence was properly received, subject, however, to observations on the weight of it, which would be more or less considerable according to the number of the other notes, the distance of time at which they were put off, and the situation in life of the prisoner, so as to make it more or less probable that so many notes should pass through his hands in the way of business. *Hough. R. & R. 120; Green, 3 C. & K. 209; Francis, 12 Cox. 612; Tattersall, 1 B. & P. [N.R.] 94n; Whiley, ibid. 92. R. v. Balls, R. & R. 132=7 C. & P. 429; R. v. Colclough, 15 Cox. 92. (Ir.)* But if other documents are let in, there must be strict proof that they were also forged. *Millard, R. & R. 245; Moore, 1 F. & F. 73.* And if the interval of time is very great, evidence of other similar acts would not carry much weight as regards proof of guilty knowledge, but would only serve to the grave prejudice of the accused, *Salt, 3 F. & F. 834.*

Under ss 474, 475 & 476 the possession of any document of the description mentioned in s. 466 or s. 467, or of any incomplete document of that description.

which was intended to be afterwards made a complete forgery, knowing it to be forged, and with the intention of fraudulently or dishonestly using it as genuine, is specially punishable. These are instances where a mere preparation is made penal having regard to the heinous character of the fraud intended to be perpetrated. The intention to make a fraudulent use of the forged document is an essential element in this offence. This intention can seldom be directly proved. Where the forged document is capable of being fraudulently used, and is found in the possession of a person who is interested in making a fraudulent use of it, I conceive that a conviction would be warranted, unless the defendant accounted for his possession of the instrument. As in the case of a party to a suit which is actually being tried who is found in possession of a forged document which if genuine would materially help his cause, 8 W. R. (Cr.) 11. Though the offence punishable under s. 474 is a preparation, a preparation for committing this offence such as being possessed of a tracing or an attempt to portray a pedigree would not be punishable under the ordinary rule of criminal law relating to preparation for offences, 16 B. 165. But it would be otherwise under ss. 475 and 476. Suppose, for instance, that a forged release were to be found in the possession of a debtor, or a forged will or conveyance in the possession of a claimant to an estate, this would be sufficient to throw upon each the burden of showing that he came innocently by the document, 1907 P. L. R. 34. But, where either accounts for his possession of the instrument in a manner which is equally consistent with his knowledge or ignorance of its fraudulent character, there the presumption of innocence will arise again. For instance, the mere fact that the purchaser of an estate is in possession of title-deeds, some of which are shown to be forgeries, would be no evidence whatever of his guilt, for, in the absence of evidence as to their origin, the natural inference is that they were handed to him by the vendor as constituting the title, and, if so, the proper presumption would be that he took them innocently. *Mad. Su. Ad. Dec.* (1859), p. 65. 1864 W. R. (Cr.) 12; 16 B. 165.

The finding of forged documents in the possession of another person in the same village, whose only connection with the accused was that he was called as his witness, and was alleged to belong to his faction, is not evidence of guilty knowledge against the accused. Nor is the fact that such evidence shows that forgery was common in the village a relevant fact as against him. 15 B. 189.

Section 477A was added by Act III of 1895 to make falsification of books of account of their employers by clerks or servants punishable even though there is no evidence to prove misappropriation of any specific sum on any particular occasion. It has been held that the expression 'clerk, officer or servant' occurring in this section is wide enough to embrace a partner in a firm managing its business, 6 Bom. L. R. 553=1 Cr. L. J. 757; as well as a mere volunteer who undertakes to perform, and does perform, the duties of a clerk or servant, Weir. l. 554. It is no offence to falsify ones own accounts, *Palin*, [1906] 1 K. B. 7.

Falsification of accounts made with intent to conceal a fraud already perpetuated has been held to be within this section, see Weir l. 554, and other cases at p 767-768 *supra*. The offence is complete the moment the accounts are falsified with the intent specified in the section, 4 M. L. T. 431=9 Cr. L. J. 92. Probably tampering with a mechanical contrivance would be falsification of an account within the meaning of this section, *Solomons*, [1909] 2 K. B. 280=75 L. J. (K. B.) 15.

III OFFENCES RELATING TO TRADE, PROPERTY AND OTHER MARKS.

194. **Fraudulent Marks on Merchandise.**—The whole law as to "Fraudulent" Marks on Merchandise now rests on the *Indian Merchandise Marks Act*, IV. of 1889, as amended by Act IX. of 1891, and this law is again borrowed from the English statute, 30 and 31 Vict., c. 28, the most important sections in the Indian Act being identical in language with those in the English

statute The law on this subject deals with three different matters first, *trade-marks*, as defined by the amended s. 478 of the Penal Code, secondly, *property marks*, as defined by s. 479, and thirdly, trade descriptions, as defined by Act IV. of 1889, s. 2 (2), which is as follows —

(2) "trade description" means any description, statement or other indication, direct or indirect, —

- (a) as to the number, quantity, measure, gauge or weight of any goods, or
- (b) as to the place or country in which, or the time at which, any goods were made or produced or
- (c) as to the mode of manufacturing or producing any goods, or
- (d) as to the material of which any goods are composed, or
- (e) as to goods being the subject of an existing patent, privilege or copyright,

and the use of any numeral, word or mark, which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act;

(3) "false trade description" means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that

A person not guilty of fraudulent use by false trademark or name may yet be guilty of a false description under ss 6 and 7 of the Merchandise Marks Act, 1887, if he describes a book as subject of copyright, when as a matter of fact he had no such copyright. 7 M. L. T. 309=11 Cr. L. J. 393=6 Ind. Ca. 683

Of these the first indicates the manufacturer of the goods, the second, their owner, the third, their quantity, quality, or origin. The framework of the Act is as follows: it defines what is meant by using a false trademark or property mark, or applying a false trade-description (ss. 480, 481, IV of 1889 ss 4, 5). It then creates the following offences: (1) using a false trade or property mark, or applying to merchandise a false trade description, (s. 482, IV. of 1889, s. 6): (2) counterfeiting a

trade or property mark ; (ss. 483, 484) : (3) being in possession of materials for counterfeiting ; (s. 485) : (4) selling, or possessing for sale, or for trade or manufacture, goods with counterfeit trade or property mark, or false trade description ; (s. 486 ; IV. of 1889, s. 7) : (5) deceiving a public servant by a false mark ; (ss. 487, 488) : (6) removing, defacing, or altering any property mark. (s. 489). In addition to the penalties prescribed by the various sections of the Act, the goods may be forfeited, **Weir I. 557**, and the costs of the prosecution may be ordered to be paid by the defendant to the prosecutor. IV. of 1889, ss. 9, 14. Even an appellate court, while confirming a conviction, can award the costs of an appeal. **16 Bom. L. R. 78**. Finally, provisions are inserted for the protection of persons who unintentionally contravene the provisions of the Act, and of servants (IV. of 1889, ss. 8, 18 (3), while a period of limitation is fixed for prosecutions (IV. of 1889, s. 15), **22 M. 488**, followed in **4 Bur. L. T. 83=12 Cr. L. J. 246=10 Ind. Ca. 787**, where the accused having been acquitted in a prosecution in the years 1908 and 1910 for having sold oil in the disused tins of the Burma Oil Co., a fresh prosecution for similar use of a false trade-mark was held barred under s. 15 of the *Merchandise Marks Act, 1889*. The argument that the specific offence charged was within a year was met by the observation, the intention of the Legislature will be frustrated if it is held that the owner of a trade-mark can stand by for several years while his trade-mark is being infringed continuously and then bring a criminal complaint in respect of some recent instance in which there has been infringement. To interpret the section in that way would reduce its provisions to a nullity, for it would entirely remove the bar of limitation excepting cases where the series of infringements has actually ceased. The words *first discovery* in the section cannot be applied to the last of a series of similar offences. It can refer only to the first offence of the series which comes to the knowledge of the complainant." The abetment by a person in India of offences under the Act committed out of India is punishable as if the acts abetted had been committed in India. (Act IX. of 1891, s. 22)

195. Trade-mark.—The law on the subject of trade-marks and the principles which should determine whether there has been an infringement are exhaustively dealt with in the judgment of Bhashyam Iyengar, J. (which, however, did not prevail on the facts of the case) in **15 M. L. J. 45**. We have no law for registration of trade-marks. The several *Chambers of Commerce* very often encourage registration in books kept in their offices. But this is purely voluntary and no statutory title is acquired thereby apart from the general rules of English Common Law, **15 C. W. N. 280**. As observed by Bhashyam Ayengar, J., in **15 M. L. J. 45** at 58, the designer and user of a trade-mark has no right of property similar to that of a patent or registered trade-mark and an action to restrain another trader from using similar marks is founded on deceit, the fundamental rule as stated by Lord Kingsdown in *Leather Cloth Co. v. American Leather Cloth Co.*, **11 H. L. Ca. 523** at 538=**35 L.J. (Ch) 53** at 61 being that one man has no right to put off his goods for sale as the goods of a rival trader. Where a trade-mark has been registered under Part IV of the statute, 46 & 47 Vict. c. 57, there can be no doubt as to its validity. In other cases there is often a good deal of doubt. A trade-mark, independent of statutory recognition, is generally a matter of slow and often of unconscious growth. A man makes a particular article. If it is a new genus or species he gives it a distinctive name. If it is a well-known article he gives it no name. Gradually his article acquires public favour, and is sought for, and gets to be known in the market either by its distinctive name, or by some other appellation given to it by the maker, or by the customers, which distinguishes it from similar articles made by other people. Sometimes the manufacturer puts a special device, or name, or description upon his trade labels. Any such distinguishing sign, when it has come to be recognized as indicating that the particular article is manufactured by a particular person, becomes his trade-mark, and is entitled to protection as such. See *per* Lord Cranworth in *Leather Cloth Co. v. American Leather Cloth Co.*, **11 H. L. Ca. 523** at 533; **9 Bom. L. R. 732=6 Cr. L. J. 75**. See as to trade-marks which are

disentitled to protection because they contain a fraudulent representation as to something material to the nature or commercial value of the article; *Cochrane v. MacNish* [1896] A. C. 225. It must be remembered that what is protected is the trade-mark, not the article. Unless the article is patented, anyone who likes may manufacture exactly the same thing in the same way; but he must sell it as his own manufacture, not as the manufacture of the proprietor of the trade-mark. *Seiro v. Provezende*, L. R. 1 Ch. 192 at 196; *Johnstone v. Ewing*, 7 A. & E. 219; 34 C. 495; 13 Bur. L.R. 381; 4 L.B.R. 192; 29 M. 569=1 M. L. T. 409=5 Cr. L. J. 94. On the other hand, a name which simply indicates the sort or quality of the article is not a trade-mark, and may be adopted by anyone who makes an article of that sort or quality. The man who first made what he called a Wellington boot, or a hansom cab, acquired no right to the exclusive use of the name. 26 B. 289=3 Bom. L.R. 683. This was the distinction which was taken in the case of the *Singer Machine Manufacturers v. Wilson*, 3 A. C. 376.

There the plaintiff was a Company which represented the rights of a Mr Singer of New Jersey, who was the manufacturer of various types of sewing machines, to which he gave his name. The defendant, a sewing machine manufacturer, advertised his machines, one of which he described as "The Singer Sewing Machine," but he put upon each machine a plate which described it as made by himself. On the trial of a suit for an injunction against the use of the name "Singer Sewing Machine" by the defendant, the latter contended that the name merely meant a machine of a particular construction, which, as it was not patented, he had a perfect right to make. The plaintiff contended that the term was understood in the trade as meaning that each machine had been made by his firm. (See *per Lord Cairns*, C. pp. 383-385) The Court decided that each party would be entitled to a decree, if he could make out the state of facts which he set up, and the case was remanded for a decision upon those facts.

The same question arose in a case where the plaintiff claimed the exclusive use of the term "camel hair belting" as a common law, that is unregistered trade-mark. Lindley, L. J., said: "The first question is, what does 'camel-hair belting' denote? If it denotes belting only

made by the plaintiffs, the defendants have no right to sell their belting by the same name, unless they take sufficient precautions to prevent buyers from being misled. But if the expression, 'camel-hair belting,' denotes a particular kind of belting which anyone can make, then anyone who makes that kind of belting may call it by that name." *Reddaway v Bentham* [1892], 2 Q. B. 639, at 643; *affd* in *Reddaway v Banham* [1896] A. C. 199 followed in 32 C. 401; *Birmingham Vinegar v. Powell* [1897] A. C. 710; *Parsons v. Gillespie* [1898] A. C. 239; *Cellular Clothing Co v. Marton* [1899] A. C. 326. See *per* Lord Langdale, *Perry v Truefit*, 6 Beav. 66 at 73; 31 C. 411=8 C. W. N. 307=1 Cr L. J. 140.

The essence of a trade-mark consists in the idea which it conveys to the mind of a purchaser as to the origin of the article. Therefore the use of another trade-mark which, though differing from it in many particulars, would be likely to be confounded with it, is fraudulent and illegal. And it does not in the least matter that the original trade-mark gives no indication of the maker, if it has become associated in the mind of the public with an article of a particular make.

A particular starch, which was first made in a little village called Glenfield, was given the name of "GLENFIELD Double Refined Powder Starch," and acquired a great reputation, being generally known as "Glenfield Starch." Its manufacture was then removed to another place but the same name was preserved. Another manufacturer, named Currie, then set up in Glenfield, and on his labels he described the article as Double Refined Powder Starch, Currie & Co., Starch and Corn Flour Manufacturers GLENFIELD. The latter word was put at the bottom of the label instead of at the top, as on the plaintiff's label, and there were other minor differences. It was held by the House of Lords that the difference was merely colourable, the object being to induce the public to purchase the defendant's starch as being the original Glenfield starch. *Witherspoon v Currie* L. R., 5 H. L. 503 at 514. See *Valentine Meat Juice Co v Valentine Extract Co., Ltd*, 83 L. T. 259, *The Dunlop Pneumatic Tyre Co v The Dunlop Motor Co*, [1907] A. C. 430, *Id v Dunn* 15 A. C. 252 reversing the judgment of Kay, J. in 41 Ch. D. 439. In this case the name was sought to be applied to an altogether different article, while Dunn applied the name to a saline aperient. Dunn used the same name *fruit salt* to a baking-powder,—altogether a different article. A different

view was, however, taken in *Neostyle Manufacturing Co. v. Flann's Duplicate Co.* [1904] 21 R. P. C. 589, where the plaintiff applied the word 'Neostyle' for a duplicating machine while the defendants used the word to the paper used for the duplicator. See also *Brooks and Co., Ltd. v. The Norfolk Cycle Co.* [1899] R. P. C. 523, 8 C. W. N. 421=1 Cr. L. J. 300; 10 Bur. L. R. 84=1 Cr. L. J. 375.

A similar decision was given in another case, where a favourite yarn shipped to India had obtained the name of *bhc-hathi* yarn, from two elephants which were prominent on the label. The use by a rival manufacturer of a label similar in colour and shape, and also bearing upon it two elephants, was prohibited as a fraudulent imitation, though the labels when put side by side were readily distinguishable. *Johnston v. Orr Ewing*, 7 A. C. 219; 6 M. 108. So as to a mere number attached to goods which had become associated with a particular firm by whom it was first adopted. 24 C. 364; see, too, *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83; *Hecla Foundry Co. v. Walker Hunter & Co.*, 14 A. C. 550 at 555; *John Harper & Co. v. Wm. Buller & Co., Ltd.*, [1896] 1 Ch. 142 at 146. The real question is whether the imitation is so close that it is reasonably calculated to deceive an incautious, ignorant or unwary purchaser, though not cautious traders, or those that purchase wholesale with a view to profit by retail trade. 13 Bur. L. R. 381=7 Cr. L. J. 113; *Ruchon v. M'Colgan*, [1901] R. P. C. 262; 32 C. 401; *Braby & Co's application*, 21 Ch. D. 223. If the same label had been used by the accused for some other species of goods other than yarn, there would be no infringement, as s. 478 is not aimed at protecting a mere get up, 2 L. B. R. 159; 10 Bur. L. R. 84=1 Cr. L. J. 375; 31 C. 411=8 C. W. N. 307=1 Cr. L. J. 140; see per Lord Westbury, *L. C. in Leather Cloth Co. v. American Leather Cloth Co.*, 35 L. J. (Ch.) 199 at 201; *Hall v. Barrows*, 33 L. J. (Ch.) 204.

A distinctive mark may be adopted by a person who is not the manufacturer, but the importer of goods, and he will acquire the property in that mark as indicating that all goods which bear it have been imported by him. The circumstance that he has only imported them into one

market does not deprive him of his property in the mark in other markets. 8 M. 149; 3 C. 417; *Cf* 27 C. 776; 24 M. 163; 6 Bom. L. R. 512=1 Cr. L. J. 581; 4 L. B. R. 192; 17 B. 584. A trade-mark may be acquired by adoption and user upon any vendible article, *e.g.*, photographs taken and developed by a particular person. 13 Bur L. R. 336. The gist of an offence under s. 480 is the use in the manner contemplated in that section. When the consignee refused to take delivery and the accused purchased the goods from the consignor and sold, it was no offence though the goods were marked with consignee's labels. 32 C. 969=3 Cr. L. J. 106. As remarked by Chitty, J., in *Monson & Co. v. Bæhm*, 26 Ch. D. 398 at 406, user is the life of a trade-mark and non-user the death of it. This is the principle on which a mark adopted to one article is not protected when adopted to another article. See the remarks of Bacon, V. C., in *Edwards v. Dennis*, 30 Ch. D. 454 at 463, and of Cotton, L. J., at 473, and of North, J., in *Hart v. Colley*, 44 Ch. D. 193 at 199. Books are the subject of trade, and are goods, within the meaning of Act IV of 1899, s. 2 (4), and if sold with a counterfeit property mark, an offence is committed under s. 486; 26 C. 232; 31 M. 512=17 M. L. J. 490=6 Cr. L. J. 374.

196. **Trade Names.**—There is a distinction between a trade-mark and a trade name. "A name may be so appropriated by use, as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade-mark properly so-called, or within the recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for the plaintiffs, just as much as the use of a trade-mark, and I think the law, so far as not altered by legislation, is the same." *Per* Lord Blackburn, *Singer Manufacturing Co. v. Loog*, 8 A. C. 15 at 32, referred to and followed in 40 C. 281=17 C. W. N. 227=14 Cr. L. J. 63=18 Ind. Ca. 404. The improper use of a trade-name may fall within

s. 5 of the *Merchandise Marks Act* and be punishable under s. 6 or s. 7 as a false trade-description." Such a trade name, if applied to goods in the manner stated in Act IV. of 1889, s. 5, would apparently be punishable as a false trade description. Where a mineral-water manufacturer issued water of his own manufacture in bottles bearing the name of a rival manufacturer, he was held punishable for applying a false trade description to his goods. The language in the English and Indian Acts as to trade descriptions is precisely the same, *Wood v. Burgess*, 24 Q. B. D. 162; *Kirshenboim v. Salmon* [1898] 2 Q. B. 19. Even the use of a man's own name may be fraudulent, if he has adopted the name for the purpose of passing the goods off as the goods of a rival manufacturer. *Pinet v. Pinet*, [1898] 1 Ch. 179.

A trade-mark which has once been private property, may, by long and undisputed public use, cease to be such.

"The test for determining whether a word which was once a trade-mark has become *publici juris*, is given by Mellish, L. J., in *Ford v. Foster*, L. R., 7 Ch., at 628. "I think the test must be, whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods. If the mark has once come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet, practically, as the right to a trade-mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods by the fraudulent use of the trade-mark, the right to the trade-mark must be gone." Cited and followed by Lindley, L. J. [1892] 2 Q. B., at 613. *A fortiori*, such a right will be lost if the owner of the mark has acquiesced in the use of it by another, and led him to believe that all claim to it by the original owner had been abandoned. 8 M. 149; *Daniel v. Whitehouse*, [1893] 1 Ch. 653.

197. Trade Descriptions.—Where a person is charged under s. 6 of the *Merchandise Marks Act*, with applying a false trade description to goods, it is not necessary to show that the trade description was physically attached to the goods. This was so held upon the construction of the

English Merchandise Marks Act, 1887, statute 50 & 51 Vict., c. 28, s. 5 (1) (d), which is *verbatim* the same as s 5 (1) (d) of the Indian Act. There a brewer, having received an order for six barrels of beer, delivered six casks of beer into the customer's cellar, and at the same time delivered at his house an invoice, in which the casks were described as barrels. The term "barrel," in the beer trade, means a cask containing thirty-six gallons. One of the barrels contained a considerably smaller quantity. It was held that the brewer might be properly convicted of applying a false trade description to the barrel. Pollock, B., said "The definition of the word 'apply,' in s 5, seems to suggest that it is not to be confined to a physical application: for it provides that a person shall be deemed to apply a trade description to goods who, *inter alia*, 'uses it in any manner calculated to lead to the belief that the goods in connection with which it is used are described by that trade description.' No doubt the description must be used in connection with goods, but I think we should be cutting down the intention of the Act, if we were to hold that the delivery of an invoice or other description of goods at the time of, or immediately after, the delivery of the goods themselves, was not a use in connection with the goods within the meaning of the section." *Budd v. Lucas*, [1891] 1 Q. B. 408; *Coppen v. Moore*, [1898] 2 Q. B. 300; *Cameron v. Wiggins*, [1901] 1 K. B. 1. And so, if an invoice referred to the goods by a trade name, this would be within s. 6, if the trade name "designated or described the goods" so as to amount to a representation that they were made by a particular manufacturer. See *Wood v. Burgess*, 24 Q. B. D. 162, at last page and 26 B. 289. It is probable that an advertisement or notice, that goods sold in a shop were articles manufactured by A. B., followed by a sale of them without anything more said, might also be held to be the use of a false trade description in connection with such goods. See *per Lord Cairns, C.*, 3 A. C. at 389. No verbal statement accompanying a sale can amount to an application of a trade description. *Langley v. Bombay Tea Co.*, [1900] 2 Q. B. 460.

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"The test for determining whether a word which was once a trade-mark has become *publici juris*, is given by Mellish, L. J., in *Ford v. Foster*, L. R., 7 Ch., at 628 "I think the test must be, whether the use of it by other persons is still calculated to deceive the public; whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade-mark as if they were his goods. If the mark has once come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet, practically, as the right to a trade-mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods by the fraudulent use of the trade-mark, the right to the trade mark must be gone." Cited and followed by Lindley, L. J. [1892] 2 Q. B., at 613. *A fortiori*, such a right will be lost if the owner of the mark has acquiesced in the use of it by another, and led him to believe that all claim to it by the original owner had been abandoned 8 M. 149; *Daniel v. Whitel* *supra*, [1892] 1 Ch. 695.

197. Trade Descriptions.—Where a person is charged under s. 6 of the *Merchandise Marks Act*, with applying a false trade description to goods, it is not necessary to show that the trade description was physically attached to the goods. This was so held upon the construction of the

English Merchandise Marks Act, 1887, statute 50 & 51 Vict., c. 28, s. 5 (1) (d), which is *verbatim* the same as s 5 (1) (d) of the Indian Act. There a brewer, having received an order for six barrels of beer, delivered six casks of beer into the customer's cellar, and at the same time delivered at his house an invoice, in which the casks were described as barrels. The term "barrel," in the beer trade, means a cask containing thirty-six gallons. One of the barrels contained a considerably smaller quantity. It was held that the brewer might be properly convicted of applying a false trade description to the barrel. Pollock, B., said. "The definition of the word 'apply,' in s 5, seems to suggest that it is not to be confined to a physical application, for it provides that a person shall be deemed to apply a trade description to goods who, *inter alia*, 'uses it in any manner calculated to lead to the belief that the goods in connection with which it is used are described by that trade description.' No doubt the description must be used in connection with goods, but I think we should be cutting down the intention of the Act, if we were to hold that the delivery of an invoice or other description of goods at the time of, or immediately after, the delivery of the goods themselves, was not a use in connection with the goods within the meaning of the section." *Budd v. Lucas*, [1891] 1 Q. B. 408; *Coppen v. Moore*, [1898] 2 Q. B. 300; *Cameron v. Wiggins*, [1901] 1 K. B. 1. And so, if an invoice referred to the goods by a trade name, this would be within s 6, if the trade name "designated or described the goods" so as to amount to a representation that they were made by a particular manufacturer. See *Wood v. Burgess*, 24 Q. B. D. 162, at last page and 26 B. 289. It is probable that an advertisement or notice, that goods sold in a shop were articles manufactured by A. B., followed by a sale of them without anything more said, might also be held to be the use of a false trade description in connection with such goods. See *per Lord Cairns, C.*, 3 A. C. at 389. No verbal statement accompanying a sale can amount to an application of a trade description. *Langley v. Bombay Tea Co.*, [1900] 2 Q. B. 460.

198. Remedies for fraudulent passing off.—Where an injunction is applied for to restrain the unauthorized use of a trade-mark, it is unnecessary to show any fraudulent intention. A trade-mark is property, and even an innocent interference with it will be restrained. *Millington v. Fox*, 3 Myl. & Cr. 338, affd. *Singer Machine Manufacturers v. Wilson*, 3 A. C. at 391, 396, 400; *Sommerville v. Schembri*, 12 A. C. 453; 2 Hyde, 485. Where, however, an action is brought for damages, it is essential to prove a fraudulent intent, *Crawshaw v. Thompson*, 4 M. & G. 357, and *a fortiori* where a criminal charge is made. In cases punishable under ss. 482, 487, 488 of the Penal Code, and s. 6. of Act IV. of 1889, fraud is an essential element in the case, but in each instance a person who has done the acts is punishable, unless he proves that he acted without intent to defraud.

The fraud which constitutes the offence under these sections, is either a fraud upon the owner of the mark which is imitated, or upon the purchaser, who is induced to buy something different from what he believed that he was buying. If fraud upon the owner of the mark is suggested, it is unnecessary to show actual damage to him. Where the defendants were sued for marking their cutlery with the name and device of a well-known firm of cutlers, the judge was held to have rightly directed the jury in telling them that they had only to consider two questions: first, whether the marks put upon the defendants' goods were calculated to lead an ordinary person to think that the marks were the marks of the plaintiffs, denoting their manufacture; secondly, whether the defendants falsely, and with intent to deceive, represented, by means of this similarity, that the knives they sold were of the plaintiffs' manufacture. *Wilde, C. J.*, said "As to the proof of damage, it is sufficient in actions of this kind to show that such acts have been done as were here proved, and that they were done with the intention, and that the natural result of them was to prejudice the plaintiffs. If the defendants adopted these marks, knowing they were calculated to induce persons to believe the goods they made and sold were goods

manufactured by the plaintiffs, that is sufficient proof of damage *Rodgers v Nowell*, 17 L. J. (C. P.) 52 at 56=5 C. B. 109 at 125; *Blopfeld v Payne*, 4 B. & Ad. 410; see per Lord Blackburn, *Singer Manufacturing Co. v. Loog*, 8 A. C. at 29. If, on the other hand, a fraud upon the purchaser is suggested, it is not necessary to show that the article actually supplied was in any way inferior to that which it purported to be.

Certain manufacturers of powder contracted with Government to supply powder. Owing to an accident, they were unable to manufacture it themselves, and, accordingly, they bought German powder put it into Government barrels, and labelled it with their own name and the description of the powder they had contracted to supply. The powder was fully equal to what they had contracted for. It was held that they were properly convicted under a section of the English statute, which corresponds to s. 6 of Act IV. of 1889 Lord Coleidge, C. J., said. "The Act is directed against the abuse of trade marks, and the putting off on a purchaser of, not a bad article, but an article different from that which he intends to purchase, and believes he is purchasing. That, I think, is the meaning of the word 'defraud' in this Act of Parliament; and in that sense only there was in the present case an intent to defraud." Mathew, J. said "The Act makes a new offence by providing that every person who applies any false trade description to goods shall be guilty of an offence against the Act. The words 'without intent to defraud' apply to cases where a person uses a particular mark, without any intent in so doing, to induce a buyer to accept goods which might otherwise be rejected." *Starey v. Childworth Gunpowder Co.*, 23 Q. B. D. 90, *Kirshenborn v. Salmon*, [1898] 2 Q. B. 19.

An intention to defraud is not negatived by showing that the immediate purchasers of the article which bears the false mark or description were not, and where known by the vendor not to be deceived by it. If it was sold to them with the intention or knowledge that they should sell it again to persons who would be taken in by it, that is a sufficient fraud. *Per* Lord Hatherley, C., *Wotherspoon v Currie*, L. R., 5 H. L., 508 at 517; *per* Lord Selborne, C., *Singer Manufacturing Co. v. Loog*, 8 A. C. at 18, and *Johnston v. Orr Ewing*, 7 A. C. 219 at 225, 226, *per* Kay, J., *Anglo-Swiss Condensed Milk Co. v. Metcalf*, 31 Ch. D. 454 at 458, 459; *Seiro v. Provezende*, L. R., 1 Ch. 192 at 196. The intention to defraud will be judged according to the effect that 'on,

however conveyed, or whatever form it may assume, will be likely to produce. This, again, will depend largely upon the class of persons to whom it is addressed. Where the persons likely to be influenced judge mainly by the eye, a similarity of device will be more important than any amount of countervailing written matter, which would probably not be understood. *Johnston v. Orr Ewing*, 7 A. C. at 225. So also persons unaccustomed to a critical examination of written documents may be easily taken in by marked similarity of description, without looking at minor statements which may alter its effect. *Singer Manufacturing Co. v. Wilson*, 3 A. C. at 390; *Weir* l. 556. It is not necessary that some one in fact should have been deceived. Ss. 480 & 481 merely require that the goods must be reasonably calculated to cause such deception, *Braham v. Beachim*, 7 Ch. D. 848; *Jay v. Ladler*, 40 Ch. D. 649. Even actual proof that someone was really deceived may not be sufficient to satisfy this test, for that some one may be an abnormal individual and his having been deceived is no proof that the goods as offered were reasonably calculated to deceive men in general, *Civil Service Supply Association v. Dean*, 13 Ch. D. 512 at 516; *contra Lee v. Haley*, L. R., 5 Ch. 155 at 160. But, as observed by Bhashyam Aiyangar, J., in 15 M. L. J. 45 at 60, the absence of deception where plaintiff's and defendant's marks have circulated side by side for a considerable time may go far to negative that the defendant's mark is reasonably calculated to cause it to be believed that his goods are the goods of the plaintiff. Further, plaintiff is not bound to wait until his customers are in fact deceived as the very life of a trade-mark depends upon the promptitude with which it is vindicated. The point has, however, been held to be one of law, see *per Cotton, L. J.*, in *Lyndon's Trade-mark*, 32 Ch. D. 109 at 118, where *Worthington & Co's Trade-mark*, 14 Ch. D. 8, and *Rosing's Application*, 54 L. J. (Ch.) 975, are followed. High Courts in India constantly interfere in revision on the question whether trade-marks are really different, or bear close resemblance to, each other. [1912] M. W. N. 85=13 Cr. L. J. 175=13 Ind. Ca. 927; 7 M. L. T. 309=11 Cr. L. J. 393=6

Ind. Ca. 683. On the other hand, no intention to defraud would be assumed where the document was in the nature of a trade description, addressed exclusively to expert wholesale dealers, who could not possibly misunderstand it, and which, in the ordinary course of business, would never reach any less experienced eyes *Per Lord Selborne, C., Singer Manufacturing Co. v. Loog*, 8 A. C. 15 at 20, 26.

The following rule was laid down by Kekewich, J., as to the admissibility of evidence to prove a fraudulent intention *Sarlechner v Apollinaris Co.*, [1897] 1 Ch. at 900.

"If the defendant's goods, on the face of them, and having regard to surrounding circumstances, are calculated to deceive, it seems to me that no evidence is required to prove the intention to deceive, nor ought time and money to be expended on any such evidence. The sound rule is that a man must be taken to have intended the reasonable and natural consequences of his acts, and no more is wanted. If, on the other hand, a mere comparison of the goods, having regard to surrounding circumstances is not sufficient, then it is allowable to prove from other sources that what is, or may be, apparent innocence was really intended to deceive. There can be no better evidence of intention to deceive than that of the deceiver himself, and this evidence may be given with equal force by admissions, oral or in writing, or by inferences from conduct. If the intent to deceive be once established, it is but a short step, though it is a step, and not an inevitable one, to the conclusion that the intention has been fulfilled, and that the goods are calculated to deceive."

199. Burthen of Proof.—Section 482 casts the burden of proof upon the accused that he acted without intent to defraud. In a civil action for restraining the use of a false trade-mark, the intent to defraud is immaterial. In *Singer Manufacturers v. Wilson*, L. R., 3 A. C. 376, Lord Cairns, C., observed, "I wish to state in the most distinct manner that in my opinion fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark." If a man's right to the exclusive use of a mark or name is infringed, it is of small account to him whether the invasion comes from a purpose to deceive or from ignorance or inadvertence or an honest misconception of the rights of the parties. It is not the

intention of the party that is in question, but the fact whether his conduct is misleading or has a tendency to mislead. How far, then, in cases under s. 482 of the Code, and s. 6 of Act IV. of 1889, is the Crown relieved of the necessity to prove fraud, by the provision that the defendant shall be convicted unless he proves that he acted without intent to defraud? The answer to this will depend upon the facts of each particular case. The prosecution must start by proving that the mark or description is, in fact, false. Where it is exactly the same as that of the goods which it untruly claims to be, as in the case of the soda water or gunpowder, mentioned in §§ 196 & 198, the intention to produce a false belief will be assumed, unless it is rebutted. Where, however, the imitation is not actual, but constructive, the Crown must prove that it was reasonably calculated to produce a false belief. Not that it might be taken for another mark or description, but that in all fair probability it would be taken for it. Here, again, the facts lead to a presumption that fraud was intended, which the defendant must repel. Practically, the Crown must always make out a *prima facie* case of fraud. The defendant must show that in the particular case he neither intended to commit a fraud, nor had any reason to believe that a fraud would be committed.

Under the English Merchandise Marks Act 1887, s. 2 (2) which is identical with s. 486 of the I. P. C., it was laid down that its effect was

"To make the master or principal liable criminally for the acts of his agents and servants in all cases within the section where the conduct constituting the offence was pursued by such servants or agents within the scope or in the course of their employment and subject to this: that the master or principal may be relieved from criminal responsibility, where he can prove that he had acted in good faith, and had done all that it was reasonable to do to prevent the commission by his servants and agents of offences against the Act." *Coppen v. Moore* [1893] 2 Q. B. 306 at 314; *Christie Manson v. Cooper*, [1900] 2 Q. B. 522

Nothing is said about fraud in ss. 183, 484, or 485, because the very definition of counterfeiting (s. 28) implies fraud. I imagine that these sections apply to

actual, not to constructive, imitations. The imitation need not be exact, but it must be intended to represent the very thing which is imitated, and not merely a completely different thing, which an ignorant person might mistake for it

Section 486 of the Code, and s. 7 of Act IV of 1889, seem to apply to persons who have been the victims of a fraud practised by someone else. To exonerate themselves they must be prepared to prove three distinct matters, marked (a), (b), (c). It is difficult to see the difference between acting innocently and acting without intent to defraud. It may perhaps mean that the defendant's mind was absolutely blank as to all facts from which fraud could have been inferred.

Act IV of 1889, s. 8, applies to persons who have been the innocent instruments employed in carrying out a fraud by the prime mover in the fraud. Section 18 (3) also protects a mere servant who has acted innocently under orders, and who has given full information against the master.

CHAPTER XII.

OFFENCES RELATING TO MARRIAGE.

200. General considerations regarding validity of marriage.—Before examining the particular offences created by Chapter XX. of the Penal Code, it will be necessary to offer some remarks on certain questions which affect the validity of a marriage or divorce. It is obvious that a man who was charged under s. 494 would be entitled to say that his former marriage was unlawful *ab initio*, or that it had been lawfully determined. If the charge were under s. 497 he would be equally entitled to dispute the validity of the marriage whose rights he was accused of violating.

Marriage.—Where the marriage in dispute has been celebrated in India, if the parties are Hindu, Buddhist, Muhammedan, Sikh, Jain, or Jew, the validity of the marriage will be governed by the personal law of the respective parties, or by such custom having the force of law as can be made out. The marriages of persons, one or both of whom are Christians, are regulated by the *Indian Christian Marriage Act*, XV. of 1872, as amended by later enactments. Parsee marriages are governed by Act XV. of 1865, and the re-marriages of Hindu converts by the *Native Converts Marriages Dissolution Act*, XXI. of 1866, while Act III. of 1872 provides for persons if there be any who do not profess the Christian, Jewish, Hindu, Muhammedan, Parsee, Buddhist, Sikh, or Jain religions. This is the Act popularly known as the Civil marriage or “Brahmo” Marriage Act regarding the amendment of which there was serious agitation recently.

Where the courts of one country have to consider the validity of a marriage contracted in another country, the general principle is that laid down by Lord Brougham in *Warrender v Warrender*. 2 Cl. & F. 488, at 530. “A marriage good by the laws of one country is held good in all others where the question of its validity may

arise. For the question always must be, Did the parties intend to contract marriage? And if they did that which, in the place they are in, is deemed a marriage, they cannot reasonably, or sensibly, or safely be considered otherwise than as intending a marriage contract. "This is the general rule of law." And it makes no difference that the marriage, if celebrated in the same manner in the country to which the parties belong would have been invalid, or even that the foreign country was sought for the express purpose of avoiding the difficulties thrown in the way of marriage by the law of their own country. This was the case with the well-known *Gretna Green* marriages, till they were dealt with by Act of Parliament. In *Dalrymple v Dalrymple*, 2 Hagg. Consist. 54, at 58, a question arose as to the validity of a Scotch marriage contracted by mere verbal assent, and without any religious celebration, one of the parties being an English gentleman, not otherwise resident in Scotland than as being quartered there with his regiment. Sir W. Scott said "Being entertained in an English court, it must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is, that the validity of Major Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin." And conversely, where a clandestine marriage in France, between two minors, British subjects, was celebrated in a manner which by the law of England was irregular, but not void and which by the law of France was absolutely null and void, it was decided that it must be treated as null and void in England also, since the English law sanctioned and adopted as the rule of decision the law of France. *Scrimshire v Scrimshire*, 2 Hagg. Consist. 395.

An exception to this rule was suggested by Lord Stowell in *Ruding v Smith*, 2 Hagg. Consist. 371 = 1 St. Tr. (N. S.) 1053 recognized by Sir W. P. Wood, V. C., in *Armitage v Armitage*, L. R., 3 Eq. 343. There a marriage had been celebrated at the Cape of Good Hope, a year after its surrender to the English, by

the chaplain of the British garrison, under a licence from the Commander in-Chief. The husband was twenty-one, and by Dutch law he was not entitled to marry without the consent of his parents till thirty, and in other respects the formalities of the Dutch law were not complied with. Lord Stowell said:

"It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where it is celebrated, is valid everywhere else; but they have not, *ex contrario*, established that marriages of British subjects, not good according to the law of the place where they are celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England. It is, therefore, certainly to be advised that the safest course is always to be married according to the

stirred; but if

difficulties, the

shall not be married abroad. And even in cases where no

difficulties of that in

practice has been seen

of the one country

and of the other that has silently accepted them, the courts of

this country, I presume, are not inclined to shake their validity

upon these large and general

case of marriage as

necessity as can be."

of Drampton, 10 East, 287, *Beamish v. Beamish*, 9 H. L. Ca. 419

= 11 Eng. R. 735, *Culling v. Culling* [1895] P. 116

It must be remembered that a marriage may be irregular, and in that sense illegal, without being invalid. Where the illegality consists in the breach of a statute it will always be a question whether the statute intended that a couple should be married in a particular way, subject to such penalties as are incurred by persons who knowingly violate a statute, or whether it intended that persons who believed they were married should find that they had never been married. Such a question arose in 1845 under an Act of New South Wales. It recited that doubts had arisen as to the validity of marriages between persons who were not members of the Church of England, and went on to provide that Scotch Presbyterians or Roman Catholics might, after making a declaration in a prescribed form, be married by a clergyman of the Presbyterian or Roman Catholic Church. The suit

was for nullity of marriage, the ground being that two persons, neither of whom was either Presbyterian or Roman Catholic, and who had never made the prescribed declaration had been married by a Presbyterian clergyman. Dr. Lushington pronounced against the prayer that the marriage should be declared null and void. After reviewing the series of English Marriages Acts and the decisions upon them, he said

‘ From this examination I draw two conclusions (1) That, so far as any decision is prohibitory as to that nullity was declared in the Act (2) That viewing the Succession Marriage Acts, it appears that prohibitory words, without a declaration of nullity were not considered by the legislature as creating a nullity, and that this is a legislative interpretation of acts relative to marriage *Cottrell v. Sweetman*, 1 Rob. Ecc. 301 at 317. In a case between the same parties 1 Rob., Ecc. 380, it was laid down that acts of Colonial legislatures which are *in pari materia* with Imperial Statutes should be governed by the same rules of construction. Where the actual words of an English Statute have been construed by a Court of Appeal in England, Colonial Courts are bound to place a similar construction upon similar words in a Colonial Act. *Preamble v. Hill*, 5 A. C. 342.

When we speak of a marriage which is valid in the country where it takes place being valid everywhere, this must be understood as referring to the *mode* in which it is celebrated, not to the substance of the marriage contract itself. Marriage means a different thing in Christian and in non-Christian countries, and when either of the parties to a marriage is a Christian, the question for a Christian court is not whether the marriage was valid where it took place, but whether that which was called a marriage in one country is the same thing which we call a marriage. As Lord Brougham said in the case already cited *Warrender v. Warrender*, 2 Cl. & F. 438, at 533.

‘ Marriage is one and the same thing, substantially, all the world over. Our whole law of marriage assumes this, and it is important to observe that we regard it as a wholly different thing, a different *status* from Turkish or other marriages among infidel nations, because we clearly never would recognize the plurality of wives, and consequent validity of second marriages standing

the first, which second marriages the laws of those countries authorize and validate."

When, therefore, a Christian enters into a marriage in a non-Christian country, it is not necessarily valid because it is a good marriage in that country, nor is it necessarily invalid because it does not profess to be a Christian marriage. The sole question is, whether the contract entered into between the parties was intended by them to be a "marriage as understood in Christendom, which for this purpose may be defined to be the voluntary union for life of one man and one woman to the exclusion of all others." *Per* Lord Penzance, *Hyde v. Hyde*, L. R. 1 P. & D. 130 at 133.

These principles are very clearly illustrated by two cases, in one of which the marriage was held invalid, while in the other it was held valid. In the former case, *In re Bethell*, 38 Ch. D. 220, a question arose as to the legitimacy of the child of C. Bethell, a domiciled English subject, who went through the form of marriage with Teepoo, a woman of the Baralong tribe in Bechuanaland, according to the custom of the Baralong tribe, and had issue by her. It was proved that the Baralongs had not any religion, nor any religious customs, and that polygamy was allowed in that tribe. Upon these facts, and with reference to the authorities above cited, it was held that the union of the parties, although it might bear the name of a marriage, and the parties of it might be designated husband and wife, was not a valid marriage according to the laws of England. On the other hand, in a suit brought to establish the legitimacy of the issue of a marriage celebrated in Japan, according to Japanese procedure, between a domiciled Englishman and a Japanese lady, the marriage was held valid. It was proved by a professor of law in Japan that the petitioner was precluded by the marriage from intermarrying with any other woman during the subsistence of the said marriage. The President, Sir James Hannen, after adopting the definition of marriage given by Lord Penzance, said: "Though throughout the judgments that have been given on this subject, the phrases

'Christian Marriage,' 'Marriage in Christendom,' or some equivalent phrase has been used, that has only been for convenience to express the idea. But the idea which was to be expressed was, that the only marriage recognized in Christian countries and in Christendom is the marriage of the exclusive kind I have mentioned, and here it was proved that in Japan marriage was of that character." *Brinkley v. Atty-Gen*, 15 P. D. 96.

The converse case of the validity of the marriage of a . . . but temporarily
re . . . Englishwoman
in . . . *Chetty, L. R.*
[1909] P. 67. There the husband, a high caste Hindu, capable under Hindu law of marrying an unlimited number of wives restricted to his own caste-women, went through a form of marriage with an Englishwoman at a Registrar's office in London. In resisting the wife's application for a judicial separation, he rested the invalidity of the English marriage on the ground that by his personal law he was incapable of entering into a marriage relationship with any woman outside his own caste

The President, *Sir Gorrell Barnes*, after an exhaustive consideration of the authorities, and the opinion expressed by Sir Bishyam Aiyangar, as an expert witness, approved of the following proposition in *Duoy on Domicile*, p 223 "A marriage celebrated in England is not invalid, on account of any incapacity of either of the parties, which, though enforced by the law of his or her domicile, is of a kind to which our Courts refuse recognition," and held that "a man marrying an English girl domiciled in this country, does not carry with him a disability of a personal character imposed by the law of his own country which would prevent him from entering into a marriage with her in his country, the marriage being one which would be recognised by the law of England, as valid between persons domiciled here . . . The present case is that of a British subject from British India marrying an English girl with due form in England, and now setting up an objection to the marriage that he has a personal disqualification when in India. Ought he be allowed to do so? Ought a foreigner domiciled abroad, who comes to this country and here marries, in due form according to English Law, another person domiciled in England, to be allowed to assert that he carries about with him, while here, the burden of an incapacity imposed by the laws of the foreign domicile to do that which he has done

voluntarily and in due form according to the laws of England, or to repudiate his marriage on the ground that he is incapable of doing what he has done, and ought our courts support such an assertion and repudiation, with the consequent effects on the position of the wife and the legitimacy of the child? To my mind the answer should be 'No.' This, of course, applies with equal, if not greater, force to a British subject domiciled abroad," p. 87). See also *Collins v. Hector*, 19 Eq. 334.

It is scarcely necessary to say that the rule in, *In re Bethell* and in *Brinkley v. Atty.-Gen.* only applies to the marriage of a Christian. If the English courts had to consider the marriage between Hindus or Muhammedans, they would decide it according to the law of their *status*. If, however, a Muhammedan were to marry in England an Englishwoman according to the law of the *Koran*, as has sometimes happened in late years, although the marriage would be perfectly valid according to Muhammedan law, it is very questionable whether an English, or even an Indian court, would recognize it as giving rise to any rights or liabilities on her part. Where a man who contracted a Mormon marriage, and had then abandoned Mormonism, sued his wife for a divorce, the court refused to grant it, on the ground that the ceremony had not produced the relation of marriage between the parties. *Hyde v. Hyde*, L.R., 1 P. & D. 130. The question would be, Can an Englishwoman, by any act of her own, get rid of the personal incapacity to contract a polygamous marriage? This seems to turn upon

not the only known exceptions to the rule, are those marriages involving polygamy and incest; those positively prohibited by the public law of a country from motives of policy; as, for instance, marriages contracted in violation of the *Royal Marriage Act*, 12 Geo. III., c. 11 (*The Sussex Peerage case*, 11 Cl. & F. 85=8 Eng. Rep. 1034=6 St. Tr. (N. S.) 79. As to marriages originally void by reason of fraud, see *Moss v. Moss*, [1897] P. 263, and those celebrated in foreign countries by subjects entitling themselves, under special circum-

stances, to the benefit of the laws of their own country*
 "In respect to the first exception, that of marriage
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 estuous
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English Courts, as has been shown, not merely consider a polygamous marriage unlawful, but treat it as not coming within their definition of marriage. Suppose, then, that a Muhammedan in England contracted a marriage with an Englishwoman. The question would be, what was the nature of the contract entered into? If the marriage was celebrated in a church, it would be a Christian, not a polygamous marriage, and would be valid as such. The statutes which authorise marriage before a Registrar make no reference to the religion of the parties, and contain nothing of a religious element. But as they all require a declaration by the parties that they know of no matter of lawful hindrance to the marriage, see 19 & 20 Vict., c. 119, it must be assumed that the statutes only contemplate a marriage which is considered lawful in England, and therefore monogamous. If, however, the marriage were celebrated in the mosque at Liverpool by a Muhammedan Cazi, it would purport to be a Muhammedan marriage, with all its incidents. It would be perfectly good by Muhammedan law, but it would be invalid and a nullity by the law of the country where it took place, and therefore, according to international law, it ought to be treated as invalid everywhere. If such a marriage took place in British India, and if the Englishwoman was a professing Christian, it would be

* See as to marriages celebrated abroad by a British consul, stat. 12 & 13 Vict., c. 68, or by a British clergyman or chaplain, 4 Geo. IV., c. 91. Foreign Marriage Act, 1892 (55 & 56 Vict., c. 23). The Foreign Marriage Act, 1892, only applied where both parties to the marriage were resident in the place where it was solemnised. This defect was remedied by various provisions contained in the Foreign Marriages Orders in Council, 1902 and 1903. The last-named Order suggested, that effect might be given to it in British Colonies or in India by special legislation, regulating the notices to be given where only one of

invalid, unless it was celebrated under Act XV. of 1872. And under s. 88 of that Act, no marriages are valid which are forbidden by the personal law of either of the parties. Apparently, then, the only cases in which a difficulty could really arise would be, first, if the woman, having previously adopted the law of the Koran, had married according to Muhammedan ceremonial in British India; or, secondly, if the marriage had taken place in a native State. In either case the question would probably depend on the domicile of the woman at the time of marriage, as being English or otherwise.

The effect of domicile upon the decision of such cases has been much considered where the objection to the marriage was that it was of an incestuous character. In *Brook v. Brook*, 9 H. L. Ca. 193, at 207, 212, 214, two domiciled British subjects, being a widower and the sister of his deceased wife, went to Denmark and married, marriages between persons so related being legal in that country. Their marriage was held void in England. Lord Campbell, C., said: "Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such in its essentials as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be considered as void in the country of domicile, though not contrary to the law of the country in which it was celebrated". "It is quite obvious that no civilized State can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country, to enter into a contract to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or any of its fundamental institutions. A marriage between a man and the sister of his deceased wife, being Danish subjects domiciled in Denmark, may be good all over the world, and this might likewise be so, even if they were native-born English subjects, who had abandoned their English domicile." A similar decision was given in a case where the widower being a domiciled British subject married his

deceased wife's sister, who was resident and domiciled in Frankfort, at the place of her domicile, where such marriages were lawful. In this case the widower was a native of Hesse Cassel, where such marriages were also lawful, but subsequently became naturalized and domiciled in England. *Mette v. Mette*, 1 Sw. & Tr. 416 = 28 L. J. (P. & M) 117; *re De Wilton* [1900] 2 Ch. 481. See *Harford v Morris*, 2 Hagg. (Consist) 423, at 434; *Warrender v. Warrender*, 2 Cl & F. 488.

The judgment in *Brook v Brook* was expressly rested by Lord Campbell on the ground, that various statutes of the reign of Henry VIII had declared such marriages to be contrary to God's law, and that the same view must be taken in all courts and proceedings of the kingdom and not on the ground that the stat. 5 and 6 Will. IV, c. 54, had declared such marriages to be *void ab initio*, instead of being merely voidable as they had been before. He intimated his opinion, that on this ground even the Danish courts, if the question came before them, would decide against the validity of the marriage. It was from the latter point of view, *Sottomayor v De Barros*, L. R., 2 P. D. 81; 3 P. D. 1 had to be considered. Here two Portuguese subjects, who were first cousins to each other, came to reside in England in 1858, and in 1866 they were married in London. In 1873 they returned to Portugal, and subsequently the lady petitioned to have her marriage set aside as being null and void. It was admitted that by the law of Portugal marriages between first cousins were held to be incestuous, and therefore illegal, though they might be celebrated under a Papal dispensation. Both cousins were Portuguese by domicile when they came to England, and the case was argued on the supposition (which turned out to be erroneous) that the domicile of both parties continued to be Portuguese at the time of the marriage. On this assumption the Court of Appeal held that the marriage was void. They said L. R. 3 P. D., at 5—7. "The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted, but, as in

other contracts, [in the later stage of the case, Sir J. Hannen disputed the soundness of this law as relating to contracts L. R., 5 P. D., at 100] so in that of marriage, personal capacity must depend upon the law of domicile. And if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons, both, at the time of their marriage, subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized. "Our opinion on this appeal is confined to the case where both the contracting parties are, at the time of their marriage, domiciled in a country, the laws of which forbid their marriage. All persons are legally bound to take notice of the laws of the country where they are domiciled. No country is bound to recognize the laws of a foreign State when they work injustice to its own subjects. And this principle would prevent the judgment in the present case being relied on as an authority for setting aside a marriage between a foreigner and an English subject domiciled in England, on the ground of any personal incapacity not recognized by the law of this country."

When the case came on for an investigation of the facts, the Probate and Divorce Court found that the respondent, who was respondent, had acquired an English domicile at the time of the marriage, and therefore held that it was valid, affirming the rule stated in p. 223 of *Dacey on Domicile*: (see p. 801 *supra*). L.R., 5 P.D. 94, at 104. The principle of the judgment went very much beyond that of the Appeal Court, and the president would evidently have given the same decision if both parties had retained their Portuguese domicile. He adopted, not only the decision, but the reasoning of *Cresswell, J.*, in *Sidmonin v. Mallac*, 2 Sw. & Tr. 67=29 L. J. (P. & M.) 97. There a Frenchman of twenty-nine

and a French girl of twenty-two, both domiciled in France, came over to England to be married, in order to evade the French law which renders persons of that age incompetent to contract marriage without the consent of their parents. On their return to France, the French courts declared the marriage void. A suit was then brought in England for a similar purpose, but was dismissed. The Court held that where the marriage itself was one which might lawfully be contracted, the personal capacity to enter into such a marriage must be judged in the courts of the country where it was celebrated, by the laws of that country alone. This decision was also recognized by the Court of Appeal, in *L. R.*, 3 *P. D.*, at 7, but was put on the narrow

of her domicile for breaches of marital relations. This dictum was followed by Baigrave Dean, J., in *Stathatos v. Stathatos*, [1913] P. 46. There an Englishwoman married a Greek, but subsequently he got the Greek court to adjudge the marriage a nullity on the ground no priest of the Greek church was present at the English marriage. The President said, "I think that for an Englishwoman, as Miss Henry the present petitioner was, domiciled here and married here to be told that she is a wife in England but no wife in Greece, the country of her husband, would be a disgrace both to our law and to our practice. There must be a way out of it. The only way out of it is that which has been suggested. She became a Greek subject domiciled in Greece by her marriage with the respondent. The Greek court has said: 'No, we cannot recognize you; you must go back to your English domicile and get what relief you can from the courts of that domicile.' She has come to this court and asks for relief by virtue of her English domicile which, she says, the Greek court has thrown her back upon." This view was followed by Sir Samuel Evans in *deMontaigne v. deMontaigne*, [1913] P. 154. A decision similar to that in *Simonin v. Mallac*, was given by the court of the domicile in an Irish case. *Steele v. Braddell*, *Milward*, *Ecc. Rep.* 1, cited and approved by Lord Campbell in *Brook v. Brook*, 9 H. L. Ca. at 216. There an Irish statute enacted that any marriage had, without the consent of the parents or guardian, where either of the parties was under twenty-one, should be absolutely null and void, and might be set aside by suit. An Irish minor went to Scotland, and there married a Scotch lady without the consent of her father. Such a marriage was good by Scotch law. On a suit brought in Ireland to declare the marriage void, it was held valid, on the ground that as both parties were of the age of consent, and as the marriage was valid by the law of Scotland, it could not be impeached in the country where the husband was domiciled. It would have been otherwise if the union had been prohibited by the law of Ireland as being contrary to the Word of God. In another Irish case of *Usher v. Usher*, [1912] 2 Ir. R. 445, a marriage was solemnized in Ireland

between two Roman Catholics by a Roman Church Priest in the presence of only one witness and in contravention of the decree of the Council of Trent requiring at least two witnesses. It was held the marriage though in contravention of the law of the Roman Catholic Church was valid being in accordance with the law of the land. In the case of a Hindu proceeding to England to get married in a Registry under the provisions of 19 & 20 Vict. C. 119 so as to avoid the declaration of negation of all faiths required by s. 10 of the Indian Act III of 1872, the same result will follow and the marriage will be good even in India, as there is no statutory prohibition of such marriages, the declaration under s. 10 of the Indian Act being only an integral part of the marriage ceremonial under the Act, as the consent of the parents under French law was declared to be in *Simmon v. Mallac*.

In *Brook v Brook*, 9 H. L. Ca. at 214, Lord Campbell, C., expressed the opinion that the Act 5 & 6 Will. IV., c. 54, which rendered marriages with a deceased wife's sister void, and not merely voidable, would not extend to any conquered colony in which a different law of marriage prevailed. Accordingly, it has been held that the statute does not extend to India, even within the Presidency towns. 2 Hyde, 65. The obligation upon Englishmen not to contract such marriages does not, however, depend upon that statute, but upon the law which prevailed in England before it was passed. Accordingly, those who are governed by that law come under the same prohibition if they contract such marriages in India. Further, the English law, as declared by the statutes of Henry VIII, was itself only a branch of the general Ecclesiastical law, which then and still prevails in many parts of Christendom, and this binds many classes of Christians who are not subject to English law. The question has arisen in India in both ways. In 12 C. 706, the parties who had contracted such a marriage were East Indians, members of the Roman Catholic Church, and married according to its rites. In a suit by the husband for a declaration of nullity of marriage, the question arose, What was the

of her domicile for breaches of marital relations. This dictum was followed by Bargrave Dean, J., in *Stathatos v. Stathatos*, [1913] P. 46. There an Englishwoman married a Greek, but subsequently he got the Greek court to adjudge the marriage a nullity on the ground no priest of the Greek church was present at the English marriage. The President said, "I think that for an Englishwoman, as Miss Henry the present petitioner was, domiciled here and married here to be told that she is a wife in England but no wife in Greece, the country of her husband, would be a disgrace both to our law and to our practice. There must be a way out of it. The only way out of it is that which has been suggested. She became a Greek subject domiciled in Greece by her marriage with the respondent. The Greek court has said: 'No, we cannot recognize you; you must go back to your English domicile and get what relief you can from the courts of that domicile.' She has come to this court and asks for relief by virtue of her English domicile which, she says, the Greek court has thrown her back upon." This view was followed by Sir Samuel Evans in *deMontaignu v. deMontaignu*, [1913] P. 154. A decision similar to that in *Simonin v. Mallac*, was given by the court of the domicile in an Irish case. *Steele v. Braddell*, *Milward, Ecc. Rep.* 1, cited and approved by Lord Campbell in *Brook v. Brook*, 9 H. L. Ca. at 216. There an Irish statute enacted that any marriage had, without the consent of the parents or guardian, where either of the parties was under twenty-one, should be absolutely null and void, and might be set aside by suit. An Irish minor went to Scotland, and there married a Scotch lady without the consent of her father. Such a marriage was good by Scotch law. On a suit brought in Ireland to declare the marriage void, it was held valid, on the ground that as both parties were of the age of consent, and as the marriage was valid by the law of Scotland, it could not be impeached in the country where the husband was domiciled. It would have been otherwise if the union had been prohibited by the law of Ireland as being contrary to the Word of God. In another Irish case of *Usher v. Usher*, [1912] 2 Ir. R. 445, a marriage was solemnized in Ireland

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meaning of s. 19 of the Divorce Act, IV. of 1869, which authorized such a declaration on the ground that "the parties are within the prohibited degrees of consanguinity (whether natural or legal) or of affinity?" The Full Bench, upon an examination of the whole course of matrimonial legislation for India, held that it was not intended to introduce the English law of prohibited degrees to persons not already governed by it, and that "the prohibited degrees for the parties to this marriage were not the degrees prohibited by the law of England, but those prohibited by the customary law of the class to which they belong, that is to say, the law of the Roman Catholic as applied in this country." That law, it appeared, prohibited such marriages unless a dispensation was obtained from the Archbishop of Calcutta. Three years later, in a case where such a marriage was celebrated between domiciled English people, members of the Church of England, Mr. Justice Straight held it invalid (Unreported Case referred to in 16 A. at 215 on the ground that the parties were subject to the law of their domicile. In 17 C. 324, an exactly similar case which arose in 1890, Wilson, J., while not deciding whether the marriage was rendered illegal by the law of the domicile, decided that it was necessarily bad, as being opposed to the law of the Church of England. See also 16 A. 212, at 215.

201. Evidence in proof of Marriage.—The fact of marriage, like any other fact, must be proved by the person whose case requires it to be established. 1874 P. R. No. 4; 1878 P. R. No. 27; 1893 P. R. No. 17. In offences under Chapter XX. of the Code, the burthen rests on the prosecution. If a man, being charged with rape, asserts that the woman was his wife, the burthen would rest on him. The amount of proof which establishes such a *prima facie* case as is sufficient, unless it is displaced, varies according to the nature of the proceeding, and according to the sort of evidence which may naturally be expected in each particular instance. As Lord Cranworth said in the *Breadalbane* case: L. R., 1 H. L. Ca., at 200. "If the validity of the parents' marriage should be disputed, it might become necessary for the

person claiming as their child to establish its validity. And inasmuch as in England all marriages are solemnized in public, and publicly recorded, it is reasonable to require the claimant to give positive evidence of its celebration, or else to explain why he is unable to do so." In civil cases, however, such evidence, though it is the most satisfactory, is not necessary. As the Judicial Committee said in such a case from Ceylon *Sastry v. Sembecetty* 6 A. C. 364, at 371. "According to the Roman law, there was a presumption in favour of marriage, rather than of concubinage. It does not, therefore, appear to their Lordships that the law of Ceylon is different from that which prevails in this country, viz., that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage." In a divorce suit in Bombay where it was objected on appeal that no evidence of the marriage had been given, though it had not been denied, and no issue had been raised upon it, Sargent, C.J., said "Strict proof of marriage is not necessary, the mere fact that people apply to a Court for a divorce raises a presumption of marriage 20 B. 362 at 364. See also *George v. Thyer*, [1904] 1 Ch. 456. Mere reputation that such persons were married, entertained by friends and neighbours, is sufficient for this purpose and even if the reputation be divided, it is still admissible for whatever it is worth. *Lyle v. Ellwood*, 19 Eq., 98. Upon this point, however, the Indian Law of Evidence is more strict, as mere opinion is inadmissible, even in civil cases, as proof of marriage, unless it is evidenced by conduct, or is a statement of a deceased person who had special means of knowledge. Ev. Act s. 32, cl. (5), (6), s. 50.

In criminal cases it is different. Were the fact of a marriage is an essential element in the offence charged, the prosecution must make out their case completely, and not by mere inference. Although in the great majority of cases people who live together as man and wife do so because they are man and wife, there are very numerous exceptions, and the prisoner has a right to

call upon the Crown to exclude those exceptions. In a case of enticing away a married woman, if it is proved that the marriage was voidable at the option of the wife, *e. g.* in Muhammedan Law, under the doctrine of '*option of puberty*,' then no offence under s. 498 is made out. 1910 P. R. No. 33=1910 P. W. R. (Cr.) 33=11 Cr. L. J. 664=8 In. Ca. 494. The rule upon this point was laid down by Lord Mansfield in the case of *Morris v. Miller*, 4 Burr. 2057=1 W. Bl. 632. That was an action for *crim. con.*, that is, a suit for damages for adultery with the plaintiff's wife. There the plaintiff was unable to prove the actual marriage either by any registry, or by witnesses who were present when it took place. But he proved articles between the man and his wife made after marriage, for the settling of the wife's estate with the privity of the relations on both sides. He proved cohabitation, that the lady bore her husband's name, and was received as such by everybody. He also proved that the defendant confessed that she was Captain Morris's wife, and that she had committed adultery.

Lord Mansfield, C.J., said: "We are all clearly of opinion that in this kind of action, an action for *crim. con.*, there must be evidence of a marriage in fact. Acknowledgment, cohabitation, and reputation, are not sufficient to maintain this action. But we do not at present define what may or may not be evidence of a marriage in fact. This is a sort of criminal action. There is no other way of punishing this crime at common law. It shall not depend upon the mere reputation of a marriage which arises from the conduct and declarations of the party himself. In prosecutions for bigamy a marriage in fact must be proved." See as to the insufficiency in a case of bigamy of an admission by the defendant that he had been previously married, *R. v. Savage*, 13 Cox 178, by Lush, J., and Lyon's case, 1 East, P. C. 468.

This rule has been followed in India. The Indian Evidence Act, s. 50, provides that opinion evidenced by conduct shall not be sufficient to prove marriage in prosecutions under Chapter XX. of the Code. In a case under s. 498, the Calcutta High Court held that living together as man and wife was sufficient evidence of marriage to throw upon the prisoner the obligation to displace it. 8 B. L. R. Appx. 63=17 W. R. (Cr.) 5. This case, however, was formally overruled by a Full Bench in 5 C. 566 in a prosecution under s. 497. There

the only evidence of the marriage was the statement of the prosecutor, "She is my wife by marriage," and the statement of the woman, "I am married to Somea"—the prosecutor. The Court held the evidence insufficient. They said: "The provisions of the Evidence Act, s 50, seem to point out very plainly, that where the marriage is an ingredient in the offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved in the regular way." A similar decision was given in 5 A. 233, where the evidence was exactly the same, with the addition of a statement by the prisoner before the committing magistrate, "Parbattia is the wife of Dubu."

Straight, J, following the decision last quoted, said: "The judge should have required some satisfactory proof, independent of the very vague assertions of Dubu and Parbattia, to show that the ceremony of marriage, as recognized among *Kachis*, had taken place between them, and his remark that 'the evidence clearly establishes that Parbattia is the lawful wife of Dubu, Kachi' was obviously made without sufficient care or reflection."

The principle laid down in both these cases, that satisfactory evidence of an actual marriage must be given, is, of course, correct, and in the case which was overruled no such evidence had been offered. See *Ratanlal* 190 where the above rulings were followed. The accused's statement cannot be used where the prosecution case contains a serious gap regarding proof of a valid first marriage, 26 C. 49; *Flaherty*, 2 C. & K. 782; *Lindsay*, 66 J. P. 505=18 T. L. R. 761; *Savage*, 13 Cox. 178, *contra John Newton*, [1843] 2 M. & Rob. 503=1 Cox. 30. But it is difficult to see why the evidence in 5 C. 566 & 5 A. 233 was considered insufficient. In the Full Bench case, *Garth*, C J, merely said, "The fact of the marriage must be strictly proved in the regular way." In the Allahabad case, Straight, J, seems to have thought evidence should have been offered to show that the ceremonies used were sufficient for the purpose of a *Kachi* marriage. The ordinary evidence of a marriage is that of persons who swear that they were present at it, and that the parties now concerned are the same whom they saw married.

If there is any doubt whether the marriage was a legal one, they are cross-examined, and if their answers leave the matter in doubt, of course the case breaks down. It is difficult to see why the evidence of the alleged husband and wife themselves, if given with sufficient particularity as to time, place, and circumstances, and subject to cross-examination, should not be enough to prove a fact of which they might possibly be the only available witnesses, and as to
ve.
In neither . . . to have been in any way questioned, by cross-examination or otherwise. In *9 M. 9*, where the evidence of a marriage was that of the husband, the wife, and the mother of the latter, given in just the same bald and meagre manner, the Madras High Court held it to be sufficient, and refused to be bound by the Calcutta and Allahabad decisions. In a still later case, *20 A. 166*, however, on a charge of enticing away a married woman, where the only evidence of the marriage was that of the complainant and the woman, the High Court referred back the case for further enquiry, saying that in case of this kind, where a false charge may easily be made of enticing away a woman, said to be a married woman, but possibly only a mistress, the Court should require some better proof of the marriage than the mere statement of the complainant and the woman. See also *4 W. R. (Cr.) 31 & (Cr. Let.) 10 7 C. W. N. 143; 1882 P. R. No. 40; 1895 P. R. No. 23; 13 C. L. R. 125; 2 C. W. N. 245, 1893 P. R. No. 17; 1898 A. W. N. 166; 3 A. L. J. 224n; 3 Ou. Ca. 342; 2 Sind. L. R. 22=10 Cr. L. J. 235; 15 Cr. L. J. 78=22 Ind. Ca. 430; 5 Sind. L. R. 270=13 Cr. L. J. 541=15 Ind. Ca. 813; 11 A. L. J. 994; 1894 P. R. (Cr.) 5*, where *1882 P. R. (Cr.) 40* is not followed; *1 Ind. Jur. (N. S.) 8*, which would support the proposition that to sustain a criminal charge strict proof of marriage is necessary.

Identity of the first husband with the person proved to be alive at the time of second marriage may be established by proving a photographic likeness of the first husband shown to witnesses present at the first marriage, *Tolson, 4 F. & F. 103; Maincarling, D. & B.*

132=26 L. J. (M. C.) 10; *Simpson*, 15 Cox. 323. See, however, *Frith v. Frith*, [1896] P. 74.

Where an actual marriage has been celebrated with the *bonâ fide* intention of making the parties man and wife, the Court will presume everything that is necessary to make the marriage formally legal, on the principle *omnia præsumuntur rite esse acta*. See Ev. Act, s. 114, cl (e); 1 Cr. L. J. 701. In two cases of bigamy, in one of which the marriage was performed in a Wesleyan chapel, in the other in a building adjoining a church which was under repair, the Court presumed that the places were duly registered and duly licensed *R. v Mainwaring*, D & B. 132=26 L. J. (M. C.) 10; *R. v Cresswell*, 1 Q. B. D. 446. In this respect there appears to be no difference between civil and criminal cases. Where a marriage had been celebrated by a duly authorized clergyman in a private house, where it would have been unlawful without a licence from the Bishop, and there was no evidence of any licence; and the Bishop swore that to the best of his recollection he did not give any licence, and that he would not have given one in the particular case, as the parties had been living together in concubinage, the House of Lords held that the presumption in favour of marriage must prevail *Piers v Piers*, 2 H. L. Ca. 331. So in 12 C. 706, where a marriage would have been unlawful by reason of the affinity of the parties, without a dispensation from the Roman Catholic Archbishop, the Court assumed that such a dispensation had been given. See 19 M. 273. In all these cases the clergyman would have been acting in violation of a perfectly well-known duty, and would have been liable to punishment if he had married the parties without the necessary authority.

Where either party relies upon a foreign marriage as being valid by the law of the country in which it was celebrated. See *ante* § 200 at pp 796-97 *supra*. He must not only prove the fact of the marriage, but that it was good by the law of the place where it was performed. Foreign law is a fact which must be proved by experts, that is, by persons specially skilled in it, either by virtue of their profes-

sion as lawyers, or as holding some office which requires a special knowledge of the branch of law which is to be proved, *Susser Peerage* case, 11 Cl. & F. 85, at 134. Where it was necessary to prove the validity of a Scotch marriage, it was held that the evidence of the sister of one of the parties, to the effect that she had been married in the same way, and that people in Scotland were always so married, was not merely insufficient, but inadmissible. *R. v. Povey*, Dears 32=22 L. J. (M. C.)

19. And the same decision was given where the evidence offered was that of the Roman Catholic priest who performed the marriage, who said that he had performed it in accordance with the law of Scotland, and that he had celebrated numerous marriages in the same way during a period of twelve years. *R. v. Savage*, 13 Cox. 178. On the other hand, where it was proved that a marriage was performed in Illinois between two Roman Catholics, who were English subjects, by a Roman Catholic priest, in a Roman Catholic Church, after the publication of banns, according to a marriage service read from a book, it was held by the majority of the Irish judges to be valid, without any evidence of the law of Illinois. The decision was put upon the ground that the evidence showed a marriage which was valid by English law, and by the law of the Roman Catholic Church, and that it must be assumed, in the absence of evidence to the contrary, that it was not contrary to the law of Illinois. *R. v. Griffin*, 14 Cox. 308.

According to English practice, foreign law must be proved by the oral evidence of the expert relied on. In India the Court may inform itself, or receive information, by means of published collections of the law or law reports of the foreign country, or by the opinions of experts to be found in their works. Ev. Act, ss. 38, 45, 60, 84, 87.

202. **Domicile determines the Forum competent to grant Divorce.**—The courts of a man's domicile have complete jurisdiction over his matrimonial *status* in regard to divorce, and their decisions, and all the consequences flowing from them, ought to be accepted by the courts of every other nation.

the matrimonial offence or offences have been committed " *Per* Lopes L.J. (*Gould v. Gould*, (1892) p. 240 at 243.

A remarkable illustration of this rule will be found in the case of *Wilson v. Wilson*, L. R., 2 P. & D. 435. There both parties, at the time of their marriage, and up to the date of their final separation, were resident and domiciled in Scotland. The marriage was in Scotland, and the adultery was in Scotland. Some time after the separation, the husband took up his residence and became domiciled in England. He then brought his suit for divorce in the English court, and it was held by Lord Penzance that the court not only had jurisdiction, but that it was the proper court to sue in. At one time it was supposed that the decision in *Lolley's* case, Russ & Ry. 237 had settled that no foreign court could dissolve a marriage celebrated in England for a ground which would not, in England, justify a divorce *a vinculo matrimonii*. This notion, however, was finally overruled by the House of Lords in the case of *Harley v. Farnie*. 8 A C 43; see *per* Lord Selborne, at 50. There a domiciled Scotchman came to England and there married an English lady. They went to Scotland to live, and the wife obtained in the Scotch court a divorce *a vinculo matrimonii* on the ground of the husband's adultery which in England would only have justified a judicial separation. He returned to England, where he married another English lady during the life of the former. It was held that both the divorce and the second marriage were good. Lord Selborne pointed out that the term "English marriage," as used in *Lolley's* case meant a marriage which, being entered into by a domiciled Englishman, became exclusively subject to English law, that the resort to the Scotch court, in his case, was merely collusive, and that he had undergone no change of domicile which would justify the action of

that court. This ruling was followed in *Armitage v. The Atty-Gen*, [1906] P. 135. There the petitioner, an Englishwoman, first married an American citizen domiciled in New York but temporarily residing and carrying on business in England. She subsequently instituted divorce proceedings in South Dakota and obtained a decree on grounds which neither the English courts nor the New York courts could recognise as valid for a divorce. Subsequently she married one Armitage, and on its being proved that the New York courts would recognise the South Dakota decree of divorce, it was held the English courts were also bound to recognise its validity and the subsequent marriage was therefore valid.

It is equally well settled that no foreign court can effectually divorce parties who, at the commencement of the suit, are only temporary residents within their jurisdiction. Such a decree may operate in the country where it is given, but it will be disregarded by the courts of the domicile, or of any other country. This was first held in England in *Lolley's case*. *Russ. & Ry.* 237. There a domiciled Englishman was indicted for bigamy, he having married a wife in Liverpool, and, afterwards, having married another woman in the same place during the life of the first. He pleaded that he had gone to live in Scotland, and that there his first wife had obtained a divorce *a vinculo-matrimonii* from him on the ground of his adultery. The plea was held bad for the reasons above stated. Similar decisions were subsequently given by the House of Lords. *Dolphin v. Robins*, 7 H. L. Ca. 390; *Shaw v. Gould*, L. R. 3 H. L. Ca. 55. Conversely, the English court refused to grant a divorce where the original domicile, marriage, and cohabitation was in Jersey, and the husband then abandoned his wife and acquired a new domicile in America. *T. v. T.* That the wife, after her desertion, had assumed it to be legally possible for her to marry again as it appeared that the husband had never come within the jurisdiction of the English tribunal. *Le Sueur v. Le Sueur*, 1 P. D. 139. So the English courts have invariably refused to recognize divorces granted by the

American courts, at the suit of a wife against a husband who was not domiciled within the American jurisdiction. *Shaw v. Atty.-Gen.*, L. R., 2 P. & D. 156; *Green v Green*, (1893) P. 89; see *Armitage v. The Atty.-Gen.*, (1906) P. 135, for a case where the husband had an American domicile

It has been several times laid down in the Scotch and English courts, that, for the purpose of founding valid proceedings for divorce, there might be a matrimonial domicile, which was something short of a complete and actual domicile, and something more than a mere temporary or collusive residence. It was defined as being the permanent matrimonial home of the parties for the time being. *Pitt v Pitt*, 4 McQueen, 627; *Brodie v. Brodie*, 2 Sw. & Tr. 259=39 L. J. (P. & M.) 185; *Niboyet v. Niboyet*, 4 P. D., 1. This doctrine, however, was finally set aside by a decision of the Privy Council in a case from Ceylon, *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.* The plaintiff was a member of the Ceylon Civil Service, but it was admitted that he retained his English domicile. While on leave of absence, he married a French lady in London, with a view to resuming his residence in Ceylon, as, in fact, he did. Several years afterwards he sued her for a divorce, charging three acts of adultery—one committed on a steamer returning from Europe to Ceylon, one in France, and a third in Ceylon. It was found by the Committee that the Ceylon courts had jurisdiction to grant a divorce *a vinculo*, and the Procedure Code authorized any husband to sue for a divorce on the ground of adultery, in the court in which he was resident. It was admitted that there was no rule of the Roman-Dutch law, which was the *lex loci*, which authorized, nor any statutory provision which conferred a jurisdiction to divorce persons not domiciled in the island. It was contended, however, that international law recognized such a jurisdiction in the courts of the

* The Board on this occasion was designedly constituted so as to include the leading English, Scotch, and Irish law lords, so that it was practically a decision of the House of Lords as well as of the Judicial Committee, *folld*. *Sinclair's Divorce* [1897] A. C. 469, *Armylage v. Armylage*, (1898) P. 178; *Roberts v Brennan*, [1902] P. 143.

matrimonial domicile, and undoubtedly, if such a domicile could exist, it would have been created by the facts of the case. This contention was overruled. Their lordships admitted "that there were unquestionably other remedies for matrimonial misconduct short of dissolution, which, according to the rules of the *jus gentium*, might be administered by the courts of the country in which spouses, domiciled elsewhere, were for the time resident:" for instance, alimony, in the case of desertion, or judicial separation in the case of cruelty. "In order to sustain the competency of the present suit, it was necessary for the appellant to show that the jurisdiction assumed by the District Court was derived, either from some recognized principle of the general law of nations, or some domestic rule of the Roman-Dutch law. If either of those points were established, the jurisdiction of the District Court would be placed beyond question, but the effect of its decree divorcing the spouses would not be the same. When the jurisdiction of the court was exercised according to the rules of international law, as in the case where the parties had their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country." "On the other hand, a decree of *divorce a vinculo*, pronounced by a court whose jurisdiction was solely derived from some rule of municipal law peculiar to its *forum*, could not, when it trenched upon the interests of any other country, to whose tribunal the spouses were amenable, claim extra-territorial authority." Their lordships then proceeded to examine the theory of a matrimonial domicile as distinguished from a domicile of succession, and concluded by stating that they had "come to the conclusion that, according to international law, the domicile for the time being of the married pair afforded the only true test of jurisdiction to dissolve the marriage."

It will be observed that in this case no jurisdiction to dissolve such marriages had been conferred by the Colonial Legislature, and no discussion arose as to what the effect of such an authority might have been. The question might, however, very easily arise in regard to Indian divorces. By Act IV. of 1869, s. 2, the Indian

courts are authorized to grant divorces *a vinculo matrimonii*, where the marriage has been celebrated or the matrimonial offence has been committed in India. If the offence has been committed in India, it is unnecessary to show where the marriage was celebrated; 20 B. 362. The Act does not apply to Christian converts in respect of a marriage contracted while the parties were Hindus; 17 M. 235. Of course the Indian Divorce Act has no authority in the English courts, and a person so divorced, if domiciled in England, might find, if he married again, that his children would be treated as illegitimate, and that he himself was indictable for bigamy. Should such a case arise, its decision would probably turn upon the answer to the question, whether the exercise of such a jurisdiction trespassed upon the interests of the mother country. In one respect it might be said to do so, as a *status* governed by the law of England would be liable to be dissolved for reasons for which it could not be dissolved by English law. On the other hand, it might be argued that the Indian legislation is only a branch of Imperial legislation. The Act of 1869 was passed in a council, whose powers were given by an Act of Parliament, and every member of which was directly appointed by the Crown. It was assented to by a Viceroy who was the immediate representative of the Crown. It might have been disallowed, and therefore was really confirmed by the Crown acting under the advice of its Government for the time being. The object of the Act was to provide for the rights of European British subjects, the great majority of whom were well known to be domiciled in England. It would seem, therefore, that a jurisdiction conferred in this way must have been intended to be effectual, and it could not be so unless it was concurrent with the English jurisdiction and entitled to full recognition by the English courts.

203 Cohabitation under pretence of Marriage. (s. 493).—It is difficult to see the distinction between the offence created by s. 493 and those under the three following sections. Everyone who, knowing that he is already married to a woman still living, marries

another woman who believes that he can lawfully marry her does by deceit cause a woman who is not lawfully married to believe that she is lawfully married to him. This is exactly what takes place in ninety-nine cases out of a hundred where a man commits what in England is called bigamy, and in India is defined by s. 494. As cohabitation may be assumed to follow upon a bigamous marriage, this makes up the complete offence under s. 493. The offence defined by s. 495 is only a special form of the deceit which is an essential under s. 493. It might be suggested that s. 493 is intended to meet the case of a man who goes through a mock marriage, which he knows to be a mere nullity, but which he represents to be a genuine and binding marriage. This, however, is specially provided for by s. 496, unless the element of cohabitation, following upon the marriage which is specified in s. 493 and omitted in s. 496, may be supposed to make the difference. Perhaps, again, it may be intended to draw a distinction between cases which are possible under s. 494, where a man really, though mistakenly, believes that he is justified in marrying again, and cases in which he acts with the full knowledge that he is not so entitled. Or perhaps the distinction may be between ss. 493 and 496, and that under the latter section the deceit consists in bringing about a marriage known at the time to be invalid, while under the former section the deceit consists in acting upon a marriage which was supposed to be valid but afterwards found out to be invalid. It has been suggested to me that the offence intended by s. 493 is the personation of a husband, who has perhaps been long absent, by one who induces the wife to believe that he is her husband, and who thereby gets possession of her. But this is rape as defined by s. 375 (4). Though a woman is incapable of committing the substantive offence, she may be convicted of an abetment of an offence under this section, *R. v. Ram*, 17 Cox. 609; but in any event the section has remained a dead letter ever since its enactment as no reported cases are found where the language of this section had to be construed.

204. Bigamy.—The offence which is defined by s. 494 consists in marrying again, *first*, while the person so marrying has a husband or wife living, and *secondly*, where the second marriage is void by reason of its taking place during the life of such husband or wife. *First*, the words "husband or wife" mean persons who are legally such. Suppose a man marries A, and then marries B during the life of A, and then marries C, he commits bigamy by his marriage with B, and again by his marriage with C, if A is still living. But if A had died before the marriage with C, but B was still living, he would not have committed bigamy, because B was never his wife 1 Hale, *P.C.* 693, *R. v. Willshire*, 6 Q. B. D. 366; *Chadwick*, 11 Q. B. 205=2 Cox. 381; *Kay* 16 Cox. 292. A marriage which is voidable, but not void, is a good marriage till it is set aside, and the existence of such a marriage where both parties were living would render a second marriage by either bigamous *R. v. Jacobs*, 2 Moody, 140. As, for instance, a marriage contracted under such fraud or deceit as would justify a court in setting it aside, *Scott v. Sebright*, 12 P. D., 21, would not entitle the party so deceived or coerced to marry again while the first marriage was in force. Where, however, the option has been exercised, as where a Muhammedan girl, who was given in marriage before puberty, elected to set aside the marriage after puberty, she would commit no offence under s. 494 by marrying again 19 C. 79. Muhammedan law recognises several forms of union just as ancient Hindu law did, grouping them into *approved* and *disapproved* forms of marriage. It has been held that a *Nikah*, 6 W. R. (Cr.) 60, or *Sagai*, 3 C. L. R. 410 & 7 C. L. R. 354, or *Pat*, 2 B. H. C. R. 117, 12 C. P. L. R. 19, are all recognised forms of marriage, but not one celebrated in *Jhingarara* form, 1888 P. R. No. 25; 1890 P. R. No. 90; 1909 P. W. R. (Cr.) 22=11 Cr. L. J. 155=4 Ind. Ca. 1042. Whether marriage with a Muhammedan divorcee during her period of *Iddat* is lawful and therefore not penal under s. 494 has been a moot point, such a marriage was held valid in 9 Bom. L. R. 207, but unlawful and bigamous in 1882 P. R. No. 43, and in 1912 P. W. R. (Cr.) 1=1912 P. L. R. 83=13 Cr. L. J. 136=13 Ind.

Ca. 824. The point has, however, been authoritatively decided in 39 C. 409=16 C. W. N. 451=15 C. L. J. 263=13 Cr. L. J. 257=14 Ind. Ca. 641. In this case a Muhammedan husband embraced Christianity, and under Muhammedan law the marriage became void *ipso facto*. He, however, reverted to Islam during the period of her *Iddat*. The wife had re-married before the expiry of the period of *Iddat*. The High Court held the second marriage though invalid under Muhammedan law by reason of the fact it took place before the period of *Iddat*, was not void by reason of its having taken place during the life of the first husband, and consequently no offence under s. 494 could be made out as the parties acted in good faith on what they believed to be a sound interpretation of a very difficult point of Muhammedan law. As to proof of marriage among Muhammedans see 10 C. W. N. 982=4 Cr. L. J. 152, where it is suggested that the decision in 19 C. 79, would have been different if the marriage of the infant there had been in the presence of the father instead of the mother. Where a Muhammedan husband alleged that he had married six wives, but to dodge the rule of Muhammedan law, that a man could have only four legal wives, he had kept two of the first four partially divorced by pronouncing '*Talak*' only once or twice (and not thrice), it was held no offence under either s. 497 or s. 498 could be committed in respect of the fifth or the sixth wife, 1875 P. R. No. 1; as to Jews, see *Althausen*, 17 Cox. 630 and *Nathan v. Woolff*, 15 T. L. R. 250.

Not only must the first marriage have been originally legal, but it must be in legal force at the time of the second marriage. The Explanation states that "this section does not extend to any person whose marriage has been declared void by a court of competent jurisdiction." Nothing is said as to the case of marriages which have been severed without decree, by some process recognized by the law or usage of the parties to the marriage. The right of Muhammedans to divorce their wives without legal process is undoubted, Mac N., M. L. 59, 296, and no wife so divorced could be indicted

for marrying again. Numerous cases have occurred in which Hindu women, charged under s. 494, have pleaded that their former marriage had been put an end to by a proceeding in the nature of a divorce. In a Bombay case the Court held that the custom had been made out, but that the divorce was bad as not being in compliance with the custom 6 B. 126. In Calcutta the defence was held to be good. 19 C. 627. See, as to the validity of such divorces 17 M 479; 7 B. H. C. R. (A. Cr.) 133; 11 B. L. R. 129=20 W R (Civ) 49; Stia H L 52; 2 Mac N H L 126, 4 B. 330 & 545; 7 C. L. R. 354; 12 C. P. L. R. 19; 1 C. P. L. R. 18; 2 N. W. P. H. C. R. 300; 3 C. 305. In Madras where a caste custom was set up to the effect that a marriage is dissolved if the husband says that he does not want his wife, and she gives him back her *tali*, but the sessions court, declined to admit the evidence in proof of the custom, on the ground that custom could not be recognised, being immoral, the High Court disagreed with its reasons holding the custom was not immoral and the parties ought to have been allowed to let in evidence Weir I. 568. In other cases the plea was held bad on the ground that the particular custom relied on was bad, as being contrary to public policy 2 B. H. C. R. 117 at 124 [See, for a correction in the report, 5 B. H. C. R. (Cr. Ca), 19;] 1 B. 347. In no case was it suggested that a judicial divorce was in all cases necessary.

It is an essential element in the offence that the case should be one "in which such marriage is void by reason of its taking place during the life of such husband or wife." Persons to whom polygamy is permissible, are not within the law. Therefore a Hindu or Muhammedan man would not be punishable under s. 494, but a Hindu or Muhammedan woman would, since their law admits a plurality of wives, but not of husbands 6 W. R. (Cr) 60; 4 B 330. With some of the hill tribes, as, for instance, the *Tolas* of the Nilgiris, the case is just the opposite, each woman becoming successively the wife of all the brothers of the family.

It has been decided in the *Trial of Earl Russel* by his Peers in Parliament, [1901]. A. C. 446, that a British subject would be amenable to the jurisdiction of the British court even though the ceremony of the alleged second marriage was gone through in a foreign country. There Earl Russel purported to obtain a divorce from his wife in the courts of the State of Niveda and the very next day married a lady there, and on his return to England was indicted for bigamy. On a preliminary objection to an indictment that the ceremony of marriage was gone through outside the British Dominions, Lord Halsbury (Lord High Steward) overruled the objection remarking that the British Legislature was competent to legislate for British subjects wherever they may be. Another question which has been decided in England, but has only occasionally arisen in India, (1876 P. R. No. 19) is this: Whether a second marriage would come within the statute where it was void for some reason applicable solely to the facts of the particular case, and not merely by reason of its being of a bigamous character. In an Irish case, *R. v. Fanning*, 10 Cox. 411, the second marriage was void by statute, as being celebrated by a Roman Catholic priest between a Protestant, who falsely represented himself to be a Roman Catholic, and a Roman Catholic. The Court of Criminal Appeal held that the second marriage was not a marriage at all, and therefore that there could be no conviction for bigamy. This case was *disapproved* of in *R v Allen*, L. R., 1 C. C. R. 367. There the second marriage was contracted by the man with the niece of his deceased wife, and was therefore void under the statute 5 & 6 Will. IV., c 54, s. 2. It was contended on the authority of *R. v. Fanning*, but in opposition to several older English cases, that there was no bigamy. This contention was overruled. Cockburn, C. J., pointed out that the object of the English statute was not to prevent polygamy, that is, the co-existence of two real wives, which was impossible by our law, but bigamy, that is, the co-existence of a real and an unreal wife. "It is obvious that the outrage and scandal involved in such a proceeding will not be less, because the parties to the second marriage may be under some special

incapacity to contract marriage The deception will not be less atrocious, because the one party may have induced the other to go through a form of marriage known to be generally binding, but inapplicable to their particular case."

"In thus holding it is not at all necessary to say that forms of marriage unknown to the law, as was the case in *Burt v Burt*, 2 Sw. & T. 88=29 L. J. (P. & M.) 133, (a case of a Scotch marriage celebrated in Australia, no evidence being given that such marriages were recognized by local law,) would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorized person, or in an unauthorized place, would be a marrying within the meaning of the 57th section of 24 & 25 Vict., c 100 It will be time enough to deal with a case of this description when it arises It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to, and recognized by, the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case"

This latter decision was again *approved* and *followed* by the Irish Court in *R. v Griffin*, 14 Cox. 308. The statute upon which all these cases rested, 24 & 25 Vict., c. 100 s 57 provides that "whoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony" Does the addition of the words which are found in s 491 make those cases inapplicable? It seems to me that it does not. Each statute is intended to punish bigamy, but the latter at the same time protects polygamy, where it is allowable. The Penal Code was passed before the decision in

R. v. Fanning, and after the earlier English cases, *R. v. Benson*, 5 C. & P. 412; *R. v. Brawn*, 1 C. & K. 144 in which the doctrine affirmed in *R. v. Allen* was laid down. These cases must have been familiar to Sir B. Peacock, who passed the Penal Code, and there appears to be nothing in the language of s. 494 to show that a different doctrine was intended to be introduced. See 1869 P. R. (Cr.) 2 & 1876 P. R. (Cr.) 19.

Conflict of Laws.—The various marriage laws which exist in India, and the possibility that the same person may become subject to different laws, may give rise to curious questions under s. 494. In England on an indictment for bigamy, the questions would be (1): Had the accused a living wife or husband; and (2) Did the accused having such living wife or husband purport to go through a form of second marriage? But in India, a third question, which is the crucial question in cases of this class if the first two questions are answered affirmatively, would arise, and on the solution of which would depend the guilt or innocence of the accused; this question is, Is this a case in which the second marriage is void by reason of its having taken place during the life of the other spouse to the first marriage? In the case of women, whether Hindu or Muhammedan or Christian, this third element is of very little importance, *Weir* 1. 565; 1882 P. R. No. 43, except in such cases as with the artizans of Malabar or the Todas of Nilgiris amongst whom polyandry is recognised by usage. But the question is of vital importance in the case of men, especially of those who oscillate between monogamous and polygamous forms of religious persuasion. In 10 M. 218, a Hindu girl, who had been baptized in her infancy, and had afterwards reverted to Hinduism, married a Hindu, who subsequently discarded her on account of the baptism. She was then re-admitted into the Christian Church, and married a Christian, her first husband being still alive. It was held that she had committed bigamy. The same decision was given where a Hindu married woman became a convert to Muhammedanism, and then married a Muhammedan. 18 C. 264; see also 4 B. 330; 1870 P. R. No. 32; 1907 P. W. R. (Civ.) 110;

18 C. 252. The argument founded upon the rule of Hindu law, that an apostate wife is civilly dead (1 *Nort, L C on H. L.* 12) was sought to be applied that if she was dead such civil death dissolved her pre-existing Hindu marriage, leaving her free to contract a valid Muhammedan marriage, but this contention was overruled, as the operation of the rule is confined to civil rights and cannot affect criminal liability under s 491 **18 C. 264.** In each case the conclusion was necessary, as soon as it was found that the first marriage was not dissolved by the change of religion. In **3 M. H. C. R. Appx. 7** approved in **4 M. H. C. R. Appx. 3**, a Christian convert married a wife according to the rites of the Christian religion. He then relapsed into Hinduism and married a second wife, a heathen, according to Hindu usages, his first wife being still alive. The Sessions Judge convicted him under s 494, but the conviction was quashed on appeal by the High Court. *Holloway, J*, considered that it was evident that if the prisoner had really come under Hindu law, then his second marriage was not void by reason of the former having taken place, since the Hindu law permits of polygamy. If, however, he still continued under Christian law, then his marriage according to Hindu ceremonial was a mere nullity, and the second marriage was void from its inherent invalidity, and not by reason of the continuance of the former marriage. The soundness of the second reason is no doubt open to question, having regard to the ruling in *R v Allen*, **L. R. 1. C. C. R. 367**, but the first reason still holds good. It was held in *Weir* **I. 563**, that the principle is incapable of being extended to women, as they are restricted to one husband at a time. When a Roman Catholic *Pariah* Christian, having a living wife married according to Christian rites to a Christian woman, renounced Christianity and married a Hindu wife, *Abdus Rahim, J.*, ruled, as a matter of law following **3 M. H. C. R. Appx. 7**, there was no case to go before a jury. **33 M. 371=11 Cr. L. J. 682=8 Ind. Ca. 572.** But if, at the date of second marriage, the husband still remained a Christian, then the existence of his Christian wife would render the second marriage invalid, and he

would be liable, as the second marriage would be merely an adulterous union. 30 M. 550=17 M. L. J. 476=2 M. L. T. 345=6 Cr. L. J. 338. In this case, there is a *dictum* of Benson and Wallis, JJ., to the effect 3 M. H. C. R. (Appx.) 7, is unsound for both the reasons given by Holloway, J., and their decision would have been the same, if the husband had formally renounced Christianity before the second marriage. But this *dictum* did not prevail with Abdur Rahim, J., in the later case cited above. In 30 M. 550, the accused was not represented, and the learned judges had not the benefit of an argument on behalf of the defence. Innes, J., in 3 M. H. C. R. Appx. 7, said: "If, in becoming a Christian, a man took upon himself the obligation of monogamy, i.e., if the Christian religion restricted him, on his embracing it, to one wife, then I should say that if such person married while still a Christian, he could not afterwards throw off his obligations by a mere change of religion. But I do not think that a profession of Christianity *ipso facto*, imposes any such obligation, though, doubtless, the tendency of Christianity is adverse to polygamy." "Then it does not appear to me that the Hindu law could regard the second marriage as void by reason of the wife of the first marriage being still alive, since the Hindu law, in re-admitting the prisoner to caste, would altogether ignore the status which he had just abandoned, together with all obligations contracted under it, and would not recognize anything as a marriage which was not entered upon by him as a Hindu, and with Hindu forms and ceremonies." This may be one reason why the legislature, while providing for men and women entering the Christian fold forsaking their non-Christian wives or husbands, facilities to acquire a new wife or husband, as the case may be, under the provisions of the *Native Converts Marriage Dissolution Act XXI of 1866*, purposely refrained from affording similar facilities to married people forsaking the Christian religion. But there must have been other reasons also for the absence from the statute book of any such legislative provision.

The obligation of monogamy, if any, imposed upon a Christian, arises, not, as Mr. Justice Innes supposed, from the Christian religion, but from the universal law of Christendom founded upon that religion. That law attaches absolutely and permanently to every inhabitant of a Christian country, so long as he is domiciled in such a country. Domicile in India carries with it no such obligation, each class of the community being governed by their own law and usage. Native Christians are bound by the laws and usages of the particular class to which they attach or assimilate themselves, so far as those practices can be reconciled with the profession of Christianity 9 M. L. A. 195=1 W. R. (P. C.) 1; 12 C 706. The obligation of monogamy is certainly a part of the customary law of every class of Native Christians, and it is of the essence of every marriage that can be called a Christian marriage (*ante* § 200 at pp 799-800). Can a Native Christian, who has contracted such a marriage, throw off its obligations, and entitle himself to another wife, merely by becoming a Muhammedan or Hindu? As between himself and his wife he certainly cannot. Such conduct would, under s 10 of the *Indian Divorce Act* IV of 1869, as amended by Act X of 1912, entitle the first wife to a divorce. Independently of the Divorce Act, there can, I suppose, be no doubt that a matrimonial court would treat such second marriage as adultery, for which it would grant the first wife a judicial separation. If the intercourse of a man with a so-called wife can be treated as adulterous, it can only be because his marriage is void, and, in the particular case, that could only be because of the previous marriage. The suggestion of Mr. Justice Holloway, that if Christian law was still binding upon the Christian after he had become a Hindu, the same law would treat the second marriage as absolutely void, seems to be irrelevant to a charge of bigamy according to the decision in *R v Allen*, cited above. A person who professes to be a Hindu, and who may be reasonably supposed to be one, and who contracts a Hindu marriage with a Hindu woman, does an act which is apparently legal; and if, in consequence of circumstances peculiar to himself, it is not legal, he commits the very offence which is the essence of bigamy.

Exactly the same point occurred before the Allahabad Court, and came on appeal to the Privy Council, in a case in which it was not necessary to decide it. A lady of Indian extraction married a European British subject, in a Christian church, and during his life professed Christianity. After her husband's death, she formed a connection with a Christian, who is described as an inferior clerk in the Judge's Court, and was probably an East Indian. He was also married, according to Christian law, to a Christian woman, who was still living. In order to legalize their illicit connection, it occurred to him and the widow to become Muhammedans, and then to marry. These facts came out incidentally in the course of an application relating to the guardianship of the daughter of the widow. In delivering the judgment of the committee, James, L. J., said: "The High Court expressed doubts of the legality of the marriage, which their lordships think they were well warranted in entertaining. 14 M. I. A., 309, at 324. See also 4. A. 343.

Several cases have occurred in India of Englishmen, married in the Christian manner to European wives, adopting Muhammedanism, and then marrying again during the life of the first wife. It seems to me that such second marriage would be punishable under s. 491. If the English domicile still continued, the personal *status* would absolutely forbid such second marriage (*ante*, § 200 at pp. 799-800). Even if an Indian domicile had been assumed, it would, I think, make no difference. The *status* of an Englishman domiciled in India is a Christian *status* and is governed by all the laws universally . . . which have been adopted in . . . is certainly one . . . actually, and not . . . may possibly be that the courts would judge his future proceedings according to the law of his adoption. But it is a very different thing to assert that they would allow him to cast off an obligation which he had previously contracted, and which, at the time of the contract, was indissoluble by any act of his own.

In the Punjab a Muhammedan man and woman, wishing for some reason to be married in Christian form, were baptised and became professing Christians, and subsequently were married in the Protestant church at Meerut by the Chaplain. About two years after, they resumed the Muhammedan faith, and continued to live together till they disagreed and parted, each forming a new connection and having families as the result. On and to have inner which if she continued to be his wife till his death. She sued for her share in the alternative, either as a Christian wife or as a Muhammedan wife. The defence was set up that she had been divorced in the Muhammedan way. This was found against as a fact. It was accordingly held by the Courts in India and by the Privy Council that, as at the time of death the personal *status* of both parties was Muhammedan, the will was invalid, and the widow was entitled to her share under the Muhammedan law. This rendered it unnecessary to decide the point raised by the Civil Judge that the Muhammedan marriage could have no effect upon the *status* created by the Christian marriage, and could not enable the husband to divorce his wife in the Muhammedan way. Lord Watson said: "Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of a divorce, is a question of importance and, it may be, of nicety. In the present case that does not arise for decision, unless it is shown that *Stuart Skinner* did, in fact, divorce *Badshah Begum* according to Muhammedan form." After stating that upon this question their Lordships agreed with the Court, the judgment proceeded to say. "In regard to the fact that has come before them an exhaustive argument from the Bar on both sides of the question impossible, they do not think it expedient to express any opinion as to the effect of a change of religion, by the spouses, their domicile remaining the

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marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would, in all probability, find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way. *R. v. Lumley*, L. R., 1 C. C. R. 195=38 L. J. (M C) 85

In a later case this singular state of facts appeared. The prisoner married A in 1864, and B in 1868, A being still alive. He was convicted of bigamy. He then married C in 1879, and D in 1880, C being still alive. He was indicted in respect of the last marriage, his wife C being still alive. It is evident that if A was still alive at the time of the marriage with C, the latter never was his wife. No evidence was offered that A was either alive or dead in 1879, and the jury convicted the prisoner without any finding on that head, apparently on the principle that the prisoner should have proved she was alive. The conviction was set aside. The Court held that there were conflicting presumptions, first, that A, who was alive in 1868, was still alive in 1879, secondly, that the prisoner in marrying C, was doing an innocent act. That upon these facts the jury should have found whether A was alive in 1879 or not. That it was not for the prisoner to prove she was alive. Lord Coleridge, C. J., said: "The prisoner was only bound to set up the life. It was for the prosecution to prove his guilt. *R. v. Willshire*, 6 Q. B. D. 366. The same decision would, no doubt, have been given in India under s 107 of the Evidence Act. If *Lumley's* case were to occur in India, the jury would probably be told that although there was a presumption in favour of the continuance of life, this did not relieve them from the necessity of finding that the husband was actually alive, and that, in considering this question, they would have to remember that the prosecution was bound to establish the guilt of the prisoner, and that her innocence should be assumed till the contrary was proved.

Absence for Seven Years.—Even where the former husband or wife is still alive, no offence is committed under s. 494.

“If such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time; provided the person contracting the subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts so far as the same are within his or her knowledge” (s. 494, Explanation).

In reference to the English statute, which contains a proviso exactly similar to the first part of the above clause, Lush, J., in pronouncing the judgment of the Court of Crown Cases Reserved, said: “Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the Act, 24 and 25 Vict., c. 100, s. 57, then comes into operation, and exonerates the prisoner from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature, by this proviso, sanctions a presumption that a person who has not been heard of for seven years is dead.” *R. v. Lumley*, L. R. 1 C. C. R. 196; Evidence Act, s. 108. In order to raise this presumption, however, it must appear that the parties have been continually absent from each other for seven years. Where the only evidence was that the prisoner married his first wife in 1865, that they lived together for some time, but how long was not shown, and that he married a second wife in 1882, and no proof of any actual separation between the first wife and the prisoner was offered, the Court held that the presumption of life continued, and that the prosecution was not bound to show that the prisoner knew that his wife was alive within seven years of his second marriage. *R. v. Jones*, 11 Q. B. D. 118, *Thomas Jones*, [1842] Car. & M. 642. Where a separation of seven years or more is established, the burthen of proving that the prisoner knew of his wife's existence within seven years rests on the prosecution. *R. v. Curgenven*, L. R. 1 C. C. R. 1;

Heaton, 3 F. & F. 819; *Dane*, 1 F. & F. 233; *Cross*, 1 F. & F. 510; *Twynning*, 2 B. & Ald., 386. The rule will apply also to cases when the absence is due to wilful desertion, *Faulkes*, 19 T. L. R. 250. Such knowledge is a question of fact, and must be distinctly found. A finding that the prisoner had the means of acquiring knowledge, if he had chosen to use them, is not sufficient. Such facts might justify a finding that the accused did know that his wife was alive, but is not equivalent to such a finding. *R. v Briggs*, D. & B. 98=26 L. J. (M. C.) 7. Where the prosecution established as a fact that the first husband though absent for seven years was still living and that the wife having the means of acquiring knowledge whether he was dead or alive did not choose to make use of them, she was held liable especially where she also failed to mention the true state of facts to the man with whom she purported to go through the second form of marriage, 4 W. R. (Cr.) 25; 1900 P. R. No. 1 [*contra Cullen*, 9 C. & P. 681]. It must further be remembered that s. 108, Ev. Act, raises no presumption as to the time of a person's death. It was held in 35 C. 25 that he who alleges that a person died at some antecedent time must prove that fact affirmatively. But this difficulty does not arise in the application of the Exception to s. 494. The fact that certain Muhammedan jurists expressed an opinion that a woman is competent to re-marry after the absence of her husband for four years would not save her act from s. 494. The period of seven years mentioned in the Exception to the section would override any rule of Muhammedan law to the contrary, 1878 P. R. No. 27.

A different case from any of those just discussed is where a man marries again within seven years after he has heard of his wife, but believing on reasonable grounds that she is dead. Such a case occurred in England under a statute, 24 & 25 Vict., c. 100, s. 57, which is almost *verbatim* the same as the first clause in the Exception to s. 494. There the Court held that although the case came within the literal terms of the statute, the defendant was excused by virtue of his *bona fide* mistake of fact. Under Indian law a similar decision

would no doubt be given under s. 79, I.P.C. *R. v. Tolson*, **23 Q. B. D. 168**; *ante*, § 50 at p. 133. This case overruled *Gibbons*, **12 Cox. 237** & *Bennet*, **14 Cox. 45**; see also *Turner*, **9 Cox. 145**; *R. v. Horton*, **11 Cox. 670**; *R. v. Moore*, **13 Cox. 544**; *R. v. Thomson*, **70 J. P. 6**.

The further proviso that the prisoner must have communicated his knowledge of the facts of the case to the person whom he was about to marry, goes beyond the English law. The burthen of proving such a communication would apparently rest on the prisoner. (Ev. Act, ss. 105, 106.)

The priest who helps at a bigamous marriage would be liable, **10 M. 218**, but not necessarily people who let a house for the celebration or guests who are invited and present at the ceremony, **6 E. 126**; **1864 W. R. (Cr.) 13**. A man may be guilty of abetment even though the girl is incapable of committing the offence owing to her age or want of knowledge, **6 C. W. N. 343**; **4 C. 10**; mere publication of banns is not an attempt, **1 A. 316**. It must however be remembered to secure a conviction under s. 494, knowledge on the part of the accused that the previous consort was alive is not essential as the wording of the section is decidedly free from any reference to intention or knowledge, *Jones*, **11 Cox. 358**.

Jurisdiction.—Where a charge is brought under s. 494, the offence consists in the second marriage, and is committed in the place where the second marriage took place. Consequently it can only be tried by a court which has jurisdiction over such an offence when committed in such a place. This was decided in the reign of Charles II. *Kelyng*, **79**; *1 Hale, P. C. 693*. The same ruling was affirmed by the Privy Council in a case from Australia *Macleod v. Atty.-Gen. of New South Wales*, [1891] **A. C. 455**. There a Colonial statute provided that "whosoever being married marries any other person during the life of the former husband or wife, wheresoever such second marriage takes place shall be liable, etc." The appellant was married in

N. S. Wales to his first wife. He was divorced from her in Missouri, where he married his second wife during the life of the first. He was indicted for bigamy in N. S. Wales under the above statute, and convicted, the judge having directed the jury that the American court could not dissolve the Australian marriage. The conviction was set aside by the Judicial Committee, on the ground that the offence, if committed at all, was committed in Missouri and beyond the jurisdiction of the Australian court. If the statute intended to give such a jurisdiction, which their Lordships held it did not, it was so far *ultra vires* and void. *Cf.* the case of Earl Russell, tried before the Peers in the House of Lords. [1901] A. C. 446.

No court shall take cognizance of any offence falling under ss 493—496, both inclusive, of the Indian Penal Code, except upon a complaint made by some person aggrieved, s. 198, Cr P C. The brother-in-law of a woman who has committed bigamy is not a person aggrieved under that section, 10 B. 340; 25 A. 132; the husband is 26 C. 336; 25 A. 209.

205. Adultery.—Adultery is defined by s 197 as being sexual intercourse with a woman who is, and whom the defendant knows, or has reason to believe, to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to rape. Exactly the same question would arise as to the original or continued validity of the marriage as have been already discussed under the head of bigamy. It is not necessary the accused should know whose wife the woman is. It is enough if he knew she had a living husband, 21 W. R. (Cr.) 13. But there must be proof that the accused knew or had reason to believe that the woman was a married woman, *Priske v. Priske*, 29 L. J. (P. & M.) 195; *Manton v. Manton*, 34 *ibid.* 121.

A different question arises where it is admitted that a ceremony of marriage took place, but where it is asserted that, by the custom of the country, the woman was at liberty, notwithstanding it, to have intercourse with

anyone at her pleasure. Here the essence of the objection is, that no marriage, within the meaning of the Code, ever took place, **4 M. H. C. R. 196**. In a case under the *Alya Santana* law of Canara, where it is customary to celebrate marriages, but the woman is at liberty to leave her husband at her own pleasure, and to marry again, the Court held that there was no marriage which would support a conviction under s. 498. Referring with approval to the case last cited, they said: "The customary cohabitation of the sexes under the *Alya Santana* law appears to us to do no more than create a casual relation, which the woman may terminate at her pleasure, subject perhaps to certain conventional restraints among the more respectable classes." **6 M. 374**.

The belief of the defendant as to the woman being the wife of another is a question of fact. Where a husband brought a suit against his wife for restitution of conjugal rights, and a decree was given in his favour, leaving her the option either to return to her husband or to pay him a sum of money, and she took the latter course, after which the alleged adultery took place, it was held that the defendant might have believed the woman was free to marry, and, if so, had committed no offence. **5 B. H. C. R. (Cr. Ca.) 17**.

Evidence of Adultery.—In a case in Calcutta, *R. v. Ward*, (1862) a question was raised in the course of the trial as to the evidence necessary to establish sexual intercourse. It was contended that the same proof was required as in the case of rape, *viz.*, of actual penetration. The point was reserved, but it became unnecessary to decide it. It is plain that the words in the Explanation to s. 375 are limited to cases of rape, and also that the object of them was the same as in Stat. 9, Geo. IV., c. 74, s. 66, *viz.*, to do away with proof of emission which used formerly to be required; the object of the provision is to limit, not to extend, the evidence for the prosecution. I conceive the rule will be exactly the same as it is in the Divorce Court, where intercourse is inferred from acts of guilty familiarity, or even from opportunities sought for, and created by, the parties

under circumstances which leave no reasonable doubt of criminal intention. 21 W. R. (Cr.) 13; 7 W. R. (Cr.) 59; 17 W. R. (Cr.) 5; 1874 P. R. (Cr.) 1. Of course, stronger evidence will be required under this Code than in the English Divorce Court, for the wife can be called as a witness against the adulterer under s. 497, 6 W. R. (Cr.) 92, whereas she cannot in a suit for dissolution of marriage. But her admissions, or confessions, out of court will not be evidence against him. *Robinson v. Robinson*, 29 L. J. (Mat.) 178.

To convict a man of an attempt to commit adultery it is not sufficient to prove that he was found in a place in which adultery might have been committed and that he was minded to commit it, *Weir* L. 569. Conversely where a married woman went to visit a man, but before adultery was committed she was taken away by her husband, it was held the man could not be convicted, 1879 P. R. No. 13; 1902 P. R. No. 25. For circumstances where commission of adultery may be presumed, see *Best v. Best*, 1 Ad. 437; *Ricketts v. Ricketts*, 1 Hagg. Const. 303; *Davidson v. Davidson*, 1 Deane 132; *Loveden v. Loveden*, 2 Hagg. Const. 2; *Williams v. Williams*, 1 Hagg. Const. 290; *Grant v. Grant*, 2 Curt. 67; *Harris v. Harris*, 2 Hagg. Const. 379; *D'Aguilar v. D'Aguilar*, 1 Hagg. Const. 777; *Richardson v. Richardson*, *ibid.* 11 & *Heathcote's Divorce Bill*, 1 Macq. H. L. Ca. 277.

It often happens that acts of criminality are spoken to by witnesses who are strangers to the parties. It then becomes necessary, if the parties themselves are not present at the trial, to establish their identity with that of the persons spoken to by the witnesses. This is often done by showing them photographs of the parties. It has, however, been laid down in England that, in matrimonial cases, unless under very special circumstances, the Court will not act upon identification by photographs only. *Frith v. Frith* (1896) P. 74.

Connivance.—Another question arises as to the nature of the evidence which will amount to consent, or conni-

rance, on the husband's part. In the case of *Allen v. Allen*, 30 L. J. (Mat.) 2; the law upon this point was laid down as follows: "To find a verdict of connivance, you must be satisfied from the facts established in evidence that the husband so connived at the wife's adultery as to give a willing consent to it. Was he, or was he not, an accessory before the fact? Mere negligence, mere inattention, mere dulness of apprehension, mere indifference, will not suffice; there must be an intention on his part that she should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife's adultery—whether that state of things was produced by the connivance of the husband, or independent of it—and if the husband, intending that the result of adultery should take place, did not interfere when he might have done so to protect his own honour, he was guilty of connivance." See also *Rogers v. Rogers*, 3 Hagg. Eccl. 57; *Philips v. Philips*, 1 Rob. 144; *Croft v. Croft*, 3 Hagg. 312; *Ricks v. Ricks*, *ibid.* 76.

In a later case, *Glennie v. Glennie*, 32 L. J. (P. & M.) 17, Cresswell, J., laid down the law a little more cautiously. He said: "I think that to establish connivance it is requisite, not that the party conniving should be actually an accessory before the fact, so as to have taken any active measures to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transactions that he approved of and consented to; and that, therefore, on the principle *volenti non fit injuria*, he cannot complain of any act he passively assented to."

But where the husband, after some angry discussion with his wife respecting the impropriety of her conduct, told her that she could not lead this life any longer, and that she must either give up her paramour or give him up, and that she could not live with him any longer if she continued her intimacy with the former, after which she deliberately left her husband, with full knowledge on his part that she was going to join the adulterer, and without his making any effort to prevent it, this was

held not to amount to connivance Sir C. Gresswell said: "I cannot construe that into a willing consent that the adultery should be committed. It is an unwilling consent, given because she would not comply with the condition he insisted upon of giving up the improper intimacy. By connivance I understand the willing consent of the husband, that the husband gives a willing consent to the act, although he may not be an accessory before the fact; that, although he does not take an active part towards procuring it done, he gives a willing consent and desires it to be done. What this man desired was, not that the act should be done, but that she should not torment him by keeping up an intimacy of this character, him as his wife, and that other." *Marris v Marris* 31 L. J. 28, 2 Q. B. & Tr. 530; see also *Stone v Stone* 1 Rob. Eccl. 99 at 101; *Moorson v Moorson*, 3 Hagg. Eccl. 95; *Gulpin v Gulpin*, *ibid* 150; 1 C. W. N. 498; 3 C. 688.

The Penal Code merely uses the word "consent," not "willing consent," but I conceive that the above construction must be put upon the term. An unwilling consent is not a consent at all. It is simply a submission to what is unavoidable.

On the other hand, evidence of merely passive acquiescence in a state of adultery after full knowledge of it, and without taking any steps to procure redress, has been held to be evidence of consent amounting to connivance, so as to disentitle the acquiescing party to a divorce, *Boulting v Boulting*, 33 L. J. (Mat) 33=3 Sw. & Tr. 329, because a divorce is only granted when the applicant is feeling, and suffering under, a sense of wrong, when the complaint is preferred. It has also been held in England that consent may be given after the act, which, if it amounts to condonation of the act, has the same legal effect as consent, *Wilson v. Glossop*, 20 Q. B. D. 354; *Keats v. Keats*, 28 L. J. [P. & M.] 57; 1879 P. R. No. 27; 4 W. R. (Cr.) 31; 1 Ind. Jur. (N. S.) 8. But it may be questioned whether, under the Penal Code, an *ex post facto* acquiescence can be used except as evidence of an

acquiescence previous to the act. If there was no consent, or connivance, up to the time the act was committed, then the offence is complete, and it is difficult to see how it can be obliterated by any subsequent consent.

This section is intended to protect the husband's rights, and, therefore, any consent, or connivance, which shows an abandonment by the husband of his claim to continence on the part of his wife, will bar an indictment, even though the consent, or connivance, be to a different adultery from that which is specifically charged. Therefore, it is held that a consent to his wife's adultery with one man is a bar to proceedings in the Divorce Court against another man, or against the same man for a subsequent act of adultery. *Gipps v. Gipps*, 32 L. J. (Mat.) 78; in House of Lords; 11 H. L. Ca. 1=33 L. J. (Mat.) 161. This rests on the presumption that an assent once given continues. But a case might occur where a sinful wife might become reconciled to her husband, and resume a life of chastity, while he might resume his efforts to protect her virtue, and then, I conceive, the right to prosecute would revive.

Can a second prosecution be maintained against the same man for adultery with the same woman, she not having in the meantime returned to her husband's protection? The case actually arose in the 4th Sessions of 1864, Bombay, and Hore, J., directed the jury that the prosecution was maintainable, and that the former conviction was rather an aggravation of the offence. There the woman had left her home before the first conviction, and lived in the prisoner's house the whole time he was undergoing his sentence; and the adultery complained of in the second prosecution was committed in that house as soon as the prisoner was released. With great respect for the learned judge, I conceive that no prosecution was maintainable. As Lord Chelmsford said in the case of *Gipps v. Gipps*, 11 H. L. Ca. 1=33 L. J. (Mat.) at 169 "It must be borne in mind that the offence of adultery is complete in a single instance of guilty connection with a married woman. It is the first act which constitutes the crime, and though the adulterous intercourse between the parties should

continue for years there is not a fresh adultery upon every repetition of the guilty acts, although all and each of them may furnish evidence of the adultery itself. The inference which I draw from this view of the subject is, that if a husband, having the right to divorce his wife for adultery, abandons that right in consideration of a sum of money received from the adulterer, he can never afterwards be a petitioner for a divorce on the ground of his wife's criminal intercourse with the same person "

It seems to be an equally legitimate inference that a husband who, having a right to institute a prosecution for adultery, does so, and enforces the full penalty of the law against the offender, cannot punish him a second time for a renewal of intercourse which inflicts no fresh injury upon himself. See **Ratanlal 150**, where however it was held the subsequent act is in the nature of an aggravation calling for more condign punishment. Of course, it would be different if he had condoned the offence, and taken the wife back again into his society. See *per* Lord Westbury, **33 L. J. (P. & M.) at 164**.

206. Taking or enticing away a Married Woman — The offence constituted by s. 498 consists in (1) taking or enticing away, or concealing, or detaining, (2) with intent that she may have illicit intercourse with any person, (3) any woman who is or is known or believed to be the wife of any other man. (4) from that man, or from any person having the care of her on behalf of that man. The elements of the crime are the same as those of kidnapping from lawful guardianship, as defined by s. 361, see the discussion upon that section, *ante*, Chap. IX, §166 at p. 564 except as to the intent. The section is intended to protect the rights of the husband. The consent of the wife is perfectly immaterial. The fact that she goes away with another man of her own accord, as generally happens, is no excuse for him, provided his part in the transaction can be characterized as taking or enticing her away. The gist of the offence is the enticement *away from* the husband, and not the enticement *to* any definite person. Hence, if an old woman takes away a wife from her

husband's house, with intent that she may be able to make some money out of any one desirous of having illicit intercourse with the wife, the offence is complete even though no definite person was in view, or the wife thus enticed away never met any person desirous of having illicit intercourse with her. 1899 P. R. No. 9. In a case where the jury found as a fact that the woman asked the prisoner to allow her to go with him, that all the solicitation proceeded from her, and that the prisoner for some time refused to yield to her request, but that finally he met her when she left her husband's house, and went off with her by railway; it was held that the offence was complete. Scotland, C. J., said, "If whilst the wife is living with her husband a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, that I think is a *taking* from the husband within the meaning of the section. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery." 2 M. H. C. R. 331. Similarly the fact the woman accompanied him of her own free will does not diminish the criminality of the act. 4 Bom. L. R. 435. The same would be the result if she left her husband's house, and went of her own accord to the accused's house, and he allowed her to live with him as his wife. Such allowing would be treated as constructive taking, as she would not have been emboldened to leave her husband's house and remove herself from his control, but for the asylum offered by the accused. 7 Mad. Jur. 133. (Contrast this case with 1 C. W. N. 498, where from lapse of time desertion and connivance were also inferred. See *R. v. Olifier*, 10 Cox. 402 below.) The same rule applies where the offence charged is that of enticing away a married woman. In this case the defendant is an active agent in the transaction, but the enticing may exist though the wife is willing and ready to be enticed. Therefore, where a procuress induced a married woman of twenty to leave her husband, and the facts showed that "she had made her deliberate choice, and was determined of her own free will to leave her husband and become a prostitute in Calcutta," the

Bengal High Court held that no conviction could be maintained under s. 366, but that there was quite sufficient evidence to convict the prisoner of enticing under s. 498, "for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interfered." **1 W. R. (Cr.) 45.** It will thus be seen that the offence under s. 198 is a minor offence to one under s. 366, and therefore, on a trial under the latter section, a conviction may rest on the former under the operation of s. 238, Cl. P. C., **20 C. 483.** It is, however, necessary that the final act which severs the connection between the wife and her husband should be one in which the defendant takes part, either by way of influence, advice, or assistance. If a woman of her own accord, and without any persuasion or inducement held out to her by the defendant, and without any complicity on his part, were to leave her husband and go to the defendant, who allowed her to remain with him, this would not be an offence under s. 498. Though it might be his moral duty to restore her to her home, the statute does not say that he shall restore her, but only that he shall not take her away. *R v Olfier*, **10 Cox. 402**; *ante*, § 166 at p. 564.

The words "conceal or detain" refer to some active conduct on the part of the accused beyond that of merely permitting her to remain in his house. It is possible to conceal a woman with her own consent, but it is not possible to detain her when she is willing to remain. In such a case the Madras High Court said "The words of the section, '*conceals or detains*,' may and were, we think, intended to be applied to the enticing and inducing a wife to withhold or conceal herself from her husband, and assisting her to do so, as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife for the purposes of illicit intercourse is the gist of the offence, just as it is of the offence of taking away a wife under the same section, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments. Here there is no reasonable evidence to show that the woman had not perfect

freedom to leave the house, or that any allurements, or persuasion was required or used, to induce her to remain." **4 M. H. C. R. 20; 1895 P. R. (Cr.) 23.** Straight, J., in **10 A. 580** construed, the words "such woman" in this clause of the section as not meaning "such woman so enticed as aforesaid," but to mean "such woman whom he knows or has reason to believe to be the wife of any other man." He seems to dissent from the construction apparently put in **3 A. 251** by Pearson and Oldfield, JJ., as meaning 'an enticed woman.' The Punjab Chief Court in **1891 P. R. No. 16** was inclined to accept the view of Straight, J. If a woman were to come to another person without his doing any act amounting to a taking or enticing, and he were then to conceal or detain her with the intent defined, he would have committed an offence under the second part of s. 498; **1913 P. W. R. (Cr.) 36=1913 P. L. R. 319=14 Cr. L. J. 595=21 Ind. Ca. 467; 1911 P. W. R. (Cr.) 29=1911 P. L. R. 224=12 Cr. L. J. 500=12 Ind. Ca. 220.**

The wording of the section as to intent shows that the offence may be committed either by an intending adulterer, or by a procurer who intends to pass the woman on to some other person.

It is essential to the offence that the woman should be taken from the husband or someone who has the care of her on his behalf. *Prima facie* a wife who is conducting herself properly is always under the control, or in the legal possession of her husband. It is not essential that he should be living with her. He may be absent on business, or his employment may compel him to live apart. **5 W. R. (Cr.) 50.** Thus, taking away the wife, when she was a mother, was held to be an offence under this section when it was proved that she was no quarrel between her and the mother, and the case with the majority of baby wives, i with their under Hindu is the proper and the parent have marr It is not necessary

that there should be co-habitation, 1874 P. R. (Cr.) 4, *overruling* 1867 P. R. (Cr.) 48. If, however, in the course of a quarrel the wife had been turned out of the house, and she was living in her mother's house, it could not be said the taking was from the husband, or from any person having the care of her on his behalf, 1883 P. R. No. 15. See also 1910 P. L. R. 33=11 Cr. L. J. 597=8 Ind. Ca. 226; 1914 P. W. R. (Cr.) 20=1914 P. L. R. 123. It cannot make any difference whether the house is hired by him, or by her, or by someone else, so long as it is occupied by her as his wife, living under his protection, and subject to his rights over her. If, however, the wife had abandoned her husband, and was living apart from and in defiance of him, and *à fortiori* if she had taken to a criminal life, it could not be said that by any act of another she was taken or enticed from her husband. See 4 W. R. (Cr.) 6; 2 W. R. (Cr.) 35, and cases cited, *ante*, 166, at pp 567-568.

It has been held in 26 M. 463 that a wife cannot be convicted of abetting the "enticing away" of herself under s. 498, but the Court did not decide whether she might be convicted of abetting the "taking away" of herself. Enticing involves the producing of an effect *ab extra* upon the mind of a woman, but if she induces another to entice her, the effect has already been produced. The offence of taking is consistent with a previous consent on the part of the woman (see p 846 *supra*). There is no provision in s. 498, as there is in s. 497, that the wife shall not be punishable as an abettor. But the Punjab Chief Court has taken the view that the offence under s. 498, is minor to the offence under s. 497, and therefore the wife could not be punished under this section also as an abettor. 1871 P. R. No. 6 & 8 *overruling* 1868 P. R. No. 17. See 1883 P. R. No. 4.

Where it is doubtful which of the offences enumerated in the section the accused has committed, the finding may be in the very words of the section though such a finding should be avoided if possible. 22 W. R. (Cr.) 72.

No court shall take cognizance of an offence under s. 497 or s. 498, except upon a complaint made by the

husband of the woman, or in his absence by some person who had care of such woman on his behalf at the time when such offence was committed. (For further discussion on this matter, see the Editor's commentaries on the Code of Criminal Procedure under s. 199.) But the death of the husband does not terminate a prosecution which has been once instituted by him. **4 M. H. C. R. Appx. 55.** The fact that the husband has appeared as a witness to prosecute a prisoner charged with committing rape upon his wife, does not amount to such a complaint by him as will sustain an alternative charge against the same prisoner for committing adultery with the wife. **5 A. 233; 29 C. 415.** Where it appeared that after the act complained of and before lodging the complaint, the husband had divorced the wife, the complaint was held rightly dismissed, as there is no reason to afford remedy in the criminal court when the doors of the civil court are closed. **1879 P. R. No. 27.**

14 Ind. Ca. 659, clearly lays down that the canons of construction laid down by Lord Herschell in the *Bank of England v. Vagliano Brothers*, [1891] A. C. 107, at 144 & 145 are inapplicable. Section 499 was enacted not in codifying the doctrines of English Law but in creating a new offence of criminal defamation and while dealing with the various classes of qualified privilege, the authors of the Code left intact the well-established doctrine of *absolute privilege* which has been recognised to be the law of this country as regards civil liability by the ruling of the Privy Council in 11 B. L. R. 321. And since this rule exists apart from the provisions of s. 499 the latter cannot be said to be exhaustive of the law of defamation and the doctrine of absolute privilege as understood in the Indian and English Law is applicable to determine criminal as well as civil liability. The Calcutta High Court however refused to be bound by the reasoning of the Madras Full Bench. See 40 C. 433 = 17 C. W. N. 297 = 14 Cr. L. J. 100 = 18 Ind. Ca. 660. This view of the Calcutta High Court was fully anticipated with regard to the trend of the opinion of that court as could be gathered from. 32 C. 756 = 9 C. W. N. 911 = 2 C. L. J. 105 = 2 Cr. L. J. 459; 36 C. 375 = 13 C. W. N. 340 = 9 C. L. J. 259 = 9 Cr. L. J. 165 = 1 Ind. Ca. 147 and 14 Cr. L. J. 528 = 20 Ind. Ca. 1008.

S. 499 only applies to attacks made upon individuals. Imputations of a seditious character directed against the Government are provided for by s. 124A, which has been already discussed (*ante*, §§ 95-97, at pp. 293-308). Blasphemous libels are not punishable at all, unless so far as they consist in words or acts which constitute an offence under s. 298. See as to oral imputations of unchastity, which though not actionable are criminally punishable, 28 C. at 464, *disagreeing with* 8 M. 175

The mode in which the imputation is conveyed is quite immaterial. The language may be vituperative, 9 A. 420, or suggestive of the complainant having committed a crime, 4 C. 124, or incurred social obloquy as by saying that he is an outcaste, 33 M. 67, or to call a *Pursutia Kaisth*, a '*Kori Chamar*,' 11 Cr. L. J. 413 = 6 Ind. Ca. 876, or to speak of one as a *Kulabrushta*, i.e.

prostitute's son, [1911] 2 M. W. N. 8=10 M. L. T. 96 =2 Cr. L. J. 497=12 Ind. Ca. 217 or even an accusation of anonymous letter writing, 7 Mad. Jur. 253. It may be defamation to publish a magazine-article as if it were written by a well-known man of letters, while as a matter of fact it was the production of a commonplace writer. If it could be proved that any one reading the article would take the plaintiff for a commonplace scribbler whereby the plaintiff could be damaged even though the damages likely to be sustained were not capable of present proof, it has been held to be actionable, *Ridge v. The English Illustrated Magazine, Ltd*, 29 T. L. R. 592. But to say that the complainant's caste is not quite so high as that of the accused is a mere expression of opinion and does not harm the reputation of the caste said to be low—*per* Muthuswamy Iyer, J., in *Weir* I. 575. To speak of a Muhammedan that he killed a cow in his compound would in no way affect his reputation, 5 C. P. L. R. 53, though it would be quite different if the same imputation had been made in regard to a professing Hindu. A man is entitled not to associate with other castes or even with members of his own caste, but it would be defamation to call a man an outcaste, 19 M. L. J. 714; 15 M. 214; 6 A. L. J. 472=9 Cr. L. J. 535=2 Ind. Ca. 226. Many matters at which people feel annoyed or imagine they are injured are often taken to criminal courts as defamation; courts will do well to consider whether there has really been an injury to reputation. Thus a statement that the complainant disobeyed some one and treated him with disrespect, is not *prima facie* defamatory, 6 M. H.C.R. Appx. 46; *Weir* I. 593. However the case reported in 1909 P. W. R. (Cr.) 3=9 Cr. L. J. 154=1 Ind. Ca. 99, would serve as an illustration. One *Abdulla*, a tailor, addressed a post card to Sergeant Clarke claiming a sum of money and had a demand note admittedly executed by Clarke to support his claim. However the District Magistrate had the claimant arrested and brought to court in handcuffs for the high offence of having addressed a post-card making a demand upon the Sergeant. He was told he would be let off if he withdrew his claim, but as he

persisted in urging the validity of his claim, he was charged with defaming the Sergeant. The Chief Court however intervened and quashed proceedings before the accused could be convicted by the District Magistrate. The words may even profess to be words of praise, provided they are so framed as to show that an opposite meaning is intended. As Buller, J., said in *R. v. Watson*, 2 T. R. 206. "Upon occasions of this sort I have never adopted any other rule than that which has been frequently repeated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel as men of common understanding, and say whether in their minds it conveys the idea imputed. Exactly the same rule applies where the imputation is not contained in a statement, written or spoken, but in some representation or by signs. Where the meaning of the imputation is ambiguous, or where it does not on its face apply to the complainant, evidence is admissible to explain its meaning, or to show who was the person really meant. Where a person is slandered by insinuation, or without mention of his name, it is everyday's practice to call witnesses and ask them whom they understood to be aimed at by the libellous matter. The ultimate question, whether the complainant really was intended, is of course a question of fact for the tribunal." *Per* Lord Mansfield. *R. v. Shipley*, 4 Doug. 164; *LeFanu v. Malcomson*, 1 H.L. Ca. 637 *per* Lord Campbell, at 668. See also *Boydell v. Jones*, 4 M. & W. 446; *Brown*, 11 Mod. 86. In all such cases the English practice is to state in the charge the meaning which the prosecution intends to asfix to the libel, by means of averments which are technically called *innuendoes*. These are unnecessary where the libel on its face is clear and specific. Where it is ambiguous, such averments appear to be material and necessary, as without them the defendant would not know what charge he had to meet, and therefore if the prosecution fails to make out the meaning which it has attached to the statement, the Crown cannot repudiate it at the trial and set up another meaning. *Williams v. Stott*, 1 C. & M. 675. See the observation of Lord Hershell in *Australian News Co. v. Bennett*, [1894] A. C. 284 at 287, 288. When the person defamed is only indicated by his

initials, *Du Bost v. Beresford*, 2 Camp. 512, or the name left blank, *Burke v. Warren*, 2 C. & P. 307, evidence may be given complainant was really the person hit. See the observations of Lord Cottenham in *Lefanu v. Malcomson*, 1 H. L. Ca. 637 at 664; 9 Cr. L. J. 425. As laid down by the House of Lords in *Hulton & Co. v. Jones*, [1910] A. C. 20, it is no defence to show the defendant did not intend to defame the plaintiff if reasonable people would think the language defamatory of the plaintiff. In this case a London Newspaper called the *Sunday Chronicle* published an article which contained statements defamatory of 'Artemus Jones', the writer believing him to be a fictitious personage with an unusual name, but unknown to the writer there happened to be a London Barrister bearing this name who was fortunate enough to obtain very heavy damages, the House of Lords approving of the *dictum* of Coleridge, C. J., in *Gibson v. Evans*, 23 Q. B. D. 384 at 386: "It does not signify what the writer meant; the question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff." Of course this might be done by altering or amending the charge in the manner authorized by the Criminal Procedure Code (ss 226—232). The office of an *innuendo* is to explain the meaning which the defamatory matter was intended to convey, and was capable of conveying; not to extend its natural meaning, or to add to it some meaning which it is incapable of bearing. "Suppose the words to be 'a murder was committed in A's house last night,' no introduction can warrant the *innuendo* 'meaning that B committed the murder,' nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly." *Per curiam*, *Solomon v. Lawson*, 8 Q. B. 823; *per Lord Campbell*, *Lefanu v. Malcomson*, *ut sup*, see, further, *post*, § 223. On the other hand, the meaning of any words, representation, or signs, is that which they would convey to persons of ordinary common sense, who are possessed of the information which would enable the statement to be understood. This is the meaning which affects the complainant, and the defendant is not all.

to set up any non-natural sense different from that which the rest of mankind would understand by what he said or did. See the cases cited *ante*, Chap. V., § 95, p. 300-304; 3 A. 664; 3 Bom. L. R. 188. When the defendant said of the complainant that he had stolen his apples he was not allowed to explain it away by saying complainant removed under an unfounded claim of right, *Rowcliffe v. Edmonds* 7 M. & W. 12; see also *Marks v. Samuel*, [1904] 2 K. B. 287; *Weir* 1. 612.

These principles received a remarkable illustration in the case of *Monson v. Tussaud*, [1894] 1 Q. B. 671.

Monson had been tried in Scotland for the murder of Lieutenant Hambrough, who was found with his brains blown out in the course of a shooting party. The theory of the prosecution was that he had been shot by *Monson*; that of the defence was that his gun had gone off by accident. The jury returned a verdict of "not proven," which meant that they could not make up their minds whether the prisoner was innocent or guilty. The defendant was the proprietor of a well-known waxwork exhibition. A figure representing *Monson*, and near to which was a gun, described as his, was exhibited by the defendant in a room next to one known as the *Chamber of Horrors*. In the same room with him were figures of Napoleon I., Mrs. Maybrick, a convicted murderess, Pigott, a perjured witness and suicide, and Scott, who had been accused as an accomplice of *Monson* in the murder. The *Chamber of Horrors* was devoted to murderers and others connected with murders. In it was a representation of the place where the body of Lieutenant Hambrough was found, with a description, "*Arillmont Mystery. Scene of the Tragedy*." Mr. *Monson* sued *Tussaud*, alleging that the whole exhibition was a libel on him. An application for an injunction, pending the hearing was made and granted by Mathew and Collins, J.J., who held that the exhibition was so managed as necessarily to convey the imputation that the plaintiff was connected with a crime, and not that he was a spectator of an accident. On appeal, further affidavits were filed, which tended to show that the plaintiff was himself a consenting party to the exhibition, and mainly on the strength of these the injunction was dissolved. Lord Halsbury, however expressed his entire approval of the judgments below, and the other judges do not seem to have disapproved of them. When the case came on for hearing, on the 30th of January, 1895, Lord Halsbury, in the course of his charge to the jury, said:—
 "The defendant has exhibited in a waxwork exhibition a figure of the late Lieutenant Hambrough, who was tried for the murder of Cecil Hambrough by a jury in Scotland; and against whom a verdict of 'not proven' was returned. The defendant has also exhibited a figure of the late Lieutenant Hambrough, who was tried for the murder of Cecil Hambrough by a jury in Scotland; and against whom a verdict of 'not proven' was returned. The defendant has also exhibited a figure of the late Lieutenant Hambrough, who was tried for the murder of Cecil Hambrough by a jury in Scotland; and against whom a verdict of 'not proven' was returned."

proven" only was passed." If it meant that—and it could not mean anything else—could the jury have any hesitation in saying that it was a libellous publication?" The jury found a verdict for the plaintiff, but assessed the damages to his character at one farthing. For other instances of defamation by visible representation, see *Lyre v. Garlic* (burning in effigy) 42 J. P. 68; *Jeffries v. Dunscombe*, 11 East 225 (fixing up callows against a man's door). In 2 N.-W. P. H. C. R. 435, the making and publicly exhibiting of the effigy of a person and beating it with shoes was held to amount to defamation.

Intention to injure.—By s. 499 the person who defames another must be "intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation" of the person defamed. It is probable that this clause throws no greater burthen upon the prosecution than arises under English law from the word "malicious," which is part of the definition of a libel. "In the English law of libel, malice is said to be the gist of action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice is meant, while by legal malice, as explained by Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 247 at 255, is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published." *Per Cockburn, C. J., Wason v. Walter*, L. R., 4 Q. B. 73, at 87. In a case where it was found as a fact that the defendants by their servant had published a libel, Lord Esher said: "If the matter stood there without more the law would infer malice, the meaning of which really is that it does not signify what the motive of the person publishing the libel was, or whether he intended it to have a libellous meaning or not." *Nerull v. Fine Arts Insurance Co.*, [1895] 2 Q. B. 156, at 168; *affd.* [1897] A. C. 68. Everything which reflects on the character of another and is published without lawful justification or excuse is a libel whatever the intention may have been, *O'Brien v. Clement*, 15 M. & W. 435 at 437. Similarly in *Weir* L. 613, where the accused attributed to the complainant *crim. con.*, with a Pariah woman with

the result that his intended marriage was broken off, but the magistrate found absence of ill-will, the High Court said that this finding does not lead to the conclusion accused acted *bona fide* and that conscious violation of the law to another's prejudice is sufficient though there is no malice in fact. Legal malice must be presumed until a case of privilege is made out by the accused. As remarked by the Punjab Chief Court in 1913 P. W. R. (Cr.) 34=1913 P. L. R. 317=14 Cr. L. J. 606=21 Ind. Ca. 478, it is not necessary that there should be an intention to harm the reputation. It is sufficient if there was reason to believe that the imputation made would harm the reputation. See also 4 Bur. L. T. 48=12 Cr. L. J. 129=9 Ind. Ca. 775. The mode of rebutting the inference of malice is by disproving the state of things from which the law infers malice, either by showing that the statement is not a libel at all, or that it comes within one of the classes of cases to which no legal presumption of an intention to injure is attached. "The accused may be able to show that, though the matter is defamatory, it was published on a privileged occasion, or he may be able to avail himself of the statutory defence that the matter complained of was true, and that its publication was for the public benefit; and those classes of cases were meant to be excluded from the purview of the section by the use of the word 'maliciously.'" *Per* Lord Russell, C.J., on the construction of the Libel Act, 1843, 6 & 7 Vict., c. 96, s. 5; *R. v. Munslow*, [1895] 1 Q. B. 758, at 761. Hence the question for the jury, in cases tried by a jury, is whether the statement complained of is a libel, and the correct mode of putting this question to them is that stated by Best, J., in *R. v. Burdett*, 4 B. & A. at 120. "With respect to whether this was a libel, I told the jury that the question whether it was published with the intention alleged in the information was peculiarly for their consideration; but I added that this intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to

produce ' See *per* Jenkins, J., 1 C. W. N. 465; 7 A. 906; **Ratanlal 140** When the fact of a libel is found according to these directions the case is over, unless the defendant sets up some special defence. "The judge ought not to leave to the jury whether the defendant intended by a libel to injure the plaintiff. Every man is presumed to intend the natural and ordinary consequences of his act. If the tendency of the publication was injurious to the plaintiff, the law will assume that the defendant, by publishing it, intended to produce the injury which it was calculated to effect " *Per* Lord Tenterden, C J., *Haire v Wilson*, 9 B. & C. 643; *R v Harvey*, 2 B. & C. at 267, *per* Holroyd, J.

It seems to me that there is nothing in the language of the Code which leads to any different conclusions. When a defendant says that he did not intend to damage the reputation of the prosecutor, what does he mean? Does he mean that he did not intend by his language to convey anything that would harm the character of the prosecutor or that he was justified in saying what he did, but that his object was not to injure the complainant, but to discharge a duty, or, that in using language of a defamatory nature, he had no wish to hurt him, and did not suppose he would be hurt? It is obvious that in the first case what he really asserts is that a false construction has been put upon his words *Prima facie*, a man's words must be judged according to the meaning which is ordinarily put upon them. But in every country there are numerous terms of abuse which literally convey the imputation of a crime, but which, when used by one angry man to another, merely show that he wants to insult him, and are understood to mean nothing more. Thus it was held in **Weir I. 607** words *prima facie* defamatory used in a street quarrel were mere vulgar abuse and would not amount to an offence under s. 499 as under the circumstances no one could infer an intention to harm the reputation of the person defamed; 1883 A. W. N. 36, 46 & 167; *Penfold v. Westcote*, 2 Bos. & P. (N R.) 335; *Minors v. Leaford*, Cro. Jac. 114. Where however the defendant in the course of a quarrel told the plaintiff, 'you are a thief,

you robbed Mr. Lake of £30,' the court held the words to be too specific to amount merely to abuse, *Hankinson v. Bilby*, 16 M. & W. 442; *Tomlinson v. Brittlebank*, 4 E. & Ad 630; *Roucliffe v. Edmonds*, 7 M. & W. 12. The result would have been otherwise if he had stopped with the general abuse 'you are a thief,' *Read v. Ambridge*, 6 C. & P. 308; *Martin v. Loci*, 2 F. & F. 654; *Slowman v. Dutton*, 10 Eng. 402. So the mere fact that defamatory words are used as a jest is in itself no defence, for, as Sergeant Hawkins says, "jests of this kind are not to be endured, and the injury to the reputation of the party grieved is in no way lessened by the merriment of him who makes so light of it" 1 Hawk, P. C. 546; *Donoghue v. Hayes*, *Hayes, Jr. Exch.* 265. But it would be very material to show that the words were spoken as a jest to persons who received them as a jest, for this would show that they never had a defamatory meaning. And in this respect there will be a great difference according as the words are spoken to a few, or to a large and mixed company, or according as they are written or spoken. Words used jestingly to a few friends will be understood as they were meant. The same words spoken in public will be taken up by half of the hearers as solemn earnest. Again, a man who speaks will be judged according to the effect produced on those to whom he speaks. He is not answerable for the effect produced on those to whom his words are repeated, unless he intended them to be repeated, *Parkes v. Prescott*, L. R., 4 Ex. 169, or addressed them to a person whose duty it was to repeat them *Kendillon v. Maltby*, 1 C. & Mar. 493. A person who writes, addresses a wider audience, and is responsible for the acceptance in which his language will be received by the general public who read his words *Foster v. Clement*, 10 B. & C. 472; *Hulton & Co. v. Artemus Jones* [1910] A. C. 20. See ante, Ch. V, § 95, at p. 300. Possibly it might be a good defence to show that the defendant did not understand his own words, as, for instance, if he was using a language with which he was imperfectly acquainted. In all such cases the real defence is that the words used had not a defamatory meaning, and before there can be a conviction this defence must have been negatived by those upon whom

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The second line of defence is a perfectly good one. It amounts to saying that the case comes within one of the Exceptions to the general rule. It has to be remembered that truth in itself is no defence the English rule 'the greater the truth the greater the libel' being sound law under the code, having regard to the limitations implied in *Excep. 1, 5 C. P. L. R. 55*; see § 213 *infra* at p. 896. When this is made out, an express intention to injure must be established by the Crown, and cannot be assumed.

The third line of defence is obviously untenable. It is not necessary to show that the defendant intended to hurt the man he maligns. It is sufficient under the Code to show that he knew, or had reason to believe, the imputation would do harm. This must be judged of by the nature of the act done, just as if the accused had stabbed the prosecutor with a knife. As Sir James Stephen says "I don't think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct." *2 Steph. Crim. L. 111*, see *per Mahmood, J., 10 A. at 451, 456; 6 N.-W. P. H. C.R. 86; 28 C. 63; Weir l. 575 & 594; R. v Tibbits, [1902] 1 K. B. 77 at 78.*

208. Defamation by injuring the reputation of the dead.—*Expl. 1.* In order to bring within the terms of this section defamatory matter relating to a deceased person, it will be necessary to show, not only that the deceased might have complained of it, but also that it was written, or spoken, with the intention of insulting his surviving relations. I conceive that the words "intended to be hurtful," etc., in Explanation 1, must be taken as meaning an express and primary intention, as distinguished from a legal and implied intention. It would be indictable to rake up the vices of a dead man for the sake of deliberately wounding his family, but no

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statements, however injurious, would be criminal, if made in the course of a *bona fide* history, or biography, the subject of which was dead. *R. v. Topham*, 4 T. R. 122, per Lord Kenyon; *Labouchere*, 12 Q. B. D. 320; *Critchley*, 4 T. R. 129 n.; *Eusor*, 3 T. L. R. 366; see the charge of Abbott, C.J., in *Hunt*, 2 St. Tr. (N. S.) 69. It has been held in such a case that a suit for damages cannot be sustained, 5 B. 580, and this is reasonable as even a prosecution for defamation abates on the death of the defamed, 1908 P. W. R. (Cr.) 21=7 Cr. L. J. 290; 31 C. 993; 26 B. 259. It is also well recognised that one man however nearly related cannot sue for injury done to another by way of defamation. 1 M. 383; 11 A. 104; 18 M. 250; 17 B. 573.

209. Defamation of a Company or a collection of persons.—Expl. 2. Where proceedings are taken for the defamation of a company or association, the matter complained of must be such as damages its reputation as such (Expl. 2). "The words complained of in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals who compose it. A corporation or company could not sue in respect of a charge of murder, or incest, or adultery, because it could not commit those crimes. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position." *Per Lopes, L. J., South Hetton Coal Co. v. N. E. News Association*, [1894], 1 Q. B. 133 at 141. Where a collection of persons is defamed as such, there must be some definite body of persons, e.g., certain Jews lately arrived from Portugal and living near Broad street, *Osborn*, 2 Barnard (K. B.) 138 at 166=2 Kel. 230; or the religious society called the 'Scorton Nunneys,' *Gathercole*, 2 Lewis 237; *Booth v. Briscoe*, 2 Q. B. D. 496, capable of being identified, and to the whole of whom it can be asserted that the defamatory matter applies. Otherwise no distinct issue could be presented for trial, and the defendant would not know what charge he had to meet. Where the

defendants were indicted for publishing a false and scandalous libel against divers good subjects of the King to the jurors unknown. the indictment was held bad ; as the jury could not say that the libel was false and scandalous, when they did not know the persons of whom it was spoken, nor could they say that anyone was defamed by it *R v Orme, or Alme, 1 Ld. Raym. 485=3 Salk 224. Eastwood v Holmes, 1 F. & F. 347 at 349* On the other hand, an indictment was held good which defamed all the English Bishops, *R. v. Barter, 1 Ld. Raym. 879*, and all the clergy in Durham. *R. v Williams, 5 B. & A. 595.* This was the ground of the decision in the *Nil Durpan* case, which caused much excitement in Calcutta many years ago. There, the pamphlet said, " I present the indigo planters' mirror to the indigo planters' hands Now let every one of them, having observed his face, erase the freckle of the stain of selfishness from his forehead ' Upon these words Sir B. Peacock is reported to have observed : " This certainly appears to me to represent to the indigo planters that if they look into this paper, they would see a true representation each of himself Is not this a reflection on a certain class ? Each of them was to look at it to find his own picture "

And, again, the Chief Justice said " It is unnecessary to decide in this case which of the indigo planters was alluded to in this publication, because every one of them is asked to look into the mirror. Any one of them could say, ' I am one of the men alluded to, and I have thereby suffered damages which I wish to recover. Then comes the question as to the class itself.' Is this court to be inundated with suits from each individual member of that class ? Has not the class itself a right to be protected in a criminal prosecution, to obviate the necessity of each party suing separately ? I therefore think the class has been sufficiently described." *Sup. Court, Calcutta, July 24, 1861.*

Where a libel which is really aimed at an individual professes to refer to an undefined class of persons, evidence may be adduced to show who is the person

referred to and the libel will then be treated as against him alone. *Lafano v. Malcolmson*, 1 H. L. Ca. 637. On the other hand a libel on a specified individual may furnish a cause of action to an association as where bankruptcy is attributed to a member of a firm. Such an imputation of facts affects the credit of both, *Harrison v. Berington*, 8 C. & P. 708; *Cook v. Batchellor*, 3 Bos. & P. 150; *Forster v. Lawson*, 3 Bingh. 452; *R. v. Jenour*, 7 Mod. 400.

As regards defamation by a corporation the subject is not of much importance. In the absence of a statutory power, the funds of the corporation are not available to pay fines on conviction or damages in a civil action. Proceedings therefore will have to be taken against the individual members of the corporation present at and taking part in proceedings alleged to be defamatory, as in 1 B. 477 at 483. Difficulty of the same order may not be felt as regards voluntary associations, but then it is a question entirely for private arrangement whether reparation is made by the offending members personally or out of the association funds. The rulings in 27 B. 189, 28 B. 314, etc., that the Secretary of State for India cannot be sued in Tort may furnish arguments by way of analogy. See *per Blackburn, J., Pharmaceutical Society v. London & Pro. Supply Asso*, 5 Q. B. D. 310, reversing 4 Q. B. D. 313 and on appeal, 5 A. C. 857.

II. PUBLICATION.

210. Publication essential to constitute the offence.—The next element in the law of defamation is that the imputation should be made or published. Whatever the difference may be between making and publishing, each act must have the quality of communicating the defamatory matter to some third person, as where defamatory matter is printed on handbills and distributed broadcast, 15 M. 214, or when a libellous drawing is set up in a public place, *Hard v. Wood*, 38 Sol. J. 234; *Spate v. Massey*, 2 Stark 559. So long as such matter is unknown to anyone but the author of it, no imputation is made at all. So long as it is only

made to the person defamed, it cannot harm his reputation, unless he himself chooses to divulge it, in which case the harm is his own act, not that of the defamer. It is probable that the words "make and publish" are only different phases of the idea which is conveyed in English law by the term "publication." A man makes an imputation when it is disseminated by the very act which brings it into existence, as when he utters it in the presence of others, or makes a sign, or chalks up a representation which conveys a defamatory idea. He publishes it when he gives currency to defamatory matter which had previously existed, as by repeating a conversation, or by posting a letter, or printing an article in a newspaper.

In *Pullman v. Hill*, [1891] 1 Q. B. 524 at 527, Lord Esher said, with reference to written matter, "What is the meaning of 'publication'?" The making known the defamatory matter, after it has been written, to some person other than the person of whom it is written "e.g., sending a post card to the person defamed, 6 M. 381; *Smith v. Crocker*, 5 T. L. R. 441, or in a telegram, *Whitfield v. S. L. Railway*, [1858] E.B. & E. 115 *Somerville v. Hawkins*, 10 C. B. 585 *Robinson v. Robinson*, 13 T. L. R. 564, *Robinson v. Jones*, L. R. 4 Ir. Ex. 391. As regards post cards it has to be remembered that publication consists in actual communication to a third person and not in affording bare opportunity for it, so that there would be no publication if it could be proved that none but the addressee of the post-card ever actually read it, *Clutterbuck v. Chaffers*, 1 Stark, 471, or none but the addressee could make out the innuendo meant to be conveyed by the language employed in the post-card or that there was nothing to connect the plaintiff with the libel, *Sadgrove v. Hole*, [1901] 2 K. B. 1, *R. v. Holt*, 5 T. R. 444, *R. v. Wyatt*, 8 Mod. 123, *R. v. Paine*, 5 Mod. 165, *R. v. Harney*, 8 B. & C. 257. These exceptions must be borne in mind in applying the general rule about post-cards enunciated in 6 M. 381 and in *Williamson v. Freer*, L. R. 9 C. P. 393, 15 M. 214; *Chattel v. Turner*, 12 T. L. R. 360; *Beamish v. Dairy Supply Co.*, 13 T. L. R. 484. In the case of defamation by printed matter, all that the complainant has to do to prove publication is to produce a printed copy. The court may well infer that the printed copy was produced by the manuscript being handed over to the printer which would be sufficient publication. Weir i

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is sent straight to the person of whom it is written, there is no publication of it, for you cannot publish a libel of a man by himself 10 W. R. (Civ.) 184; 7 A. 205; (see the dissenting judgment

of *Duthoit, J.*) 30 C. 402=7 C. W. N. 74; 1910 P.R. No. 10; 6 N.-W. P. H. C. R. 38; 18 B. 205. If there was no publication, the question whether the occasion was privileged does not arise. If the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk, and takes away the libel and makes its contents known, I should say there would not be a publication. If the writer of a letter shows it to any person other than the person to whom it is written, he publishes it. In the case from which these remarks are taken, the publication consisted in the giving a letter to be copied, where the privilege attaching to the occasion did not authorize such a step. *Heckford v. Galatin*, 2 Hyde 274.

As regards the effect of unintended publications as where a man writes something *prima facie* defamatory intending to communicate it only to the person concerned or to some one privileged to receive the same, but by mistake posts it in a wrong cover, as in *Thompson v. Dashwood*, 11 Q. B. D. 43, or *Fox v. Broderick*, 14 Ir. C. L. R. 453, or inserts a notice regarding dissolution of a partnership under the wrong heading of 'First Meetings under the Bankruptcy Act,' in England it has been held there is a difference as regards civil and criminal liability. While holding him liable in an action for damages, *Shepherd v. Whitaker*, L. R., 19 C. P. 502, *Stubbs v. Marsh*, 15 L. T. 312, negligence has been held to be an answer to a criminal prosecution, see *per Lord Russel, C. J.*, in *Q. v. Munslow*, [1895] 1 Q. B. 758 at 761; *Blake v. Sterens*, 4 F. & F. 232; *Lord Abingdon*, 1 Esp 226; *Brett v. Watson*, 20 W. R. 723; *Paine*, 5 Mod. 167. Under the Code intention to injure the complainant's reputation being essential for criminal liability the same principle would be followed. Thus if a man write libellous matter and communicates only to the person defamed and the latter publishes it to several of his friends, the author of the libel cannot be held liable, *Barrow v. Leicellin*, Hob. 62. In *Stubbs v. Russell*, [1913] A. C. 386, defendants published in their Weekly Gazette plaintiff's name as one of the persons against whom an ex-parte decree had been passed in the Small Debts Court, while the real fact was the suit was dismissed for want of prosecution as the claim had been settled before the hearing date. The plaintiff averred that the representation carried with it the in-

nuendo that he was unable to pay his just debts. But the House of Lords held, *overruling* the Courts in Scotland that the entry which was coupled with an explanatory note (to the effect that the entry did not imply inability to pay on the part of the person named) was incapable of bearing the defamatory meaning ascribed to it and there was no case to go to the jury. In 10 Bur. L. R. 304=1 Cr. L. J. 982, the accused wrote a letter apparently defamatory of the complainant but there was nothing to indicate that he meant to send it to the person who got it in due course through the post office or that he posted it; it was held the accused was entitled to an acquittal in the absence of proof that he published it, but if the prosecution had proved publication, there would be no difficulty in inferring intention to injure. In the case of a newspaper article, proof that the original was in the handwriting of the accused has been held to be sufficient evidence to show that he published even though there was no evidence adduced to show that the printing or publication was under his direction. *Lozett*, 9 C. & P. 462. The production of the printed copy is sufficient proof of publication, *Weir* 1. 579. Sending a libel regarding a man to his wife is a sufficient publication. *Wenman v. Ash*, 13 C. B. 836=22 L. J., (C. P.) 190; 4 C. L. J. 390; *Jones v. Williams*, 1 T. L. R. 572, though uttering a libel by a husband to his wife has been held to be not publication, *Wenhack v. Morgan*, 20 Q. B. D. 635; 1910 P. R. No. 10=1910 P.W. R. (Cr.) 6=11 Cr. L. J. 281=5 Ind. Ca. 892. In the last case the accused in answer to a lawyer's notice sent a reply defamatory of the client on whose behalf the lawyer had issued the notice and it was held as the defamatory matter was altogether irrelevant to the subject of the notice, the pleader could not be identified with the client and the publication must be deemed to be publication to a stranger. The reason for holding communication to the person concerned not to be defamation is self-esteem is something different from reputation and s. 499 deals only with harm to reputation. As regards communication by husband to wife the English Law based it on the fiction husband and wife

are but one person. It is difficult to imagine why under the terms of s. 499 such communication is not a publication intended to harm the complainant's reputation. If the Legislature intended having regard to the freedom of domestic life, to save such communication from amounting to publication, one would expect to find an express provision to that effect as in s. 212, I. P. C. If a husband communicates information defamatory of the complainant to his own wife and the latter embodies the same in a writing addressed to the complainant there is no reason why the husband should not be liable. In **17 M. 401**, *Muttuswami Iyer & Best, J.J.*, held with reference to a case of theft that there is no presumption in the code that the husband and wife constituted in law but one person, and even in England, when a letter is addressed to the defamed himself at his ordinary place of business, and is opened in the usual course of business by a partner or clerk, it has been held to amount to defamation. *Pullman v. Hill*, [1891] **1 Q. B. 524**; *Gomersale v. Davies*, **14 T. L. R. 430**. Where several persons unite in an act of defamation, as where one states the libellous matter, another writes it down, a third carries it away, and a fourth prints it, each is guilty of the publication. *5 Bac. Abr. 206*; ss. 34, 37, I. P. C., *ante*, § 82 at p. 237; **10 B. 97**; *ante*, § 97 at p. 306. The publisher is as much liable as the author of the libel, **19 B. 703**, *Ratanlal 769*; where a libel is printed the disposal of each copy would constitute a distinct publication and a fresh offence and there is nothing in law to prevent as many prosecutions as there are number of copies sold, **1883 P. R. No. 12**. But this does not apply to one who is an innocent agent in carrying out part of the transaction; as, for instance, a porter who carries libellous handbills in ignorance of their contents; *Day v. Bream*, **2 M. & Rob., 54**, or a mere news vendor who does not know, and had no reason to know the contents of the paper; *Emmens v. Pottle*, **16 Q. E. D. 354**; *Mallen v. Smith*, **9 T. L. R. 621**; or a compositor who sets up the type of a libel mechanically, and without any intelligent perception of its meaning. *R. v. Mertens*, (so held by Stephen, J., *2 Steph. Crim. L. 262n*.) This aspect of the case is discussed at great length by Romer,

L J, in *Vizetelly v Mudie's Select Library, Ltd.*, [1900] 2 Q. B. 170 at 180. See *per* Wills, J., in *Munslow*; [1895] 1 Q. B. 758 at 765. On the same principle every repetition of a libel furnishes a fresh cause of action, 12 B. 167. The fact the rumours repeated were prevalent and did not originate in the accused is no excuse, *Waithman v Weaver*, 11 Price 257n; *Kerr*, 8 C. & P. 177. When a person uttered a defamatory statement and four months later repeated the same when examined as a witness in the course of a judicial proceeding, it was held that the repetition was absolutely privileged was no ground for exempting him from liability for the first offence as the doctrine of merger has no place in criminal law, *Weir* 1. 530 & 535; *cf.* § 205 *supra* at p. 839 in connection with adultery.

Under English law a person who sells, in the ordinary way of his business, any defamatory publication is liable both civilly and criminally, even though he proves that he knew nothing of its nature, and supposed it to be of an innocent character. This was well illustrated in one of the political prosecutions of the last century. *Cuthell* was a bookseller, who only dealt in old and rare books, and who never dealt in political works. He had often published books of a learned theological nature for the Rev. Gilbert Wakefield, and finally published the production for which he was indicted, supposing it to be one of the same stamp. It turned out to be a flaming political pamphlet. For this he was prosecuted, and, according to the fashion of the time, the indictment charged him with every rebellious and wicked intention which the draftsman could imagine. The Attorney-General told the jury that if a man publishes a libel, his knowledge of its contents is only material in estimating his punishment, just as it would be in the case of a chemist who, by mistake, sold poison instead of medicine. *Erskine* delivered an ingenious and elaborate argument in support of the proposition, that even if he had published negligently and inadvertently, he ought to be acquitted if he was found to have none of the intentions which were stated in the indictment. Lord Kenyon, C J., in charging the jury,

met all this with the simple remark, "God only knows the hearts of men, and we can collect their meaning only from what they do. These are fallible modes of arriving at knowledge; but we have no better, and we must pronounce men innocent or guilty according to this standard." *R. v. Cuthell*, 21 St. Tri 641, pp. 655, 663, 674; *Gutch Moo. & Malk.* 548; *Keenslow* [1895] 1 Q. B. 758. The ground of this rule appears to be, either that the law could not
could disperse libels abroa

the import of them from ..
P. C. 545. [See however *Smith v. Streetfield*, [1913]

3 K. B. 764 where the innocent printer was also made liable where the author's privilege was defeated by proof of malice,] or that a person who makes a profit out of his business is bound at his peril to conduct it in such a manner as not to be injurious to others (*ante*, §§ 11 & 97). The severity of the law was mitigated in England as regards newspapers and other periodical publications by allowing the defendants to prove, among other things, that the libel had been inserted without actual malice, and without gross negligence. 6 & 7 Vict. c. 96, s. 2. In a recent case an action for libel was brought against the Trustees of the British Museum, because they had allowed a pamphlet containing a libel on the plaintiff to be lent in the ordinary manner to one of the public for perusal. The case was dismissed, on the ground that the defendants had only done what the statute under which they acted required them to do. It was admitted by the Court that a person who sold books across the counter, or who delivered them to be sold in the street, would be liable, even though ignorant of their contents; but it was said that no case had been cited in which a private person, who innocently lent a book out of his library, had been held liable as publishing a libel. *Martin v. Trustees of British Museum*, 10 T. L. R. 338. The principle of this decision was carried further in *Walden v. Times Book Co.*, 28 T. L. R. 143. The defendants who are book-distributors sold two French books published in Paris and which the plaintiff alleged contained libellous statements regarding her. The jury found the defendants were ignorant of the contents

of the book and it was not through their negligence they were so ignorant and the book was not of such a character as to put them upon inquiry. *Cozens Hardy, M. R.*, held while there may be a duty to examine some books carefully because of their titles or of the recognised propensity of their authors to scatter libels abroad, there is no general obligation on distributing agents to read every book they sell in order to ascertain whether or not it contains libellous statements.

Under the Penal Code a person is only liable for making or publishing an imputation when he does so "intending to harm, or knowing or having reason to believe that such imputation will do harm. These words cannot mean less than the wilful intention to do a wrongful act (*ante*, p. 857) or the connivance at, or tacit permission to publish libels of the sort complained of, which would amount to an authority to publish any particular libel. *R v Holbrook*, 4 Q. B. D. 42. Accordingly, in a charge against a newspaper editor, the Madras High Court held "that it would be a sufficient answer to the charge in this country, if the accused showed that he entrusted in good faith the temporary management of the newspaper to a competent person during his temporary absence, and that the libel was published without his authority, knowledge, or consent." 9 M. 387; 1883 P. R. 12; 35 C. 945; 22 B. at 131. *ante* Chap V § 97 at p. 304. See ss. 501, 502. I. P. C.; *Stanger, L. R.*, 6 Q. B. 352, *Hart v. White*, 10 East 94. The law was laid down in 3 A. 342 at 345 according to the strict English rule by Stuart, C. J. The only authority referred to was an English text-book, and no notice was taken of the special terms of s. 499. It is no answer to an editor to say that the author is a correspondent whom he regarded as trustworthy. *De-Crespigny v. Wellesley* 5 Bing. 392 at 402; or that he merely extracted from another respectable journal. *Talbutt v. Clark*, 2 M. & Rob. 312; *Watkin v. Hall, L. R.*, 3 Q. B. 396; *M'Pherson v. Daniells*, 10 B. & C. 270; *Saunders v. Mills*, 6 Bing. 213; *Holt*, 8 Cox. 411. A man who repeats a rumour is as much liable as one who originates it. *Davis v. Lewis*, 7 T. R. 17; *Spight*,

v. Gorney, 62 L. J. (Q. B.) 231 and even if the originator was privileged and therefore, not liable, the man who repeats may be liable. *Titeman v. Ainslie*, 10 Ex. 63; *Mills v. Spencer*, Holt. (N. P.) 533; *McGregor v. Thwaites*, 3 B. & C. 24.

The place of publication is only material with regard to jurisdiction. When a defamatory petition is sent to a public officer who in the ordinary course of official routine sends it to some subordinate for enquiry, there is a publication at the place where the enquiring officer receives it for which the petitioner may be held responsible, whether or not he expressly asks for enquiry, 1889 P. R. No. 14. Where a libel is posted in one district, and received and opened in another, the offence of publication takes place, and may be tried in the latter district. 3 A. 342; 22 B at 129; 15 B. 286; 5 W. R. (Cr.) 44. In *Burdett's* case, the libel was written in Leicester, and was delivered unsealed by A to B in Middlesex, there being no evidence as to where or how A received it. The case was tried in Leicester, and it was held that it might be assumed that A received it in Leicester, and that whether it was delivered to him open or sealed, there was a publication in Leicester. *R. v. Burdett*, 4 B. & Ald. 95. Where a libel is put into course of delivery in one district, and is actually delivered in another district, the case would come within ss. 179 or 182 of the Criminal Procedure Code and be triable in either district.

Under s. 198 of the Crim. P. C. no Court shall take cognisance of any offence falling under Chap. XXI of the P. C., except upon a complaint made by some person aggrieved by such offence. A husband is aggrieved by an imputation of unchastity made against his wife. 14 M. 379. 25 B. 151=2 Bom. L. R. 665 overruling *Ratanlal* 327; 12 M. C. C. R. 201=10 Cr. L. J. 263; 15 M. L. J. 224=2 Cr. L. J. 381; 1891 A.W.N. 183. *contra* 1884 P. R. No. 22; 1887. P. R. No. 39. The principle has been extended to other members of the family with whom a female relation has been residing as a dependant, 32 C. 425=3 C.L. J. 38=1 Cr. L. J. 445. But it was held in 1893. A. W. N. 207. that a mother and

son are not in the same position as wife and husband, and a son has no *locus standi* to prosecute if his mother's character is assailed. The President of a Municipal Corporation is not aggrieved by defamatory statements affecting his subordinates. 26 M. 43.

Under Act XXV of 1867, s. 5, the printer and publisher of a newspaper is required to make an official declaration that he is such. By s. 7 the production of an authenticated copy is sufficient evidence, unless the contrary is proved, as against the person whose name is subscribed to such declaration, that he is the printer or publisher, as the case may be, of every portion of every periodical work of a corresponding title. Such evidence throws upon the defendant the burthen of disproving the actual publication by himself, and leaves it open to him to show any circumstances which would negative the presumption of intent, which the law infers from such publication. 9 M. 387.

III. CIRCUMSTANCES IN WHICH IMPUTATIONS *Prima*

Facie DEFAMATORY ARE NOT PUNISHABLE.

211. Exceptions: their Nature and Scope.—The ten exceptions to s. 499 state cases in which an imputation *prima facie* defamatory may be excused. There may be said to be five groups of exceptions, all relating to occasions as to which qualified privilege is recognised. Exception 1 corresponds to the plea of justification being a bare statement of truth for public good. Exceptions 2, 3, 5 & 6 correspond to the plea of fair comment on a matter of public interest. Exception 4 covers the plea of a fair report of public proceedings. Exceptions 7 & 8 cover the cases of censure by a lawful authority passed in good faith and accusation made to a lawful authority in good faith. Exceptions 9 & 10 cover the cases of imputation made in good faith by a person for the protection of his interest or for the public good, and the case of caution intended for the good of the person to whom it is conveyed or for the public good. Looking at the matter from a different aspect, it may also be stated that the ninth Exception states a general principle of

which Exceptions 7, 8 and 10 are particular instances, so that the last four Exceptions include the whole of what are known to the English law, as communications made on a privileged occasion, i.e., one made in the discharge of a duty or protection of an interest in the person who makes it. It will be convenient to deal with these Exceptions *seriatim*, after some general discussion of privilege, considered in its broad aspects and of the doctrine of "absolute privilege," the law relating to which is left in an unsatisfactory state owing to the divergence of views on the part of the several High Courts. It must be remembered no magistrate is entitled to discharge a case of defamation *prima facie* made out, solely on the ground the accused might have had some ground for making the imputation. The *onus* is on the defence to bring the case within one or other of the Exceptions by offering affirmative proof, 13 Cr. L. J. 488=15 Ind. Ca. 488; [1911] 2 M. W. N. 8=10 M. L. T. 96=12 Cr. L. J. 497=12 Ind. Ca. 217. But where an alleged defamatory statement is said to be embodied in an official confidential report falling within the scope of ss 123-125 of the Evidence Act, and there is no likelihood of proving the communications by primary or direct evidence a dismissal of the complaint under s. 203, Cr. P. C., may be justified, 1910 P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

The phrase "privileged communication" is a loose but convenient way of denoting a communication made on a privileged occasion. As Parke, B., said: "The term 'privileged communication' is not perhaps quite a correct expression. The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it on him to prove that there was malice in fact; that the defendant was actuated by personal spite or ill-will, independent of the occasion on which the communication was made." *Wright v. Woodgate*, 2 C. M. & R., at 577; *per* Lord Esher, *Clarke v. Molyneux*, 3 Q. B. D., at 246. An occasion is privileged when the person who makes the

communication has an interest, or a duty, legal, moral, or social, to make it to the person to whom he does make it, and the person who receives it has a corresponding duty or interest to hear it. Both these conditions must exist in order that the occasion may be privileged—*Per* Lord Esher, *Pullman v. Hill* [1891], 1 Q. B. 524, at 527; *per* Lord Campbell, C. J., *Harrison v. Bush*, 5 E. & B. 344=25 L. J. (Q. B.). 25; 24 B. 13; 26 M., 464. It is further essential that the statement complained of should be delivered in the honest belief that the party was performing his duty in making the communication. *Per* Erle, C. J., *Whitely v. Adams*, 15 C. B. (N. S.) 392=33 L. J. (C. P.), 89, 491; *per* Brienwell, L. J., *Clarke v. Molyneux*, 3 Q. B. D. at 244. The words "moral or social duty" have been defined by

Q. B., at 350. Anything which a person may say or write in maintaining his own interests may also be said or written by his solicitor, or agent, or any other person to whom the protection of those interests is entrusted. *Baker v. Carrick*, [1894] 1 Q. B. 838. When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them, relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the original interview; and it is a question for the jury whether any further conversation on the same subject, though apparently causal and voluntary, does not take place under the influence of the confidential relation already established between them, and is therefore entitled to the same protection—*Per* Pollock, C. B., *Beatson v. Skene*, 5 H. & N. 838, at 855=29 L. J. Ex. 430.

Probably the most instructive and exhaustive judgment on the subject of privilege is that of Willes, J., in *Henwood v. Harrison* L. R., 7 C. P. 606. The following instances of the application of the rule may be useful. An

which Exceptions 7, 8 and 10 are particular instances, so that the last four Exceptions include the whole of what are known to the English law, as communications made on a privileged occasion, i.e., one made in the discharge of a duty or protection of an interest in the person who makes it. It will be convenient to deal with these Exceptions *seriatim*, after some general discussion of privilege, considered in its broad aspects and of the doctrine of "absolute privilege," the law relating to which is left in an unsatisfactory state owing to the divergence of views on the part of the several High Courts. It must be remembered no magistrate is entitled to discharge a case of defamation *prima facie* made out, solely on the ground the accused might have had some ground for making the imputation. The *onus* is on the defence to bring the case within one or other of the Exceptions by offering affirmative proof, 13 Cr. L. J. 488=15 Ind. Ca. 488; [1911] 2 M. W. N. 8=10 M. L. T. 96=12 Cr. L. J. 497=12 Ind. Ca. 217. But where an alleged defamatory statement is said to be embodied in an official confidential report falling within the scope of ss. 123—125 of the Evidence Act, and there is no likelihood of proving the communications by primary or direct evidence a dismissal of the complaint under s. 203, Cr. P. C., may be justified, 1910 P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

The phrase "privileged communication" is a loose but convenient way of denoting a communication made on a privileged occasion. As Parke, B., said: "The term 'privileged communication' is not perhaps quite a correct expression. The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it on him to prove that there was malice in fact; that the defendant was actuated by personal spite or ill-will, independent of the occasion on which the communication was made." *Wright v. Woodgate*, 2 C. M. & R., at 577; *per Lord Esher*, *Clarke v. Molyneux*, 3 Q. B. D., at 246. An occasion is privileged when the person who makes the

him. Such statements are privileged, whether asked for or volunteered, but when volunteered, this is a circumstance which may be taken into consideration with reference to a question of actual malice *Pattison v. Jones*, 8 B. & C., 578; *Child v. Affleck*, 9 B. & C. 403; *Fryer v. Kinnersley*, 33 L. J. (C. P.) 96; 15 C. E. (N. S.) 422. See § 222 *infra* at p 919

Mutuality of Interest.—Numerous cases have arisen out of the rule, that the person who receives a communication made by a person interested in any matter must himself have a corresponding interest. For instance, after an election, the defeated candidate or his constituents have an interest in exposing any malpractices which have affected the election. But if they address their complaints to the newspapers, or to persons who have no authority to afford redress, their complaints, if untrue, will be defamatory, even if they *bona fide* suppose that the person addressed has authority in the matter *Dickenson v. Huddard*, L. R., 9 Ex. 79; *Hebditch v. Melluaine*, [1894] 2 Q. B. 54. But if the person addressed has an interest or a duty which would require him to examine into the truth of the charge, and to take steps to have the offender punished, a communication to him is privileged, though he is not the immediate authority through whom redress is administered *Harrison v. Bush*, 5 E. & B. 344=25 L. J. (Q. B.) 25. See *per Parke*, B *Toogood v. Spyring*, 1 C. M & R. 181 at 193. The same principle applies where, in the process of making a communication on a privileged occasion, the matter is divulged to persons who are strangers to the matter. A communication which would be protected if made by A to B in his own room, or by letter, would be defamatory if made in the presence of a general company, or by telegram or postcard *Williamson v. Free*, L. R., 9 C. P. 393; 6 M. 381; 15 M. 214. It is not defamation for a man to communicate to his own wife statements affecting the character of a servant, *Wennhak v. Morgan*, 20 Q. B. D. 635. The decision was put on the ground that husband and wife are one person; but the more sensible reason appears to be, that the matter was one in which

employer published a weekly circular addressed to his servants, in one issue of which the dismissals of a servant for misconduct, and the charges alleged against him were stated. *Hunt v. Great Northern Ry. Co.*, [1891] 2 Q. B. 189; *Somerville v. Hawkins*, 10 C. B. 583=20 L. J. (C. P.) 131. A *guth* addressed a letter to the villagers directing that a woman should be excommunicated for illicit intercourse with a man of a lower caste. 22 C. 46. Both statements were held privileged. They are instances of Exception 7, as to which see § 219 *infra* at p. 913. So where petitions were presented by the creditors of a defendant in a suit suggesting that the claim was collusive; 2 M. 13, or by villagers praying for retention of a village moonsiff, and asserting that a Zemindar who was trying to get him removed was actuated by improper motives. 12 M. 374. These would come under Exception 8. See § 220 *infra* at p. 914. Statements attributing unprofessional conduct to a medical man; 3 A. 342, a letter by the defendant to the complainant's partner accusing the complainant of misappropriating money which ought to have been paid over to the defendant, 15 B. 351; 1910 P. W. R. (Cr.) 6, were held privileged under Exception 9. See § 221 *infra* at p. 916. Under the same head would come the case of statements made in the course of judicial or quasi-judicial proceedings which will be referred to hereafter in § 212 at p. 885 as, for instance, statements made before a panchayet which was investigating the imputations made upon the character of a villager. 7 M. 36. On the same ground, where an insurance company intimated to the owner of a ship, that if the plaintiff continued in command they would refuse to insure it, the communication was protected, as it appeared that the company had been informed that he was of intemperate habits. *Hamon v. Falle*, 4 A. C. 247.

A typical instance of cases protected by Exception 10 is that of characters given, or statements made in reference to the character of a servant or other person in a subordinate position, made by his former employer to one who is about to engage him, or by one who has taken him into his service to the person who recommended

not the usual course in a merchant's business to write letters containing defamatory statements, and to communicate them to a clerk in the office. I adhere to what I said in that case as to there being neither a duty nor an interest in a merchant to make such a communication as was there made. The case of a solicitor seems to me to be certainly different. The business of a solicitor's office could not be carried on unless it were communicated to the clerks in the office, and it is common knowledge that such is the usual course." *Boxsius v. Goblet Freres* [1894] 1 Q. B. 842, followed in *Edmondson v. Birch and Co., Ltd.*, [1907] 1 K. B. 371=76 L. J. (K. B.) 346 where *Pullman v. Hill* is discussed and distinguished; 1910 P. R. (Cr.) 10=1910 P. W. R. (Cr.) 6=11 Cr. L. J. 281=5 Ind. Ca. 892. And so if it was necessary or proper to communicate matter to a large number of persons and the occasion is such that if the matter is defamatory it would be privileged, it is allowable to have the matter printed for circulation, as being a necessary and reasonable mode of communicating it to those who have an interest in receiving it. *Lawless v. Anglo-Egyptian Co.*, L.R., 4 Q. B., 262; *Andrews v. Nott-Bower* [1895], 1 Q. B. 888. No doubt the same decision would be given if, on a privileged occasion, it became necessary to use the telegraph. As, for instance, if one police-officer had to direct another to arrest a supposed criminal who was about to leave the country.

Good Faith.—It will be remarked that in Exceptions 7, 8, 9, and 10, it is always stated that the imputation must be made in good faith. Taking the ordinary meaning of the words, this is nothing more than is required by the English law. "To entitle matter otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty, *bona fides*, or, to use our own equivalent, honesty of purpose, is essential; and to this again two things are necessary: first, that the communication be made not only in the which would justify duty; secondly, —Per Cockburn, 1. R. 5 Q. B., at 102"

husband and wife are equally interested. So if a man is making, in presence of another person, a serious charge against him, he is justified in calling in a third person for his own protection to witness what takes place. *Taylor v. Hawkins*, 16 Q. B., 308=20 L. J. (Q. B.) 313. Where the defendant, a member of a board of guardians, at a meeting where the claims of one of the servants of the board came under consideration, grounded his opposition to the claim on a statement that the servant had been robbing public money, and the jury found that the words were spoken honestly, in the discharge of a public duty and without malice, it was held that the privilege attaching to the occasion was not affected by the presence of reporters, over whom the defendant had no control, and whom he could not remove, *Pittard v. Oliver*, [1891] 1 Q. B. 474. It would have been otherwise if the speaker had invited some outsiders to be present to hear his speech.

The same question has arisen several times where in the ordinary course of business a letter passes under the eyes of different persons before it reaches its destination. In *Pullman v. Hill*, [1891] 1 Q. B. 524, the defendants wrote a defamatory letter to the plaintiff, who was a member of a mercantile firm. The letter was *prima facie* privileged, but it was dictated to a shorthand clerk, who then copied it out by a typewriter, from which it was press-copied by an office boy. On reaching the plaintiff's firm, it was opened in the usual course of business by one clerk, and shown to another, before it reached the principal for whom it was intended. These circumstances were held to deprive the letter of its protection. The Court held that neither the practice of business nor the necessities of the case made any difference. A person who writes of another what is *prima facie* libellous must at his own peril keep it from all persons to whom he is not privileged to show it. This case was distinguished in a later one, where a solicitor acting for his client wrote to the plaintiff a letter containing matter defamatory of her, and gave it to his clerk to copy. It was held that this did not destroy the privilege. Lopes, L. J., said: "The ground of the decision in *Pullman v. Hill* was, that it was

was privileged, the intention which the law infers from the defamatory nature of the statement is rebutted, and then an express intention must be made out. But the privileged character of the occasion carries with it no presumption that the accused had made the statement, not only innocently, but after due care and attention. Apparently, therefore, till this has been shown the burthen of proof is not shifted from the defendant to the plaintiff. Accordingly, it has been held in India that in order to establish a *prima facie* case in his favour, the defendant must show, not only that he believed the statements which he made on a privileged occasion, but that "he had some reasonable ground for making the imputation, either by showing that it was true, or that, if false, he had reasonable ground for believing it to be true, looking to the source from which the information was obtained." 4 C. 124; 6 A. 220. The absence of reasonable cause for making an imputation is evidence of the absence of good faith, Weir I. 607. The mere absence of ill-will does not of itself prove that the imputation was made in good faith, Weir I. 613; 11 Bom. L. R. 638=10 Cr. L. J. 372. See also 2 W. R. (Cr.) 35; 19 B. 717. The recent English case of *Smith v. Streetfield*, [1913] 3 K. B. 764, illustrates this principle. The defendant, Canon Streetfield on a privileged occasion published a printed pamphlet by circulating it to persons interested with him, concerning the business of the plaintiff a surveyor of ecclesiastical dilapidations. The jury found the writer was actuated by malice but the printers were not. It was held the malice of the writer defeated the privilege both for him as well as for the printers though the latter merely printed in their usual course of business and without malice; they were liable as joint tort-feasors with the writer. Of course the whole of this, regarding the *bona fides* of the defendant may come out on the case for the prosecution, in which event the defendant need do nothing till the Crown has taken the next step. But if it does not come out, the defendant will have to go into his case at once. 1910 P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

per Lord Coleridge, C. J., *Stevens v. Simpson*, 5 Ex. D. 53. And even an actual belief in the truth of the statement is not necessary, if the statement is of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Per Bramwell, L. J., *Clarke v. Molyneux*, 3 Q. B. D., at 244; *James v. Boston*, 2 C. & K. 4. So Lord Esher said: Though what is said amounts, to a slander, it is privileged, provided the person who utters it is acting *bona fide*, in the sense that he is using the privileged occasion for the proper purpose, and is not abusing it. *Royal Aquarium Society v. Parkinson*, [1892], 1 Q. B., 431 at 443. Under the Penal Code, however, by s. 52, "nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." Then by s. 105 of the In Ev. Act, "when a person is accused of any offence, the burthen of proving the existence of circumstances bringing the case within any special exception or proviso contained in any other part of the same Code, or in the law defining the offence, is upon him, and the Court shall presume the absence of such circumstances." It is probable that in practice this definition of good faith will make little difference in the proof required in England and in India. Due care and attention in arriving at any belief is exactly the same thing as reasonable and probable cause, which it has been decided depends upon the whole circumstances of the case, and not upon the omission to make any specific inquiry which might have thrown light upon it. *Perryman v. Lister*, L. R., 4 H. L. 521. It will, however, in many cases affect the procedure at the trial. According to English law, "It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burthen of showing actual malice is cast upon the plaintiff; but unless the defendant does so, the plaintiff is not called upon to prove actual malice." Per Lord Esher, *Hebditch v. McIlwaine* [1894], 2 Q. B., at 58. See 3 C. L. R. 122 as to the state of the law in India regarding the onus of proof. The reason of this is, that in English law the essence of the offence is an intention to do a wrongful act. As soon as it appears that the occasion

was privileged, the intention which the law imputes to the defamatory nature of the statement is rebutted. If then an express intention must be made out. But the privileged character of the occasion carries with it a presumption that the accused had made the statement not only innocently, but after due care and attention. Apparently, therefore, till this has been shown to the burthen of proof is not shifted from the defendant to the plaintiff. Accordingly, it has been held in India that in order to establish a *prima facie* case in his favour, the defendant must show, not only that he believed the statements which he made on a privileged occasion, but that "he had some reasonable ground for making the imputation, either by showing that it was true, or that, if false, he had reasonable ground for believing it to be true, looking to the source from which the information was obtained." 4 C. 124; 6 A. 220. The absence of reasonable cause for making an imputation is evidence of the absence of good faith, Weir I. 607. The mere absence of ill-will does not of itself prove that the imputation was made in good faith, Weir I. 613; 11 Bom. L. R. 638=10 Cr. L. J. 372. See also 2 W. R. (Cr.) 35; 19 B. 717. The recent English case of *Smith v. Streetfield*, [1913] 3 K. B. 764, illustrates this principle. The defendant, Canon Streetfield, on a privileged occasion published a printed pamphlet by circulating it to persons interested with him, concerning the business of the plaintiff a surveyor of ecclesiastical dilapidations. The jury found the writer was actuated by malice but the printers were not. It was held the malice of the writer defeated the privilege both for him as well as for the printers though the latter merely printed in their usual course of business and without malice; they were liable as joint tort-feasors with the writer. Of course the whole of this, regarding the *bona fides* of the defendant may come out on the case for the prosecution, in which event the defendant need do nothing till the Crown has taken the next step. But if it does not come out, the defendant will have to go into his case at once. 1910 P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

per Lord Coleridge, C. J., *Stevens v. Simpson*, 5 Ex. D. 53. And even an actual belief in the truth of the statement is not necessary, if the statement is of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. *Per* Bramwell, L. J., *Clarke v. Molyneux*, 3 Q. B. D., at 244; *James v. Boston*, 2 C. & K. 4. So Lord Esher said. Though what is said amounts, to a slander, it is privileged, provided the person who utters it is acting *bona fide*, in the sense that he is using the privileged occasion for the proper purpose, and is not abusing it. *Royal Aquarium Society v. Parkinson*, [1892], 1 Q. B., 431 at 443. Under the Penal Code, however, by s. 52, "nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." Then by s. 105 of the In Ev. Act, "when a person is accused of any offence, the burthen of proving the existence of circumstances bringing the case within any special exception or proviso contained in any other part of the same Code, or in the law defining the offence, is upon him, and the Court shall presume the absence of such circumstances." It is probable that in practice this definition of good faith will make little difference in the proof required in England and in India. Due care and attention in arriving at any belief is exactly the same thing as reasonable and probable cause, which it has been decided depends upon the whole circumstances of the case, and not upon the omission to make any specific inquiry which might have thrown light upon it. *Perryman v. Lister*, L. R., 4 H. L. 521. It will, however, in many cases affect the procedure at the trial. According to English law. "It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burthen of showing actual malice is cast upon the plaintiff; but unless the defendant does so, the plaintiff is not called upon to prove actual malice." *Per* Lord Esher, *Hebditch v. Mellicaine* [1894], 2 Q. B., at 58. See 3 C. L. R. 122 as to the state of the law in India regarding the onus of proof. The reason of this is, that in English law the essence of the offence is an intention to do a wrongful act. As soon as it appears that the occasion

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Express Malice.—Where the occasion is shown to be privileged, and there is such evidence before the Court as raises a presumption that the defendant was acting within one of the Exceptions, the prosecution must prove malice, which at this stage means, a state of the mind amounting to actual malice, as the moving cause of the particular imputation. Even this, however, will not be sufficient where the communication made was one which it was the absolute duty of the defendant to make under the particular circumstances of the case. This was so laid down in the case of *Dawkins v. Lord Paulet*.

There the case came on upon demurrer, the pleadings shortly coming to this: The plaintiff complained that the defendant, his superior officer, had forwarded to the Commander-in-Chief certain letters written by the plaintiff to the defendant, and had accompanied them by a report of his own, which contained the defamatory matter sued upon. The defendant pleaded that it was his duty as superior officer to forward the letters, with his report upon them, and that in doing so he had acted in the ordinary course of his military duty, and as an act of military duty, and not otherwise. The plaintiff replied, asserting actual malice, want of probable cause, and that the report was not *bona fide*. To this there was a demurrer, which, of course, admitted all assertions properly pleaded. The majority of the Court held that the replication did not assert that the statements in the defendant's report were false, or were known by him to be false. Mellor, J., said: "I apprehend that the motives under which a man acts in doing a duty, which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty, and not the motives from or under which it is done. In short, it appears to me that the propositions resulting from the admitted statements in this record amount to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not." *L. R.* 5 Q.B. 94, at 111 approved in *Hart v. Von Gumpach*, *L. R.* 4 P. C. at 464. *Chatterton v. Secretary of State for India*, [1895], 2 Q. B. 129; *Grant v. Secretary of State for India*, 2 C P. D. 403.

Suppose, to take an instance which might often occur, that a person upon whom the law imposes a duty to report any circumstances which throw a suspicion of crime upon any individual, receives information of such circumstances, and that he reports them, hoping thereby to ruin his enemy, and sending in his report from that express motive; if the information turned out to

be false, he could not be charged for defamation. And it would make no difference that he did not believe the information, if it came to him in such a shape that he was bound to pass it on to his superior.

Where the statement made on a privileged occasion is not compulsory, but optional, so that proof of express malice is sufficient, this proof is not afforded merely by showing that the statement was false. The plea of privilege always assumes that the statement is in itself defamatory, and generally that it is false **2 M. 13**. The falsity of the statement is an element in determining the existence of malice, but does not by itself establish it. The question still remains whether the defendant was using or abusing his privilege. "If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion, **19 B. 51**. But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held to have abused the occasion, and in that sense to have spoken maliciously. If a person from anger, or from some wrong motive, has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion" *Per Lord Esher, Royal Aquarium Society v Parkinson*, [1892] **1 Q. B. at 442**. On the other hand, the evidence must be such as to warrant an absolute finding that there was express malice. The matter must not be left upon an even balance. In *Sommerville v Hawkins*, **10 C. B. 583=20 L. J. (C. P.) 131**, the Court said: "It is true that the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the jury to have the question of malice left to the jury; for the existence of malice is consistent with the evidence in all cases, except those in which something inconsistent with malice is shown in evidence; so that to say that in all cases where the evidence was consistent with malice it should be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not

disproved, which would be inconsistent with the admitted rule that in case of privileged communications malice must be proved, and therefore its absence presumed till such proof is given. It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than its non-existence." See 27 B. 585.

and excessive language in which are themselves privileged, the privilege. In one case this was so held, even though *bona fides* was found, and malice was negatived. *Fryer v. Kinnersley*, 15 C. B. (N. S.) 422=33 L. J. (C. P.) 96. Possibly this would be so under the Code, if the words were held not to have been used with due care and attention, and therefore not in good faith. Under English law, however, the better view seems to be that the only questions in such a case are, privilege or no privilege, malice or no malice. A man who is making a statement on a privileged occasion may incorporate with it statements against others, or even against the party concerned, which are wholly irrelevant to the privileged occasion, and as to which there is no privilege at all. *Warren v. Warren*, 1 C. M. & R. 250. But when there is only an excessive statement having reference to the privileged occasion, and which therefore comes within it, then the only way in which the excess is material is as being evidence of malice. If the jury refuse to find malice, a finding that the language was excessive is not one from which malice can be inferred by law. If the law did infer so, it would often be inferring what is not true. A man may use excessive language and yet have no malice in his mind. See *per* Lord Esher, *Nettill v. Fine Arts Insurance Co.*, [1895] 2 Q. B. at 170; *per* Lopes, L. J., *ib.* 172; *affd.* [1897] A. C. 68; *Cowles v. Potts*, 34 L. J. (Q. B.) 247 at 250; *Spill v. Maule*, L. R., 4 Ex. 232.

Evidence of other libels upon the prosecutor, either before or after the libel complained of, is admissible for the purpose of proving actual malice. The more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question merely affects the weight, not the admissibility, of the evidence. See the answers of the judges in *Barrett v Long* 3 H. L. Ca. 395; *Hemmings v Gasson*, E. B. & E. 346=27 L. J. (Q. B.) 352, 22 B. 112; 20 A. 55; *ante*, Part II, Chap. V, § 95, at p. 361.

212. Absolute Privilege.

of what is known

in *Bottomley v Bottomley*, [1898] 1 Q. B. 261.

not think that it is a very accurate expression, and I am sure that calling it a 'privilege' is sometimes misleading. Privilege means in the ordinary way, a private right. Now there is no private right of a judge, or a witness, or an advocate to be malicious. It would be wrong of him, and if it could be proved, I am by no means sure that it would not be actionable. The real doctrine of what is called 'absolute privilege' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice, that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates or as litigants should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiring into them merely on the allegation that they are malicious. I think there is something more in that distinction than mere words, and the reason that this peculiar doctrine of 'absolute privilege' is sometimes complained of is that it is not thoroughly understood. The explanation of the doctrine will be found here

every court of justice, as, for instance, to a County Court, or the court of a coroner, *Scott v Stansfield*, L. R. 3 Ex. 229; *Thomas v Churton*, 2 B. & S. 475=31 L. J. (Q. B.) 139 and to proceedings held under Bankruptcy Act on the examination of a debtor who was held in custody. *Ryalls v Loader*, L. R. 1 Ex. 296; *Dicas v Lord Brughorn*, 6 C. & P. 249. The same doctrine extends to cases where there is an authorized inquiry which, though not before a court of justice, is before a tribunal which has similar attributes, as a military court of inquiry, *Duckins v. Lord Rokeby*, L. R., 7 H. L. 744; *Hodgson v. Puse*, [1899] 1 Q. B. 455, or a Medical Council to which a statutory jurisdiction had been given to adjudicate on cases of professional misconduct. *Allbutt v General Council of Medical Education*, 23 Q. B. D 400; or to the vice-chancellor of a university when sitting as a judge in the university court, *Kemp v Neville*, 10 C. B. (N. S.) 523. It does not apply to proceedings of a municipal body, although they are deciding a question entrusted to them by statute, upon which they take evidence in an informal manner, and upon which they have to exercise a judicial discretion. *Royal Aquarium Society v Parkinson*, [1892] 1 Q. B. 431 at 442. *London County Council*, 71 L. T. 633. Similarly, it has been held Governors of a Jockey Club hearing a dispute are not absolutely privileged, though they adopt judicial forms and methods. *Hope v Lanson*, 18 T. L. R. 201. A recent Full Bench of the Madras High Court held that defamatory statements made before a Registrar in an inquiry held in connection with the execution and presentation of a document is not entitled to absolute privilege, 23 M. L. J. 59=[1912] M. W.N. 478=13 Cr. L. J. 508=15 Ind. Ca. 552, and the same view was taken by the Bombay High Court in 19 B. 51 at 62, with respect to a statement made in the course of an inquiry made by a Collector acting under the orders of Government into a charge of corruption and bribery. The privilege has been held to extend to masters of the supreme court in England, *Pedley v. Morris*, 61 L. J. (Q. B.) 24, but not to a magistrate's clerk who is not a judicial officer, *Delegal v. Highley*, 3 Bing. (N. C.) 950.

The immunity of parties and witnesses applies to all statements which they make in that capacity during the course of the judicial proceeding, (see *ante* § 118 at p. 372) whether given in open court, or by way of pleading or affidavit *Henderson v. Broomhead*, 4 H. & N. 569=28 L. J. (Ex.) 250. The Madras High Court which has always taken a view most favourable to the doctrine of absolute privilege held in 1910 M. W. N. 155=8 M. L. T. 55, that there is no difference between evidence given in the box and affidavit evidence, and both are equally entitled to the protection of an absolute privilege. This is also English Law; the Chief Courts of Punjab and Lower Burma have with equal consistency adopted the opposite view, 1887 P. R. No. 21, 13 Eur. L. R. 96. As to Sind see 5 Sind L. R. 133=3 Cr. L. J. 25=13 Ind. Ca. 217. That of counsel extends to all persons, who act in that capacity whether barristers, pleaders, vakils, or attorneys *Mackay v. Ford*, 5 H. & N. 792=22 L. J. (Ex.) 404.

This immunity as already stated is not based on any presumption however violent, that the words spoken have been uttered in good faith. It rests upon the higher principle that it is essential to the full and fearless administration of Justice, that those who are protecting their own interests, or discharging duties in a judicial proceeding, should be under no apprehension of ulterior proceedings from the opposite party. "It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty." *Per Fry, L. J., Munster v. Lamb*, 11 Q. B. D. 583 at 607. This rule still leaves ample protection against abuse. A judge who exceeds his duty is liable to censure and removal by the Executive. A false witness may be prosecuted for perjury. An advocate may be reprimanded and stopped in court by the presiding judge, and his conduct may be brought to the notice of the authority which controls his branch of the profession (Ev. Act, s. 150.) Accordingly, it is long since

established that no proceedings for libel or slander can be brought against judge, party, or witness, in respect of words spoken in the course of a judicial proceeding, although they are uttered falsely and maliciously, and without reasonable and probable cause. As to judges see *Scott v. Stansfeld*, L. R., 3 Ex. 220; *Fray v. Blackburn*, 3 E. & S. 576, and per Brett, M. R., *Munster v. Lamb*, 11 Q. B. D., at 603, 608, overruling the dictum of Lord Denman in *Kendillon v. Maltby*, 1 Car. & M. 402; *Anderson v. Gorrie*, [1895] 1 Q. E. 668; ante §§ 53—55 at pp. 138 to 149. As to witnesses, *Reis v. Smith*, 18 C. E. 126=25 L. J. (C. P.) 195; *Handerson v. Broomhead*, 4 H. & N. 569; 28 L. J. Ex. 250; *Seaman v. Netherclift*, 1 C. P. D. 540; 2 C. P. D. 53. The same rule to its fullest extent was laid down as to counsel in *Munster v. Lamb*, in which the whole law upon the subject was reviewed by the Court of Appeal. There Brett, M. R., said

‘For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client. I shall assume that the words were uttered without any justification, or even excuse, and from the indirect motive of personal ill will or anger towards the prosecutor, arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered, nevertheless, inasmuch as the words were uttered with reference to, and in the course of the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been.’ 11 Q. B. D., at 599.

A privilege of so wide an extent must be strictly limited in the cases to which it applies. If a judge, whether sitting on the bench or not, hears and answers applications for advice by parties who have no cause pending, over which he has jurisdiction, his remarks have nothing but the ordinary and limited privilege, *McGregor v. Thwaites*, 3 B. & C. 24; per Lord Campbell, C. J., *Lewis v. Lery*, 27 L. J. (Q. B.) at 283=E. B. & E. 537; *Kirbey v. Simpson*, 10 Exch. 358; *Gellen v. Hall*, 2 H. & N. 379; *Thomas Picton*, 30 St. Tr. 225; *Law v. Lleuelllyn*, [1906] 1 K. E. 437. And this would

apply to any case where the judge chooses to make observations which have no bearing upon any judicial proceeding in which he is engaged. So the statements in a writ of summons have not the same immunity as would apply to a plaint or written statement. *Bank of British North America v. Strong*, 1 App. Ca. 307. The same principle was applied where a party, who was defended by counsel, chose to interfere during the examination of a witness, and make grossly defamatory remarks upon his character, 15 M. 414, but where a party got his counsel to put to a witness under cross examination a question containing defamatory suggestions, it was held in *Weir*, 1. 587, that he was not answerable for defamation. See also *Weir*, 1. 589. So the mere fact that a man is standing in the witness-box does not protect statements which he might make, not as part of his evidence, nor in his character of witness, though if they are made in that character, they would not be deprived of immunity because they were irrelevant to the inquiry before the court. *Per Cockburn, C.J., and Bramwell, J., Scaman v. Netherclift*, 1 C. P. D. 540, 2 C. P. D., 53; *Goffin v. Donnelly*, 6 Q.B.D. 307; *Bottomley v. Brougham*, [1908] 1 K.B. 584, 8 C. W. N. 292=1 Cr. L. J., 122. It has even been laid down that the remarks of a witness in the box wholly irrelevant to the inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purpose is not protected, 32 C. 756=9 C. W. N. 911=2 C. L. J. 105=2 Cr. L. J. 453, following 21 C. 332. see 2 W. R. (Cr.) 36. 3 W. R. (Cr.) 45, 5 C. W. N. 293; 32 C. 1063. In England also an observation made by a witness while waiting about the Court before or after he has given his evidence is not privileged, *Trotman v. Dunn*, 4 Camp 311; *Lynam v. Gowing*, 6 L. R. Ir. 259. Still less would there be any privilege where the witness had left the witness-box and finished his deposition. 10 A. 425 at 455.

The Penal Code makes an attempt to reconcile two rival principles. In the first place it is for the public welfare that the privilege of resorting to court for redress of injuries ought not to be hampered, and on

the other hand it is equally for the public welfare that the procedure of courts of justice should not with impunity be used as the means of indulging in personal spite, 3 C. L. R. 122. This attempt at reconciliation has resulted in a conscious departure on the part of the framers of the Code from the doctrine of absolute privilege. The language of Exceptions 7 and 9 certainly does not import any such absolute immunity as is recognized by English law. The illustration appended to Exceptions 7, 8 and 9 make this abundantly clear. Each of those Exceptions uses the term "good faith" as an element in the definition, and this is repeated in each of the illustrations annexed. Accordingly in a case where a party to a criminal prosecution had used defamatory expressions against the opposite party with reference to the charge, and, as a part of the proceeding, the statements were held to be punishable, as not being made with due care and attention, and, therefore, not in good faith. 2 W. R. (Cr.) 36; 3 W. R. (Cr.) 45; and see *per* Straight, J., 3 A. 815; 9 E. H. C. R. 451; 3 C. L. R. 122. In a later case, where a defendant in a civil suit had filed a petition, asking that a witness might be recalled for further examination, and in the petition made defamatory statements against him, the Calcutta Court held that he was properly convicted under s. 500, and was not protected by Exception 9, as he had not acted in good faith. Phear, J., based his judgment upon the fact that the Penal Code alone should be looked to, and not the English cases, so far as they went beyond the provisions of s. 499. 14 W. R. (Cr.) 27; *folld.* in 23 C. 867. See 5 C. W. N. 293. On the other hand, it has been expressly laid down by the Judicial Committee, as regards civil suits in India, that, on grounds of public policy, "witnesses cannot be sued in a civil court for damages in respect of evidence given by them upon oath in a judicial proceeding. The ground of it is this. that it concerns the public and the administration of justice that witnesses, giving their evidence on oath in a court of justice, should not have before their eyes the fear of being harassed by suits for damages, but that the only penalty which they

should incur, if they give evidence falsely, should be an indictment for perjury." 11 B. L. R. 321 at 328=17 W. R. (P. C.) 283 followed in 15 C. 264; 8 C. W. N. 292=1 Cr. L. J. 122. Of course the rule as regards witnesses is only an instance of the wider rule already discussed. Hence the English rule, to its full extent, has been followed by the Indian courts in suits against a judge, 17 M. 87, party, or witness, for defamatory expressions used in the conduct of a suit. 14 B. 97. It would be singular if the public policy which forbids such persons to be harassed by civil suits, would allow them to be harassed by prosecutions. See *per* Shepherd, J., 11 M. 477 at 479. This was evidently the *ratio decidendi* in the recent Full Bench ruling of the Madras High Court, 36 M. 216=23 M. L. J. 39=11 M. L. T. 416=13 Cr. L. J. 275=1912 M. W. N. 393=14 Ind. Ca. 659, though in arriving at this result the judges had to hold that ss. 499 to 503 were not exhaustive of the law of criminal defamation in India. See also 30 M. 222=6 Cr. L. J. 130; 9 Cr. L. J. 276; 17 B. 127 & 573. The Allahabad High Court, 22 A. 234, 24 A. 635, 10 A. 425, 1890 A. W. N. 170; 3 A. 815, 29 A. 635=1907 A. W. N. 235=4 A. L. J. 635=6 Cr. L. J. 197 and the Punjab and Lower Burma Chief Courts, 1889 P. R. 34 & p. 131 n.; 1893 P. R. 14; 1913 P. R. No. 5=1912 P. W. R. Cr. 31=1912 P. L. R. 244=13 Cr. L. J. 424=15 Ind. Ca. 494; 1911 P. W. R. 7=12 Cr. L. J. 193=10 Ind. Ca. 682; 13 Bur. L. R. 96=5 Cr. L. J. 382, also entertained the view that the Code is exhaustive and they are not entitled to go beyond the terms of s. 191 which do not embody any case of absolute privilege 3 L. B. R. 265. As to Mysore, see 15 M. C. C. R. 275. It is necessary that the Legislature should set at rest this unseemly conflict of the two chief courts and the Allahabad High Court on the one hand and the other High Courts which rightly or wrongly relying on the dictum of the Privy Council have to hold the Code to be incomplete in order to permit of the application of the rules of English law in the administration of criminal justice. The urgency for this step will be all the more apparent as the more recent view of the Calcutta High Court as expressed in 40 C. 433=

17 C. W. N. 297=14 Cr. L. J. 100=18 Ind. Ca. 600 is against the view of an absolute privilege as enunciated by the Madras High Court. 38 C. 830=15 C. W. N. 917=11 Ind. Ca. 311 and a number of previous Calcutta rulings as 15 C 264, 27 C. 262 were *distinguished* on the ground that those were cases of civil liability where perhaps the English rule may be resorted to as embodying the principles of justice, equity and good conscience. And the decision to the contrary in 40 C. 441n.=17 C. W. N. 449=14 Cr. L. J. 69=18 Ind. Ca. 340, was *distinguished* on the ground that the Calcutta judges instead of deciding the question of absolute privilege, were merely of opinion that the Madras Full Bench ruling rendered the propriety of the conviction doubtful. The law is thus left in an exceedingly dubious state and no counsel can advise a client with any degree of confidence. If a witness makes a defamatory statement totally irrelevant to the enquiry in a Madras Court he will go *scott free*, but if the same evidence is given in Benares he may be held liable. It is highly inconvenient that the interpretation of the language of s 499 should thus be made a function of the latitude and longitude where the defamatory statement is made and published. Where an application was made to the High Court of Madras, to call upon counsel to answer for language used by him while defending his client on a criminal charge, the application, so far as it came within the controlling powers conferred by s 10 of the Letters Patent, was refused, and Collins, C J, laid down the general principle, following *Munster v. Lamb*, "that an advocate in this country cannot be proceeded against, either civilly or criminally, for words uttered in his office of advocate" 10 M. 28 at 35; see the observations of Earle, C.J., in *Kennedy v Brown*, 32 L. J. (C. P.) 137 at 146; *Mackay v. Ford*, 29 L. J. (Ex.) 404=5 H. & N. 702; *Baker v. Carrick*, [1894] 1 Q. B. 838. In *Pennel's* case however the Lower Burma Chief Court said, an advocate cannot shelter himself behind his clients when he allows himself to be made the medium of reckless imputations on a Court of Justice, 2 L. E. R. 130 (F. B.) The same principle was laid down by the

same court where a witness had been convicted for defamation. Collins, C. J., referring to the English cases and the *dictum* in 2 M. 13, said: "The judges there said that the principle of public policy guards the statement of a witness against an action whether the statements were malicious or not. I think the same observations will apply if the criminal law is set in motion, and proceedings taken under s. 500 of the Indian Penal Code. If the petitioner gave false evidence, he can be punished for that offence." 11 M 479. The same ruling was followed where a man who had answered questions put to him by the police under s. 161 of the Cr. P. C. was indicted for defamation. 16 M. 235; see as to civil action, 28 C. 794. In England, this privilege has been held to extend to statements made by a witness to a party or solicitor in preparing his 'proof' for trial, *Watson v. M'Ewan*, L. R. [1905] A. C. 480. These cases again were followed in Bombay, where witnesses had been erroneously convicted under s. 500 by the trial courts for statements contained in their depositions. See 17 B. 127 & 573; *folld.* in 27 C. 263; 19 B. 51 at 62; *per Subramania Iyer, J.*, in *Weir* l. 589; 15 M. 414, 31 M. 400; 19 M. L. J. 217=6 M. L. T. 15=9 Cr. L. J. 385=1 Ind. Ca. 799.

In 19 B. 340, (*followed* in 36 C. 375=13 C. W. N. 340=9 C. L. J. 259=9 Cr. L. J. 165=1 Ind. C. a. 147,) a pleader had been convicted of defamation for the very mild offence of calling the witnesses for the prosecution "loafers." The decision was reversed, as the High Court held that if the word was defamatory, there was no evidence of express malice, which could not be presumed, and that in the absence of such proof, "a Court, having due regard to public policy, would be extremely cautious before it deprived the advocate of the protection of Exception 9." See also as to pleaders. 9 Bom. L. R. 1287=6 Cr. L. J. 387; 2 N. W. P. H. C. R. 473; *Weir* l. 594.

As to the question under discussion, however, the Court seemed inclined to revert to the early decisions, which laid down that the English law could not be resorted to

where it went beyond the terms of s. 499. They considered that judges were already protected by s 77 of the Code, and that witnesses were protected by Exception 9, unless where they deliberately stated what they knew to be untrue. In such a case, they ought to be charged for giving false evidence, on the general principle laid down in 13 B. 502, that it is an evasion of the law to treat an aggravated as an ordinary offence, and thus introduce a different jurisdiction, or a lower scale of punishment.

In 22 A 234 certain parties were charged for a defamatory statement contained in a petition asking that a Magisterial proceeding might be transferred to another Court, the High Court of Allahabad said that the remarks complained of were in themselves defamatory, but were undoubtedly pertinent to the case which was pending against them in the Criminal Court. According to English Case law, the accused could not, therefore, be proceeded against, either civilly or criminally for using these expressions. After examining several of the Indian decisions, the judgment proceeded "The Indian Legislature might, had it chosen, have so framed s 499 of the Indian Penal Code as to afford to parties, counsel and witnesses in this country the same protection against indictment for defamation which they have in England. The fact remains that it has not seen fit to do so. The case must therefore be decided according to the Indian Penal Code." Judging it by that Code, they held that, as the statement complained of might have been reasonably supposed to be true, though it was in fact false, it was made in good faith for the protection of the interests of the accused, and was therefore protected by Exception 9. As to defamatory matter in petitions addressed to a Court see the Conflicting rulings in 11 M. L. T. 431 = 13 Cr. L. J. 293 = 14 Ind. Cas. 757 & 40 C. 441n & 433; 4 Sind. L. R. 67 = 8 Ind. Ca. 220.

On the whole, it cannot be said that the law as to parties or counsel is finally settled in India. The Privy Council in (23 I. A. 18) expressed a strong opinion that the direct words of an Indian Act ought not to be

same court where a witness had been convicted for defamation. Collins, C. J., referring to the English cases and the *dictum* in 2 M. 13, said. "The judges there said that the principle of public policy guards the statement of a witness against an action whether the statements were malicious or not. I think the same observations will apply if the criminal law is set in motion, and proceedings taken under s. 500 of the Indian Penal Code. If the petitioner gave false evidence, he can be punished for that offence." 11 M 479 The same ruling was followed where a man who had answered questions put to him by the police under s. 161 of the Cr. P. C. was indicted for defamation. 16 M. 235, see as to civil action, 28 C. 794. In England, this privilege has been held to extend to statements made by a witness to a party or solicitor in preparing his 'proof' for trial, *Watson v. M'Ewan*, L. R. [1905] A. C. 480 These cases again were followed in Bombay, where witnesses had been erroneously convicted under s 500 by the trial courts for statements contained in their depositions. See 17 B. 127 & 573 ; folld. in 27 C. 263 ; 19 B. 51 at 62 ; *per Subramania Iyer, J.*, in *Weir* l. 589 ; 15 M. 414, 31 M. 400 ; 19 M. L. J. 217=6 M. L. T. 15 =9 Cr. L. J. 385=1 Ind. Ca. 799.

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frattered away by reference to English cases laying down a different rule.

213. First Exception—truth—for public good.—It is a serious question which the advocate for the defence has to face at a very early stage of the case, before deciding to rely on justification as a defence whether he will admit the making or publication of the libellous matter with intent to harm the reputation of the complainant. Though the Code of Criminal Procedure is silent on the point, no person could both deny as well as justify a libel with any likelihood of his plea being accepted by a court. A plea of not guilty under the Code, no doubt, would technically involve one of confession and avoidance. But in ordinary practice, it would be as illogical and dangerous for the accused to deny and justify in the same breath, as it would be for a man charged with murder to set up an *alibi*, and at the same time plead provocation or self-defence. See *Rassam v. Budge*, (1893) 1. Q. B. 571 at 574, 575, and *Bremridge v. Latimer*, 12 W. R. 878.

Nothing is said in the definition of a defamatory imputation, to imply that it must be false. For this purpose it is necessary to resort to the first Exception "It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact."

The result of the definition and of the Exception is to assimilate the law of India to that of England, since *Lord Campbell's Act*, 6 & 7 Vict., c. 93. The general rule in England was that, on an indictment for libel, its truth could not be pleaded as a defence to the charge, nor even proved after conviction in mitigation of punishment, though it might be shown for that purpose that the defendant, when he published the charges contained in the libel, believed, and had reasonable ground to believe, that the charges were true. *R. v. Halpin*, 9 B. & C. 65. Under *Lord Campbell's Act*, which is, in substance, the same as the above Exception, the

defendant was allowed in such a case to prove that the statement was true, and that it was for the public benefit that the matters alleged should be published. Both parts of the plea have to be established. A remarkable instance of the success of such a defence was the collapse of the prosecution brought against the Marquis of Queensberry by *Oscar Wilde*, in 1895. The same doctrine once existed in civil cases, where the action was for slander in writing, *5 Bac Abr 203*, though it has long since been settled that in all suits for defamation the truth of the libel may be pleaded as a justification. Even in such cases, however, the purely wanton making up of the past events of a man's life appears not to be always capable of justification.

In an early case, *Cuddington v. Wilkins*, *Hob 67 at 81*, the plaintiff sued for defamation, the defendant having said of him, "He is a thief, and why will you take his part." The plea was that the plaintiff had stolen a sheep, to which it was replied, that the King had issued a general pardon, and that he came within its terms. This replication was held good, even though the defendant did not know of it, on the ground that a royal pardon cleared the offender of the crime and infamy. The Court said that a person who did not know of a secret pardon might arrest a man for felony, "because it is an advancement of justice, but so it is not to call him a thief, for that is neither necessary, nor advanceth nor tends to justice."

In a recent case, where, in an interchange of amenities between newspaper editors, one called the other a *felon-editor*, and was sued accordingly, it was pleaded that the defendant had been convicted of felony and sentenced to twelve months' imprisonment. Replication that the conviction had taken place many years ago, and that the plaintiff had endured his punishment, and by virtue of stat 9 Geo IV., c. 32, s. 3, was in the same position as if he had been pardoned. The replication was held good. The Court, referring to *Cuddington's* case, said that the Legislature deliberately adopted the view of the judges; it was considered to be proper that a person who had endured the punishment for his offence, should not be liable to have reflections made upon him. Such questions could be put in cross-examination, where it was

necessary, for purposes of justice, to test his credibility, "but needlessly to rake up the past misfortunes of another person, shows a malignant and wicked frame of mind." *Leyman v. Latimer*, 3 Ex. D. 352.

In *Monson v. Tussauds*. Lord Halsbury, after citing the above decisions, said: "It seems to be thought that because it could be said that it was true that the applicant was tried for murder, this is of itself a sufficient answer. It seems to me that this is no answer at all. Because the applicant was tried for murder, and was commonly known by justice—privileged, be it—this does not justify the

unauthorized and unproved repetition as a narrative of circumstances of suspicion, or of evidence, which certainly were urged by the proper authority, as showing that he was guilty of murder, [1894] 1 Q. B., p. 685. See also the remarks of Sir James Stephen, 1 *Steph. Crim. L.* 385 Cf. 25 M. 464, where the remarks of Benson, J. in which he treated a statement that the complainant had been convicted and sent to jail for theft, as covered by Exception 4 to s. 499, as a true report of proceedings in a court of justice seem clearly wrong.

The expression public good denotes the common convenience and welfare of society or a considerable section thereof as opposed to the convenience of individuals. See *Whitely v. Adams*, 15 C. B. (N. S.) 392 at 418, and *Macintosh v. Dunn*, L. R. [1908] A. C. 390 at 399=77 L. J. (P.C.) 13. The denouncing of a Brahmin for providing alcoholic refreshment at a wedding-reception for those of his guests who desired to partake of such beverages was held not to be for public good, 4 Bur. L. T. 148=12 Cr. L. J. 125=9 Ind. Ca. 775.

Even where it is for the public benefit—that is, for the benefit of a portion of the public—that certain facts should be made known, the privilege conferred by Exception 1 may be taken away, if the facts are disseminated to a circle of readers wider than those who can possibly be interested in the facts communicated. This would warrant a finding that the statement was not for the good of the public actually addressed. 19 B. 703; *Ratanlal* 769; 5 C. P. L. R. 59; a privilege does not justify a publication in excess of the purpose or object which gives rise to it, 6 M. 381 at 395, *Purcell v. Souler*, 1 C. P. D. 781 & 2 C. P. D. 215. 15 M. 214.

As the *onus* of making out a justification so as to get the benefit of an Exception is specially cast on the accused (s. 105, Ev. Act). 2 Agra H. C. R. 87, where it is intended to rely on the truth of a libel as a defence to the charge, it is necessary to plead specially justifying it, so that the prosecutor may know what the case is that he has to meet, and he will be entitled to full particulars as he has no other opportunity to rebut the case for defence. *Speck v Phillips*, 5 M. & W. 279. When the prosecutor is examined as a witness, he should be distinctly cross-examined upon all the facts which it is intended to prove against him 6 A. 220.

Where a libel contains several distinct defamatory statements, and a justification is pleaded to the whole, if it fails as to some, judgment must be given against the defendant. *R v. Neuman*, 1 E. & B. 558; 3 A. 664; *McGregor v Gregory*, 11 M. & W. 287; *Fleming v. Dollan*, 23 Q. B. D. 388. Where, however, a plea of justification as to a particular assertion is supported by several instances, some of which are not proved, judgment may still be given for the defendant, if those which are made out amount to a substantial proof of the charge which is justified as where the defendant published. L B and G are a gang who live by card-sharping, and proved two specific instances where persons had been cheated by them, *R v Labouchere*, 14 Cox 449; *Morrison v Harmer*, 3 Bing. (N. C.) 767; *Edsall v Russell*, 4 M. & G. 1090; *Alexander v. N E Ry Co.*, 34 L. J. (Q.B.) 152 Cf *Gwynn v S E Ry Co.*, 18 L. T. 738; *Biggs v G. E. Ry Co.*, 16 W. R. 908; *Helsham v Blackwood*, 11 C. B. 128. But where the plaintiff was described as a libellous journalist, proof that in a single instance he was mulcted in £100 damages for a libel was held insufficient, *Wakely v. Cook & Healey*, 19 L. J. (Ex.) 91. See also *Bishop v Laimers*, 4 L. T. 775; *Clarkson v Lawson*, 6 Bing. 266.

214 Second Exception: Fair criticism in public interest.—As remarked by the Privy Council in *Arnold's case*, 18 C. W. N. 785=26 M. L. J. 621, the distinction between the second and the first exceptions

is the first deals with allegation of fact and the second deals with expressions of opinion. In all the cases previously discussed in §§ 211 & 212, the nature of the privilege consists in this: that statements of a defamatory nature, embodying assertions of fact which are not true, are yet protected by virtue of the occasion on which, and the purpose for which they were made. There is, however, a completely different class of cases which is provided for by the second and the following Exceptions.

It will be seen that in all these cases what is protected is opinion not assertion, and that only in regard to persons or things which affect the public by their nature or their interest. They are all particular instances of the general principle of English law, that fair comment upon public men, or upon matters of public interest is not libellous. In the language of Parke, B: "There is a difference between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives is unquestionably libellous." *Parmiter v. Coupland*, 6 M. & W. 105; *Seymour v. Butterworth*, 3 F. & F. 372. Cases which come within this rule are not privileged, in the sense of being libels which cannot be punished. They are not libels at all. They are acts done in the exercise of a right, given by our constitution though not by the constitution of other countries, and upon which, more than upon anything else, depends the reality of what we call liberty. "The defence in such a case is that the words are not defamatory, that fair and proper criticism is not libel. It is only, as was said by Bowen, L. J., in *Merivale v. Carson*, 20 Q. B. D. at 283, when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all." *Per Lopes, L. J., South Hetton Coal Co. v. North-Eastern News Association* [1894], 1 Q. B. at 141. When, therefore, such a defence is set up, it is necessary to show (1) that the matter was of public

interest, (2) that the statements of fact were accurate; and (3) that the comment was fair.

Matters are of public interest either by their own nature, or because the person criticized has chosen to make them so. Matters connected with the state of the nation, the government, the administration of justice, the management of municipalities, the character and conduct of public men are necessarily such. So is the sanitary condition of the cottages let by a Colliery Company to its workmen, *South Hetton Coal Co. v. North-Eastern News Association* [1894], 1 Q. B. 133, the professional behaviour of a medical practitioner *Allbutt v. Council of Medical Education*, 23 Q. B. D. 400, the conduct and management of a church by its incumbent, *L. R.*, 1 Q. B. 699, the acts and language of persons attending a public meeting for a public object *Davis v. Duncan*, *L. R.*, 9 C.P. 396. The mode in which a purely private charity is managed is not a matter of public interest. *Gathercole v. Miall*, 15 M. & W. 319.

The private life and opinions of anyone are not matter of public interest, unless so far as they affect his fitness for the discharge of any public duties. Exceptions 2 and 3 appear to limit criticism of the character of a public servant or public man to his conduct in such capacity. Cases in which it was for the public good to publish acts of private misconduct which showed his unfitness for his position, would be protected by Exception 1. A man may make his private life or opinions public property by writing and publishing a book about them, and he may make his management of his private business public property, by publishing advertisements or handbills about it, *Paris v. Levy*, 9 C. B. (N. S.) 342=30 L. J. (C. P.), 11.

It is essential to this defence that the alleged facts upon which the criticism rests should be accurate. The comment must not be based upon a perverted text.

"There is no doubt that the public acts of a public man may lawfully be made the subjects of fair comment or criticism, not only by the press but by all members of the public. But the

distinction cannot be too clearly borne in mind, between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a publicman, and quite another to assert that he has been guilty of acts of misconduct." *Per* Lord Herschel, *C., Davis v. Shepstone*, 11 A. C. 187 at 190; *Purcell v. Souler*, 2 C. P. D. 215.

Nor has a newspaper any greater licence in this respect than a private individual. In the case last cited, a newspaper editor had received a deputation, which came up to London to complain of certain alleged offences committed by a public man, and, having heard their statements, published an article which assumed, falsely, that they were true.

If newspaper men in this country were under the delusion that the law has accorded them a special privilege the judgment of the Privy Council in *Arnold's case*, 18 C. W. N. 785=25 M. L. J. 621 will
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of the press as distinguished from the members of the public
The freedom of the journalist is an ordinary part of the freedom
of the subject, and to whatever lengths the subject in general

In Campbell v. Spottiswoode, 3 B. & S. 769=32 L. J. (Q. B.) 185, the *Saturday Review*, in criticising letters, in which the owner of a religious paper sought subscriptions for it, as a means of converting the Chinese, imputed to him that he had published a false subscription list. The jury found that this was untrue, but that the writer of the article did believe the imputations in it to be well founded. This was held to be no justification. Blackburn, J., pointed out that this was not a case of privilege in which such a defence was admissible. Crompton, J., said: "I have always in my experience

heard it laid down that although you may attack a public person for anything he has done publicly, the moment you go beyond that and impute wickedness to him, then you come within the rule with regard to all who publish a libel, which is that you must prove that the imputations are true." Nor is it any justification that the false statement had appeared in and been copied from another newspaper 12 B. 167.

Lastly, the criticism must be fair. Probably no better explanation of what is fair criticism could be furnished than the summing up of Cockburn, C. J., in the case of *Waron v. Walter*, L. R., 4 Q. B. 73 at 96, which was held by the Court to be perfectly correct

"The jury were told that they must be satisfied that the article was an honest and fair comment on the facts. In other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice; but this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion. That a person taking upon himself publicly to criticize and condemn the conduct or motives of another, must bring to the task not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of the censure." See also the summing up of Bramwell, B., in *Kelly v. Sherlock*, L. R., 1 Q. B. 689, cited and approved in *Kelly v. Tinsling*, L. R., 1 Q. B. 699, and per Lord Esher, *South Hetton Coal Co. v. North Eastern News Association* [1894], 1 Q. B., 133 at 140

In an action against a paper which had published a criticism on a play, Bowen, L. J., said

"It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong and exaggerated or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism. In the case of literary criticism, it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author he was criticizing. In such a case the writer would be going beyond

So, it is not fair comment upon the acts of a public man to state truly facts which suggest discreditable conduct, and knowingly to suppress other facts which show that the suggestion was unfounded. 4 E. 298. It must also be remembered that in this, as in all other cases of alleged libel, the meaning to be put upon the criticism is not that which the author may have had in his mind, but the impression which would be produced upon the mind of an unprejudiced reader, who reads the article straight through, knowing nothing about the case beforehand. *Per LORDES, L. J., South Hetton Coal Co. v. N.-E. News Association* [1894] 1 Q. B. 133 at 143. Again public servants ought not to be too thin-skinned. A writer in the press is not to be held liable for failing to prove all that he has written to the letter. Rasping criticism, provided it is fair and honest, would be no offence though it was couched in a language all of which could not be literally justified, *Hunter v. Sharpe*, 4 F. & F. 983; *Tournbull v. Bird*, 2 F. & F. 526.

215. Third Exception: Fair comment on public conduct of public men, other than public servants.—In the *march* of progress, the number of publicists who hold no official position is ever increasing and this Exception is intended to protect fair comment on the actions and conduct of these men. A comment to be fair must rest on true facts or at all events on facts honestly believed to be true and must not convey imputations of an evil sort except in so far as the facts warrant the imputation, see *Joynt v. Cycle Trade Publishing Co.* [1904] 2 K. B. 292 at 294, where it was laid down following *Campbell v. Spotteswoode*, 3 B. & S. 769=32 L. J. (Q. B.) 185, that the defence of 'fair comment' cannot be maintained if in criticising the conduct of a man in relation to a matter of public interest the writer goes on to impute to him base and sordid motives, there being no facts to warrant the imputations. See 3 A. 342 for a case where criticism was held to be within legitimate bounds when a question of Hospital management was brought before the public by means of advertisement. The same would be the result if a literary work which is submitted to public criticism is severely handed by a

reviewer, *McQuire v. Western Morning News Co., Ltd.* [1903] 2 K.B. 100; *Cookery v. Edreain*, 14 T. L. R. 34; *Wason v. Walter*, L. R., 4 Q. B. 73; *Dunne v. Anderson*, 3 Bing. 88, where it was held the presentation of any subject to parliament would make it a fit subject for public comment; so also evidence offered before a Royal Commission See *per Wickins, V.C. Mulkeruv Ward*, 13 Eq. 622; or proceedings at a public meeting, *Davis v. Duncal*, L. R., 9. C.P. 396. While opinions are protected, a statement of what is not true as a fact is not covered by the Exception, e.g., to impute conduct to a person amounting to a criminal offence can by no stretch of imagination be called an honest expression of opinion See 36 C. 883 at 897-899, 35 C. 495; *Popham v Pickburn*, 7 H. & N. 891 at 898; where comments are professedly based upon what the writer calls credible information received, if it can be proved as a fact accused never received any information, credible or otherwise, his liability becomes conclusive, *Calthorpe*, 27 J. P. 581, *Andrew Grey*, 26 J. P. 663; *Davis v. Shepstone*, 11 A. C. 187 at 190; when positive facts are asserted, there is no other defence except an absolute justification. Good faith, though a good defence to one's opinions is no defence for an allegation as a fact of that which never was a fact, *Peters v Bradlaugh*, 4 T. L. R. 467, *Brennen v Ridgeway*, 3 T. L. R. 592; *Bryce v Itusden*, 2 T. L. R. 435; *Lefroy v. Burnside*, 4 L. R. 1r. 557; *Hunter v Sharpe*, 4 F. & F. 983.

The public career of a member of a legislative council or of a local or municipal board, may no doubt be the subject of comment, however harsh or severe it may be, but none has a right to peep into his private life-history, not material to his public life, and no one has a right to publish to the world facts injurious to a person merely because he happens to stand as a candidate. *Duncombe v Daniell*, 8 C. & P. 222. But it may be necessary in public interest to expose the intemperate habits of a clergyman or the immoral habits of a physician or the dishonest habits of an attorney because in their cases, the private vice becomes material as affecting the discharge of their public duty. *Kelly v Tinsling*, L. R., 4

Q. B. 699. It has also been held the conduct of a private trust is not a matter of public interest, though it would be otherwise if one takes upon himself to expose the mismanagement of Hindu and Mahommedan religious endowments of a public or a quasi public character. See *Walker v. Brogden*, 19 C.B. (N.S.) 65, *Gathercole v. Miall*, 15 L. J. (Ex.) 179; *Booth v. Briscoe*, 2 Q. B. D. 496.

216. Fourth Exception ; Reports of Proceedings.—It must not be supposed that whenever one person is protected in making a defamatory statement, another person will be protected in publishing it. Whether he may do so or not will depend upon a completely different question, whether the persons whom he addresses, whether (limited in number, or the general public,) if the matter appears in a public print, have such a right or interest to know the particular matter as will justify its being spread abroad, the general principle being the advantage to the public in having these proceedings made available would more than counter-balance the inconvenience if any to private persons whose conduct may be the subject of such proceedings, *Wright*, 8 T. R. 293 at 298; 26 M. 464. But this benefit ought not to be made the cloak for ulterior purposes. Thus when a series of seditious articles were reprinted and published when one of them had been made the subject of a prosecution against the editor, this was held not justified as the other articles were not used as evidence in the case under trial, 35 C. 141 at 154. The strongest case of this sort is that of judicial proceedings. These are provided for by the fourth Exception. "It is not defamation to publish a substantially true report of the proceedings of a court of justice, or of the result of any such proceedings."

"*Explanation.*—A justice of the peace, or other officer holding an inquiry in open court, preliminary to a trial in a court of justice, is a court within the meaning of the above section."

As to such reports, Lord Halsbury, C., said :

"The ground on which the privilege of accurately reporting what takes place in a court of justice is based is, that judicial

proceedings are in this country public, and that the publication of what takes place there, even though matters defamatory to an individual may thereby obtain wider circulation than they otherwise would, is allowed, because such publication is merely enlarging the area of the court, and communicating to all that which all had the right to know." It follows that the report must fairly represent to the reader what he would have learnt for himself if he had been present. The report of the evidence on one side without the evidence on the other, of the examination of a witness without the cross-examination, of the summing-up or judgment, where such summing-up or judgment gave only a one-sided view of the case would not be a fair report, and therefore would not be privileged. *MacDougall v Knight*, 13 A. C. 193 at 200; *Flint v Pike*, 4 B & C 373 at 482. When the defendant's counsel referred to the plaintiff's attorneys as 'Messrs. Quirke, Gammon, and Snag, referring to the notorious firm of pettifoggng attorneys of that name in the well known novel 'Ten Thousand a year' and a newspaper-man reproduced this description without any reference to the evidence adduced to rebut such a statement, the comment was held to be too one-sided to be fair, *Woodgate v. Rideout*. 4 F & F 202

It is not, however, necessary that the report should be complete, in the sense of being *verbatim*, if it is substantially fair and correct. *Hoare v Silverlock*, 9 C. B. 20=19 L. J. (C. P) 215. It is immaterial whether the proceedings were *ex parte* or not or whether the court had jurisdiction or not, *Usill v Hales*, 3 C. P. D. 319, which overrules *McGregor, v. Thwaites*, 3 B. & C. 24. The reporter ought not to mix up comments of his own, *Fisher*, 2 Camp 563. Where a report of proceedings was headed by a sensational head-line 'Shameful conduct of an Attorney,' this was held to be not justified, *Clement v Lewis*, 3 B. & Ald. 702. See also *Boydell v Jones*, 4 M. & W. 446; *Lewis. v. Levy*, 27 L. J. (Q. B.) 282, *Lewis v. Walter*, 4 B. & Ald. 605; *Roberts v Brown*, 10 Bing. 519. The proceedings should be kept distinct from comments if there any *Fleet* 1 B. & Ald. 379, *Andrews v Chapman*, 3 C. & K. 286. The report must not be one-sided or highly coloured. *Styles v. Nokes*, 7 East. 493. A newspaper article affecting the conduct and character of persons under trial which would have been inadmissible in evidence against them, published during the proceedings would not be within this Exception, *R. v. Tibbits*, [1902] 1 K. B. 77.

It was held in a case in England that the privilege of publishing proceedings of courts of justice was not absolute, and that if it was shown that the report was sent to a paper for the mere purpose of injuring the person concerned, he would be liable to an action. *Stevens v. Sampson*, 5 Ex. D. 53. This, however, seems opposed to the language of Lord Halsbury, in a much later case above quoted. In *Exception* nothing is said as to good faith, the only requisite being that the report should be substantially true. Such a report may, however, be punishable under s. 292, if it contains obscene matter. *Steele v. Brannan*, L. R., 7 C. P. 261. *Hicklin*, L. R., 3 Q. B. 360. In *re the Evening News*, 3 T. L. R. 255; or is blasphemous, *Carlisle*, 3 B. & Ald. 167, or the publication of which is for other reasons prohibited by the Court, *Clement*, 4 B. & Ald. 218. But in the absence of express prohibition the right of reporting is in no way affected merely because the proceedings are not in open Court but in Chambers, *Smith v. Scott*, 2 C. & K. 580 or in jail, *Ryalls v. Leader*, L. R. 1 Ex. 296.

As to preliminary proceedings, see *Ryalls v. Leader*, above and *Kimber v. Press Association*, [1893] 1 Q. B. 65. We have already seen (§ 214 at p. 902) a newspaper has no higher privilege than any other means of publication, say, a pamphlet, *Milissich v. Lloyds*, 13 Cox. 575; *Solomon v. Isaac*, 20 L. T. 885.

The result of the publication of which is permitted to be the result on the date of conviction had been reversed in appeal, this fact ought to be stated; or if a decree-debt had been satisfied, a mere report that a decree had been passed would not be covered by this *Exception*, *Williams v. Smith*, 22 Q. B. D. 134.

In England reports of debates in Parliament are privileged on the same principle as judicial proceedings, viz., on the public policy which entitles everyone to know what is going on in Parliament. *Wason v. Waller*, L. R., 4 Q. B. 73. But, again, the report must be a fair

one. The report of a single speech which contains defamatory matter, without the others which might explain or contradict it, is not privileged, unless the speech is *bona fide* published by a member for the benefit of his constituents. In that case there is the mutuality of interest which creates privilege. *R v. Creery*, 1 M. & S. 273; *per Cockburn, C. J.*, L. R., 4 Q. B. D. 94. In the great case of *Stockdale v. Hansard*, 9 A. & E., 1., which led to a conflict between the House of Commons and the courts of law, the Queen's Bench decided that the House of Commons had no privilege entitling them to publish papers of a defamatory nature, not being the statement of their own actual proceedings. Such publications are now directly authorized by 3 & 4 Vict., c. 9. The judgment of Lord Denman upon the law apart from statute, is always referred to as embodying the soundest principles of law. See *per Willes, J.*, in *Henwood v. Harrison*, L. R., 7 C. P., at 625=41 L. J. (C. P.) 206, *per Cockburn, C. J.*, *Wason v. Walter*, L. R., 4 Q. B. at 86.

Reports of the proceedings of a quasi-judicial body, which is entrusted with the control of persons and matters, in which the public are interested, and in respect of which they are entitled to information, are also privileged. *Allbutt v Council of Medical Education*, 23 Q. B. D. 400. So are Government proceedings relating to matters of national importance, as, for instance, where the Admiralty published a minute after the loss of the turret-ship *Captain*, to explain the circumstances under which it had been sent out, and the general policy of the Board as to the construction of the Navy, which contained a letter reflecting upon the plans of a naval architect. *Henwood v. Harrison*, L. R., 7 C. P. 606. Whether a report of the proceedings of a municipal body, in the course of which aspersions are cast upon an individual, would have any privilege on the ground of public interest, seems not quite settled. See *Davidson v. Duncan*, 7 E. & B. 229=26 L. J. (Q. B.) 104; doubted in *Davis v. Duncan*, L. R., 9 C. P. 396. No such privilege exists where an *ex parte* statement is made as to a person who is not present to defend himself, and as to which no proof is offered and no decision is given. *Purcell v.*

Souler, 2 C. P. D. 215. Even where the public body is directed by statute to publish an annual statement of its proceedings, this does not authorize a report by anticipation of the proceedings at a particular meeting at which charges are made, which might in the authorized annual statement be rebutted or explained. *Popham v. Pickburn*, 7 H. & N. 891. The charge delivered by a Bishop to his clergy is privileged as between himself and them, and if he is attacked in public in respect of anything supposed to have been said in such charge, he is justified in sending the charge to the newspapers in self-defence. *Laughton v. Bishop of Sodor and Man*, L. R., 4 P. C. 495.

It is probable that in India similar decisions would be given in all the above cases under Exceptions 9 and 10

217. Fifth Exception: Fair comment on cases adjudged in open Court.—This Exception protects *bona fide* comment on cases adjudicated, while curtailing the freedom of comment when they are still *sub judice* (s. 228B.) *R v. Tibbits* [1902] 1 K. B. 77. The comment should however be fair and *bona fide*. See the observations of Cockburn, C.J., in *Woodgate v. Rideout*, 4 F. & F. 202, at 216 & 223 and in *Tanfield*, 42 J. P. 423 at 424. Judges are apt to err like any other people, and it would not be a contempt of Court if the criticism of judges be honest. See *per Fitzgerald, J.*, in *Sullivan* 11 Cox 44 at 57; also *Dair v. Ely*, L.R. 7Eq. 49; *White*, 1 Camp 359n. *per Lord Russell, C.J.*, in *Gray*, [1900] 2 Q.B. 36 at 49. But it is not fair criticism to say of an accused person tried and acquitted that he is really guilty, for men are not tried by newspaper scribblers but by duly constituted tribunals. *Riskallah Bey v. Whithurst*, 18 L. T. 615; *Lewis v. Walter*, 4 E. & Ald. 605; though it would be right to point out reasons why there had been a miscarriage of justice or in what respects the trial judge had erred, it would be intolerable if personal or corrupt motives are attributed to judges every time they go wrong *Hibbins v. Lee*, 4 F. & F. 243; 1887 P. R. No. 21, following 1879 P. R. (Civ.) No. 16.

Not only may the action of judges be the subject of temperate and reasonable criticism, but so also the conduct of parties, counsel and witnesses, provided care is taken not to exceed the limits of fair comment. Thus when a servant girl, who had given birth to a bastard child, failed to get it affiliated on her master, a clergyman, it was held to be improper for a newspaper editor to uphold the girl's story, alluding to the clergyman as a gay deceiver, *Roberts v Owen*, 5 T. L. R. 11. Similarly a mere newspaper man would be exceeding the limits of fair criticism if he chooses to characterise a witness as a maliciously or recklessly false witness. *Felkin v Herbert*, 33 L. J. (Ch.) 294; *Roberts v Brown*, 10 Bing. 519; *Littler v Thomson*, 2 Bev. 129; and no one would be justified in commenting upon a person not examined or a document not exhibited, *Helsham v Blackwood*, 11 C. E. 111; *Hope v. Sir W. Leng & Co*, 23 T. L. R. 243; *Andrew Grey*, 26 J. P. 663. The right to comment on terminated judicial proceedings is a right shared by the newspaper writer with the ordinary subject. He has no higher right by reason of the fact that he earns his livelihood by spreading information regarding facts and opinions. When a defendant in certain criminal proceedings after the termination of the proceedings, reiterated to his pleader what was substantially his plea in defence, this reiteration was held to be privileged both under this Exception as well as on the ground it was communication made by a party to his legal adviser at a time when the relationship of legal adviser and client cannot be said to have ceased, and under such circumstances the communication cannot be said to have been made with intent to injure the reputation of any one, 13 C. W. N. 1087=10 Cr. L. J. 475=4 Ind. Ca. 27.

218. Sixth Exception Opinion on performance subjected to public judgment.—Lord Ellenborough said in *Tobart v Tipper*, 1 Camp 350 at 351, "Liberty of criticism must be allowed or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science, that publication therefore I

shall never consider as a libel which has for its object not to injure the reputation of any individual but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to morality." Any performance subjected to the appreciation of public taste may be criticised provided the criticism is confined to the work submitted for public appreciation and the opinion expressed, however adverse it may be, is a possible inference therefrom, *Strauss v. Francis*, 4 F. & F. 939 & 1107 at 1114 but no one can tolerate the inference from a badly constructed syntax of words that the author was a swindler or a libertine, 31 B. 293=9 Rom. L. R. 230 at 235=5 Cr. L. J. 237. A critic may be illogical, or capacious, or his inferences and opinions may be obtuse, but provided he acts in good faith, i.e. with due care, and attention, he has got every right to attempt to mould public opinion in accordance with his own taste on the work subjected to the appreciation of the public. No one can expect an ordinary newspaper writer or reviewer to possess a calm and philosophical mind or a refined taste, but if his opinions and conclusions are honest, he is protected. But if he bases his opinions on what is not subjected to public criticism, his good faith cannot save him from liability; similarly if his opinions are grounded on misstatements of fact, however *bona fide*, see *Thomas v. Bradbury Agnew & Co., Ltd.*, L. R. [1906] 2 K. B. 627. In this case, Mr. H. W. Lucy (Toby M.P.) reviewed in the *Punch*, a biography written by the plaintiff. The review contained a misstatement of fact to the effect that the materials available for a delightful biography were abundant. It was held by the Court of Appeal on a full consideration of the rulings in *Campbell v. Spottiswood*, 3 E. & S. 769=32 L. J. (Q.B.) 185; *Hentwood v. Harrison*, L. R., 7 C. P. 606, and *Merivale v. Carson*, 20 E. D. 275, that this misstatement of fact made the case a fit one to go before a Jury and that as the Jury inferred malice which would put the review beyond the pale of fair comment, the verdict could not be interfered with. Thus to give room to the plea of fair comment the facts must be truly stated. In *Duplany v. Davis*, 3 T. L. R. 184 a critic advised an actor to return

to 'his old profession, that of a waiter,' and was held liable when the plaintiff proved that he had never been a waiter. If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails, *Hunt v The Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309 at 320=77 L. J. (K. B.) 732. See also *Peterwalker & Son v. Hodson*, [1909] 1 K. B. 239; *Digby v. The Financial News*, [1907] 1 K. B. 502 at 507; 36 C. 883 at 897-898. To prove malice extrinsic evidence of malice is not necessary. The words of the libel and the circumstances attending its publication may themselves afford evidence of malice,—per *Fletcher, J.*, 36 C. 907 at 915 where English authorities on the subject are referred to. See also *Dakhyl v Labouchere*, [1908] 2 K. B. 325n=77 L. J., (K. B.) 728. Where the plaintiff was caricatured as an author bowing beneath the weight of his books, it was held to be no libel, *Carr v. Hood*, 1 Camp. 355n, though a personal caricature of him as he appeared in private life would have been.

A tradesman's advertisement or handbill or placard is as much open to fair criticism as a literary or artistic publication or an architect's design for a public building, *Thomson v Shackall*, M. & M. 187; *Paris v. Levy*, 9 C. B. (N. S.) 342=30 L. J. (C. P.) 1; *Soane v Knight, Moo. & Mal.* 74.

219. Seventh Exception: Censure by superior on the conduct of subordinate.—The class of cases often arising in India under this exception is in the exercise of spiritual authority vested in a guru over his disciples, 6 M. 381, 8 B. H. C. R. (Cr. Ca.) 168, 11 Bom. L. R. 638=10 Cr. L. J. 372=3 Ind. Ca. 744, 6 M. H. C. R. Appx. 46, 24 B. 13, 22 C. 46, or of social authority vested in the headman of a caste as in *Ratanlal* 387. In both classes of cases the privilege would be lost if the publication was unduly wide, *Simpson v Downs*, 16 L. T. 391; *Harb v. Gatherall*, 14 L. T. 801, *Pears v. Ellis*, 6 Ir. C. L. R. 55. In England it has been held a Bishop's charge to his clergy is privileged, *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495

The position may also arise out of a lawful contract. Thus in *Humphries v. Stilwell*, 2 F. & F. 590, the plaintiff was under a contract to supply butcher's meat to a public school of which defendant was the governor. A warning given by the defendant to the school-steward that the plaintiff had been known to sell bad meat was held privileged. In the Illustration to this Exception, the very first instance is that of a judge censuring the conduct of a witness. If a judge is absolutely privileged as held by the Full Bench of the Madras High Court in 36 M. 216, it is difficult to imagine why this instance was put in under this Exception where only a qualified privilege is accorded to a Judge. It is difficult to follow the Madras High Court in its reasoning that in carrying out a large scheme of successful codification, the framers of the Code left untouched the cases of what is known in English law as absolute privilege. As White, C. J., remarks, the framers must have been aware of this doctrine and the Illustrations to this Exception, to Exception Eight, and Illustration (b) to Exception Nine, indicate a conscious departure from the rule of English Law.

220. Eighth Exception: Complaint made to superior touching conduct of subordinate.—As stated in the discussion in s. 212 *supra* at p. 886 this Exception need not be resorted to when the accusation is one of an offence punishable under law and made with a view to initiate a judicial proceeding. If the complaint is a false complaint, there is the ordinary remedy provided by s. 211, I.P.C. The scope of the Exception is therefore restricted to cases where the complaint is made not with a view to initiate a judicial proceeding, but where the accusation is an essential part of a proceeding to which this Exception includes the case of a complaint before a magistrate, thus implying that ordinary complaints falling within s. 4 (h), Cr. P. C., are protected only by virtue of this Exception, if they are made *bona fide*, 3 A. 815. This lends some support to the views of the Allahabad High Court and of the Chief Courts of Punjab and Burma, and the recent view of the Calcutta High Court and it is a matter for regret, attention of the

Court was not drawn to the illustration to this Exception in 36 M. 216 (F.B.)=23 M. L. J. 39=11 M. L. T. 416=[1912] M. W. N. 393=13 Cr. L. J. 375=14 Ind. Ca. 659. The case of a party initiating a judicial proceeding is certainly within the English rule and though that is the very case dealt with by the illustration the learned Chief Justice based his conclusion on the absence of any such indication either in the Exceptions or in the Illustrations.

Whatever may be the scope of the Exception, good faith (see § 211 at p. 879 *supra*) is essential to get the benefit of it. *Proctor v. Webster*, 16 Q. B. D. 112 at 114; 1913 P. W. R. (Cr.) 34=1913 P. L. R. 317=14 Cr. L. J. 606=21 Ind. Ca. 478. A letter written by a Brahmin to the members of his own community to obtain their opinion on a matter affecting his religious interest would come under this Exception, 8 B. H. C. R. (Cr. Ca.) 163. See also *Weir* I. 575. But proof of malice will take away the privilege, *Proctor v. Webster*, 16 Q. B. D. 112. or excessive publication without proper investigation, *Ratanlal* 474, 1910 P. W. R. (Cr.) 4, where 1880 P. R. No. 23 is distinguished. Honesty of purpose is essential for protection and the imputation when not substantially true must have been honestly believed to be true. 11 C. W. N. 390 at 392=5 Cr. L. J. 160. But even a true statement would not be protected if made to a person who has no lawful authority in the matter, *Weir* I. 612. The onus of proving good faith is upon the accused, *Weir* I. 608. The mere fact that rude country folk used language which is inaccurate would not necessarily negative good faith, *Weir* I. 609; 4 W. R. (Cr.) 22. See *per* Lord Esher, M. R., in *Nerill v. Fine Arts, etc., Co.*, [1895] 2 Q. B. 156 at 163.

Even where an accusation has been made to the person in authority, but who is not the authority who could directly deal with the matter of complaint, as when a petition is sent to the Home Secretary for the removal of a magistrate when it should have been more properly addressed to the Lord Chancellor.—*Harrison v. Bush*, 25 L. J. (Q. B.) 25, the occasion has been held to

be privileged; see also *Blagg v. Stuart*, 10 Q. B. 899; *Jenoure v. Delmege* [1891] A. C. 73; *Fairman v. Ires*, 5 B. & Ald. 642; *Woodward v. Lander*, 6 C. & P. 548; *Bannister v. Kelly*, 59 J. P. 793.

If the view of the Madras High Court in 36 M. 216 is correct, this Exception is confined in its operation to accusations made to persons in authority other than judicial authority, e.g., *Kershaw v. Bailey*, 17 L.J. (Ex.) 129, where while the Justices were about to swear in the plaintiff as a paid constable, the defendant, a parishioner came forward and objected that he was an improper person, this was held to be privileged, even though other persons were present. See also *Padmore v. Lawrence*, 11 A. & E. 388; *Bozsus v. Goblet Freres*, [1894] 1 Q. B. 842. For other instances see *Jaynes v. Boston* 2 C. & K. 4; *Knight v. Hill*, 1873 J. P. 176. Bringing to the notice of the Deputy Commissioner that an officer in charge of an hospital was leading an immoral life and that he should be removed from the station was held to be covered by this Exception. 7 C. P. L. R. (Cr.) 20. Such an imputation will not be an offence unless express malice be made out. 7 C. W. N. 246.

221. Ninth Exception: Imputation for protection of Interest.—This Exception rests on the ground that honest transactions of business and of social intercourse should be duly protected, so long as the parties act in good faith. 12 M. 374 at 377. As remarked by Lindley, L.J., in *Stuart v. Bell*, [1891] 2 Q. B. 341 no definite line can be so drawn as to mark off with precision those occasions which are privileged and separate them from those which are not. Mutuality of interest in the communication no doubt would serve as the fundamental basis for privilege as held by Lopes, L.J., in *Hunt v. G. N. Ry. Co.*, [1891] 2 Q. B. 189 at 192; see *Knight v. Gibson*, 1 A. & E. 43; *Corhead v. Richards*, 2 C. B. 569; *Amen v. Damm*, 8 C. B. (N. S.) 597 at 602; *Davis v. Snead*, L. R., 5 Q. B. D. 608 at 611; *Waller v. Loch*, 7 Q. B. D. 621; *Dunman v. Bigg*, 1 Camp 269n. In 9 B. 269 a statement made to a judge in the course of trial that the complainant was tamper-

ing with the witnesses and that he should be asked to sit in Court was held to fall within this Exception. See also 9 C. W. N. 195=2 Cr. L. J. 47. But a statement which a party or counsel may freely make would not be protected if made by a by-stander because the latter has no such interest *Lynam v. Gowing*, 6 Ir. L. R., Ex. D. 259; *Botterill v. Whitehead*, 41 L. T. 588. Illustration (a) to this Exception is drawn from *Blackham v. Righ*, 2 C. B. 611. See to the same effect, *Baker v. Gamich*, [1894] 1 Q. B. 838. Illustration (b) is based on a string of English cases like *Sutton v. Johnston*, 1 T. R. 493; *Mansergh*, 1 B. & S. 400; *Warden v. Bayley*, 4 Taunt 67. Petitions presented by villagers to officers of Government would be protected if they are made in good faith even though every assertion therein may not be true to the letter, 15 Cr. L. J. 281=23 Ind. Ca. 489; and so also *bona fide* statements before a caste Panchayat 4 L. B. R. 84. The Exception is often requisitioned in connection with resolutions at caste-meetings and the doings of caste-heads and Gurus. *Weir I.* 613; 14 Bom. L.R. 585=1 Bom. Cr. Ca. 152=13 Cr. L. J. 687=16 Ind. Ca. 335. But in such cases parties should be careful that they do not indulge in excessive publication to members who are not of the caste or disciples of the Guru. Such excessive publication would negative good faith, 11 Bom L. R. 638. To invoke the aid of this Exception the mere fact the complainant and the accused were of the same caste is not sufficient and no man would be justified in calling another an out-caste unless he does so *bona fide* and for the protection of his own interest, see 33 M. 67, where the previous rulings are considered; see *Weir I.* 614, 6 A. L. J. 472, as to privilege of caste assemblies and responsibility for communication of its resolutions.

Whatever may be the ultimate fate of the doctrine of absolute privilege in India, no one has hitherto claimed any such privilege for official reports submitted by an officer to his superior in the execution of his duty. If statements in such reports are recklessly or unjustifiably made, liability cannot be avoided on the ground

of any such absolute privilege. It was so held in the case of the Police-Inspector who being asked to report whether a certain person was the leader of a gang of dacoits added at the end of his report 'I learn from private inquiries that there is scarcely a woman in the houses of *Banias* who has not passed a night or two with the defendant,' 6 E. L. R. Appx. 42=14 W. R. (Cr.) 22. See 1880 P. R. No. 23; 1910, P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

In cases of defamation where the accused is afraid that it might be found that he has gone beyond the limits of the Exception, it is open to him to prove that the character he had defamed is not of a very high order and that the general reputation of the complainant was bad enough to afford a reasonable ground for the imputation; under such circumstances, an English jury returns a verdict for plaintiff with a farthing damages as in *Monson v. Tussand*, [1894] 1 Q. B. 671, *King v. Watts*, 8 C. & P. 614, and would go a long way to reduce the sentence under the Penal Code, 2 C. P. L. R. 198. But care must be taken that the evidence thus let in, affects the character of the complainant only so far as the particular transaction is concerned, 7 A. 906 and the defendant is not allowed a commission of a roving nature into the entire past history of the complainant; or, that he does not derive advantage by calling witnesses whose opinion of the complainant has been affected by the libel in question *Thompson v. Nye*, 16 Q. B. 175 at 179; *Bell v. Parke*, 11 Ir. C. L. R. 418; *Scott v. Sampson*, 8 Q. B. D. 491; *Wood v. Denham*, 21 Q. B. D. 501; *Jones v. Stevens*, 11 Price. 235; *Mangena v. Wright*, [1909] 2 K. B. 258. The benefit of this Exception will be lost if the publication is found to be excessive beyond the reasonable limits of the requirements of the occasion. 4 Sind. L. R. 67=11 Cr. L. J. 588=8 Ind. Ca. 209. Similarly even a reply to a lawyer's notice of demand may make a person hable, if the reply is made the vehicle for making imputations on the character of the claimant and wholly irrelevant to the business. 1910 P. R. (Cr.)

10=1910 P. W. R. (Cr.) 6=11 Cr. L. J. 281=5 Ind. Ca. 892 Similarly, even an imputation made in a communication by a party to his own solicitor may make him liable, if the imputation is not made in good faith, and without the slightest ground and without honestly believing that it was true. 5 Bom. L. R. 122.

Though under s. 350, Cr. P. C., a magistrate succeeding another who had heard the case in part may with the consent of the accused proceed with the case from the point of the inquiry left unfinished by his predecessor yet it is highly desirous in cases of defamation that the magistrate who convicts, should have the complainant examined by himself rather than act merely on the record left by his predecessor, 13 C. W. N. 550.

222. Tenth Exception Caution conveyed for the good of the informant or for the public good.—This Exception covers cases of imputation in the discharge of a social duty such as giving a character to a servant seeking employment. The privilege will be lost if the publication is made to an unduly wide circle, 3 Bom. L. R. 188; or if it is sent by means of printed letters or circulars, *Gilpin v. Fowler*, 23 L. J. (Ex.) 152; or by way of post-cards and telegrams, 6 M. 381, *Williamson v. Frere*, L.R. 9 C. 393; or if the caution given is accompanied by excessive expressions of opinion, *Fryer v. Kinnerley*, 33 L. J. (C. P.) 96. The question whether a publication is for the public good arises expressly in connection with Exceptions 1, 9 & 10 and incidentally in other Exceptions also. This is essentially a question of law, which even a Court exercising only powers of Revision under s. 439, Cr. P. C., will feel bound to consider. See the remarks of Lindley, L. J., in *Stuart v. Bell*, [1891] 2 Q. B. 341 at 345, 350. See *Clover v. Royden*, L. R., 17 Eq. 190 at 204 for the nature of the public interest which may be protected even by damaging the reputation, of a person in the way of his business. 'Interest' is an ever-widening circle and may sometimes be co-extensive with humanity at large, so that all difference between interest and public good may

vanish. Generally, when a man has nothing to gain for himself by damaging the character of the plaintiff but the imputation is made for common good it is protected not on the ground of interest but on the ground of public good, *Blake v. Pilford*, 1 Moo. & Rob. 198; *Woodward v. Lander*, 6 C. & P. 548. But there are many men whose interest in life is to promote public good. Where a matter is of public interest the Court ought not to weigh any comment on it in a fine scale; some allowance must be made for even intemperate language, provided however the writer keeps himself within the bounds of substantial proof and does not misrepresent or suppress any facts, 13 Bom. L. R. 1187=12 Cr. L. J. 595=12 Ind. Ca. 971; see also 15 Cr. L. J. 357=23 Ind. Ca. 725. But where a Brahmin was described as a man with whom not even Turks could associate, and the wedding of his daughter was described as a sinful carnival worthy of perdition—a moral end involving a disgrace, degradation and degeneration—it was held such language used to hold up the complainant to public execration could not be justified, 4 Bur. L. T. 48=12 Cr. L. J. 129=9 Ind. Ca. 775.

Apart from the question of public good, this Exception also covers communications made for the good of the person to whom the information is conveyed on a matter of supreme importance, such was held to be the case in *in Re Coleridge*, Q. C., 15 C. B. (N. S.) 410=1 T. L. R. 84. where the lady whom the plaintiff was about to marry was informed of his antecedents by the defendant who was a friend of the plaintiff, the letter being written in consultation with the clergyman of the parish. Similarly when the defendant informed a man about to engage the plaintiff as *accoucheur* at his wife's approaching confinement that plaintiff was a man of immoral habits, *Dixon v. Smith*, 29 L. J. (Ex.) 125 at 129. *Todd v. Hawkins*, 8 C. & P. 88. As the law stands at present, it makes no difference whether the caution is conveyed uninvited. *Stuart v. Bell* [1891] 2 Q. B. 341 at 347, *Clark v. Molyneux*, 3 Q. B. D. 237, *Ramsay v. Webb*, Car. & M. 105; the earlier cases to the effect

information volunteered is not protected, being no longer regarded as sound law *King v Watts*, 8 C. & P. 615; *Corhead v Richards*, 2 C. B. 569, *Bennet v. Deacon*, *ibid.* 628. *Masters v Burgess*, 3 T. L. R. 96, *Amann v Dimm*, 8 C. B. (N. S.) 597, *Kine v. Sewell*, 3 M & W. 297; *Cleaver v Senande*, 1 Camp 268.

As regards persons standing in certain fiduciary relationships as solicitor and client, guardian and ward, caution given is protected not merely by this section but on the ground such communications are necessary for the protection of mutual interests from the very nature of the relationship and there is an absence of undue publicity. The mere fact a defamatory matter is marked private and confidential will not afford any special protection *Picton v Jackman*, 4 C. & P 257, see *King v Paterson*, 83 L. T. 498, as to legality of confidential trade circulars See *Macintosh v Dunn*, [1908] A. C. 390, followed in *Greelands v. Wilmhurst*, [1913] 3 K. B. 507.

IV PROVINCE OF JUDGE AND JURY.

223. Province of Judge and Jury.—Every charge of defamation contains assertions of fact and assumptions of law. It is the business of the jury to find whether the assertions are true, and of the judge to direct them as to whether the assumptions are sound. The practice in India is substantially the same as that in England since *Fox's Libel Act*, 32 Geo. III., c 60; that is to say, the judge directs the jury as to the law, leaving them to find the facts, and then verdict ought to be such as the judge directs to be appropriate to the facts arrived at by them. It is competent, however, to the jury to disregard the directions of the judge, and their verdict will still be good, till it is set aside in the manner provided by law. As to the English practice, see the summing up of Best, J., in *R. v. Burdett*, 4 B. & A., at 120; and *per Parke, B.*, *Parmiter v. Coupland*, 6 M. & W. 105. There are some cases, however, in which the law is so clear that it leaves no question for the jury, and then it is the duty of the judge absolutely to withdraw the case from their

consideration, and to direct them what verdict they should find. This generally happens where the verdict ought to be one of acquittal. It is very important to distinguish the two classes of questions, as the right to have a finding reopened in revision may depend largely upon whether the mistake complained of is one of law or of fact.

Where there is no question of privilege, the only points for decision are, whether the accused published the statement ascribed to him with the intent necessary under the Code, and whether the statement is defamatory. The first point is purely a question of fact for the jury; the second is a mixed question of law and fact. It is for the judge to say whether the statement can be a libel; it is for the jury to say whether it is a libel. In *Capital and Counties Bank v. Henty*, 7 A. C. 741, Lord Selborne, C., said, "In *Sturt v. Blagg*, 10 Q. B. 893, at 908, Wilde, C.J., said, 'It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an *innuendo*; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.' If the judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the *Innuendo* to the jury." In the same case Lord Blackburn quotes from a judgment of Lord Mansfield, in *R. v. Shipley*, 4 Doug. 164, as follows "Every circumstance which tends to prove the meaning, is every day given in evidence, and the jury are the only judges of the meaning," and then goes on to say: "If the words were reasonably capable of a meaning which, in the opinion of the Court, would be libellous on the plaintiffs personally, I think there can be no doubt that it ought to have been left to the jury to say whether the words bore that meaning." Cited and followed in *Nevill v. Fine Arts Insurance Co.* [1895] 2 Q. B., at 158; *affd.* [1897] A. C. 68; see also *Jenner v. A Beckett, L. R.*, 7 Q. B. 11; *Grant v. Yatts*,

6 A. C. 158; see the dictum of Montagu Smith, J., in the course of argument in *Simmons v. Mitchell*, **6 A. C. 156** at **158**; and **19 M. L. J. 714**; **Ratanlal 140**. It must be remembered that the dictionary sense of the words is not necessarily that which gives their meaning in the particular instance. That sense may be perfectly harmless and yet the words may be used so as to convey an offensive suggestion, or the sense may be in the highest degree defamatory, and yet the words as used may convey nothing beyond banter. It is for the jury to say what was meant, if that meaning can reasonably be affixed upon what was said.

Where the defence is that the occasion was privileged, this in general admits that, except for the privilege everything which would make out the charge has been established or is admitted. "The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but when the jury have found the facts, it is for the judge to say whether the occasion is privileged."—*Per* Lord Esher, *Hebditch v. McIlwaine* [**1894**], **2 Q. B.**, at **58**. "Where privilege exists the burthen of proof of actual malice is cast upon the person who complains." "The jury in civil cases, equally as in criminal cases, are the proper tribunal to determine the question of libel or no libel. This was affirmed by the *Declaratory Act of 1792*, and has been often recognized. But it is not competent for the jury to find that upon a privileged occasion relevant remarks, made *bona fide* and without malice, are libellous. It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this and every other question of law, if we were to hand over the discussion of privilege or no privilege to the jury. In actions of libel, as in other cases where questions of fact, when they arise, are decided by the jury, it is for the Court first to decide whether there is any evidence upon which a rational verdict for the affirmant can be found." *Per* Willes, J., *Henwood v. Harrison*, **L. R.**, **7 C.**, at **626**. Where there is neither internal nor

extrinsic evidence of malice or want of good faith which can reasonably be left to the jury, it is the duty of the judge to direct the jury, as a matter of law, that they should find for the defendant. *Nevill v. Fine Arts Insurance Co.* [1895], 2 Q. B. 156; see *per Lopes*, L. J., at 171; *affd.* [1897], A. C. 63.

The same rule exists where the defence is that the case is not a libel at all, but a fair comment upon a matter of public interest. Before leaving the question of fair comment to the jury, the judge must be satisfied that the defamatory inference can reasonably be drawn from the stated facts. If it can, then it will be for the jury to say whether it ought to be drawn. *The Homing Pigeon Publishing Co., Ltd. v. The Racing Pigeon Publishing Co., Ltd.*, 29 T. L. R. 389. Whether the matter commented on is one of public interest, is for the Court to decide. Whether the comment is fair and *bona fide* is essentially a question for the jury, provided there is any evidence upon which they can so find. Whether there is any evidence upon which such a conclusion can be arrived at is again a question for the Court, but if there is any such evidence, the decision as to the effect of such evidence is wholly for the jury. *South Hetton Coal Co. v. North Eastern News Association*, [1894] 1 Q. B. at 141 143, *Per Lopes*, L. J.; *Kelly v. Tinling*, L. R. 1 Q. B. at 701, *Per Cockburn*, C. J. The functions thus determined for the judge and jury are likely to be of any practical use in trials under the Criminal Procedure Code only in cases where a European British subject happens to be the accused person or where the High Court is called on in Revision to deal with a case of defamation tried by an inferior criminal court.

B.—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

224. **Criminal Intimidation.**—The injury threatened by s. 503, is substantially the same as that which is the essence of extortion s. 383; *ante*, Ch. X, § 179 at p. 635 *supra*. The objects aimed at are, however, wider under s. 503 than under s. 383, and the offence is complete by the attempt, although nothing is

effected by it. Thus while a constable was taking certain persons to his Inspector, threatening them with the head constable's vengeance if they accompanied the constable, was held to fall within the definition in s. 503, **Ratanlal 850**. But mere idle threats by a person in an angry mood without the power of putting the threats into immediate execution are not within the section, **1882 P. R. No. 45**.

The word "injury" is defined by s. 44 as denoting any harm *illegally* caused to another. Therefore, it will not be an offence to threaten another with an action, or indictment, which might lawfully be preferred against him, **8 B. H. C. R. (Cr. Ca.) 101**; **(1897-1901) U. B. R. 359**; **30 C. 418=7 C. W. N. 116**, or with getting him dismissed from the public service **20 B. 794**; though if he obtained money by the threat, it would apparently be punishable under ss. 388 and 213. A threat to bring a false charge against a person and support it by fabricating false evidence would clearly be an offence punishable under s. 506. **Weir I. 623**. But a threat in order to be indictable must be made with intent to cause alarm to the complainant. A communication by a person that he is going to take revenge by false complaints cannot amount to a threat or criminal intimidation, **2 Bom. L. R. 55**. But a threat to get the complainants imprisoned if they kept the terms of an *Ikrarnama*, to keep the peace in *Mohurrun*, was held in **1886 A.W.N. 41** to be within this section. And similarly a threat by the owner of stolen property that he would get the complainant turned out of his village if he did not prove his innocence (of theft) by dipping his hand in heated oil, which the complainant did and got his hand badly scalded, **9 C. P. L. R. 18**.

A question which has arisen under this section, is as to the criminality of pronouncing a *bona fide* sentence of excommunication or exclusion from caste. There can be no criminality where such a sentence is legal; that is to say, where it is justified by the usages of the class or sect to which the complainant has voluntarily submitted, though it may not be one which the civil law would enforce.

There can be no criminal intimidation where the injury of which complaint is made is the hardship arising from a conventional punishment, which a spiritual superior, acting in the exercise of his authority as regulated by the custom of the caste, is competent to inflict. The custom implies a common submission to his authority, and, assuming that there was an error of judgment on his part, the error cannot be accepted as sufficient for turning a case of conventional discipline into a criminal offence. It is not denied that the pronouncing a man out of caste is a conventional mode of vindicating caste usages. Nor does it appear that the respondent acted in this case officiously, or before instructions were solicited from him by his orthodox disciples." *Perr Muttusawmy Aiyar, J.*, 6 M. 381 at 388.

Where the legality of the sentence is itself a matter of dispute, it is one which must be decided by the court. Where, however, such illegality is at the same time under the consideration of a competent civil court, it is advisable that the criminal court should suspend its proceedings until the vital question has been decided in a manner which will bind both parties. 8 M. 140.

To advise others not to deal with a man is an injurious act, but it is not a threat and the harm caused is not to property already owned but rather to his opportunities for earning, *Ou. S. C. 146*. The question often arises when a village faction prohibits a particular individual being served by the village barber and washerman, whether an offence under s 503 is committed. The Bombay High Court has held that mere threatening to bring a matter before a caste-panchayet to get one expelled does not come within s. 503, *Ratanlal 186*, even where the object was to compel the complainant to give up his field, *Ratanlal 37*.

Very important questions have arisen in England under a statute similar to s. 503, which is part of the legislation defining the rights of workmen against their employers. By 38 and 39 Vict., c 86, s. 7, "Every person who, with a view to compel any other person to abstain from doing, or to do, any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority, uses violence to or intimidates such other person or his wife or children, or injures his property" is liable to conviction and punishment.

In *Gibson v. Lawson* [1891] 2 Q B 545 Gibson and Lawson were both working under the same shipbuilding company. Gibson was a member of the National Society, Lawson of the Amalgamated Society. The members of the latter society resolved that they would strike unless Gibson left his society and joined theirs. He refused, and his employers dismissed him, to avoid a strike. The magistrate refused to convict Lawson, who was the mouthpiece of the Amalgamated Society, and the medium through which it communicated with Gibson. On appeal the Queen's Bench held that he was right. No violence had been used to him, and the question was, whether the conduct of the defendants amounted to intimidation. The Court held upon a review of the Trades Union Legislation, that it did not. Strikes were legal by that legislation, and they held that the word "intimidate" must imply at least a threat of personal violence.

In another case, *Cunneen v. Trebilcock* (reported on the same page as this case was decided along with the last) the pressure was applied directly to the employer. The defendants' union threatened him that unless he ceased to employ non-union men they would call out the union men, which they accordingly did, and the latter all struck work. No violence was threatened, and no immoderate language was used, but the men quietly ceased work, causing of course great inconvenience and loss to their employer. In this case the magistrate convicted, and the High Court reversed his conviction, for the reasons already given. They considered that the harm which incidentally followed to the employer from the conduct of his workmen, which was itself legal, and which was intended to protect their own supposed interests, was not illegal, and that the combination of many to do that which was lawful in each, could not be considered criminal under the law of conspiracy. See further, *Allen v. Flood* [1898] A. C. 1. As to picketing and the remedy by action or injunction against, see *Lyons v. Wilkins*, [1898] 1 Ch. 811 [1899] 1 Ch. 255 (*Charnock's case* [1899] 2 Ch. 35 *Taff Vale Ry v. Amalgamated Railway Servants* [1901] A. C. 426 *Quinn v. Leatham* ib. 495).

Should similar cases arise in India, it seems to me that they would not be punishable under s. 503. The question would then turn upon the word "injury." Injury, as already observed, is defined by s. 44 of the Code as harm illegally caused. Where no criminal breach of contract was concerned, the threat to leave work in a body would be as lawful in India as in England, and the harm

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fore injury, a farther question would arise, whether the loss to trade and general inconvenience and expense resulting from a strike, would be injury to property within the meaning of s. 503. It might be argued, and probably with success, that property in that section means some specific, tangible property. If a man threatens illegally to dismiss his servant or agent, can he be said to threaten injury to his property?

It is essential to the commission of an offence under the second clause of this section that the person to whom the threat is addressed should be interested in the person to whom the injury is threatened. A petition was sent to a Revenue Commissioner containing a threat that a certain forest officer would be killed if he were not removed. It was found as a fact that the Commissioner had neither official nor personal interest in the forest officer. This being so, it was held that no conviction under ss. 503 or 507 could be maintained. **11 B. 376; 1882 P. R. No. 45.** The gist of the offence consists in the pressure put upon the mind of the person upon whom the threat is intended to operate. But if the person threatened is indifferent to him, he will obviously be indifferent to the threat. Thus a threat to commit suicide is not within s. 503 unless the person threatened is interested in the accused, **1866 P. R. No. 109.**

The threat need not be directly addressed to the party whom it is intended to influence. It is sufficient, although it is addressed to others, if it is intended to reach the ears of the party threatened, **Weir I. 622, 623,** and **13 C. 671.**

It is not necessary that the threat should be aimed at by this section. In a case falling under the second part of s. 503 there should be a distinct finding as to the act which the accused endeavoured, to make the complainant abstain from doing. **R. V Mackenzie, L. R. [1892] 2 Q. B. 519=17 Cox. 442.**

A special form of intimidation is rendered punishable by s. 508, where a person induces or attempts to induce another to believe that he, or some person in whom he is

interested, will become, or will be rendered by some act of the offender, an object of Divine displeasure, if he does, or does not do, some act which he is legally entitled to do or to omit doing **Ratanlal 376** The words "by some act of the offender" must be read with the verb "become" as well as with the verb "be rendered" The Illustrations to this section are clumsily worded. If a Brahmin starves at his debtor's door to obtain payment of a sum of money which the other had promised to pay on demand, it is not within the section, the debtor being legally bound to pay; but if the Brahmin does the same or behaves similarly to obtain a charitable contribution for the celebration of his daughter's marriage, he would be within the section. Thus when a Brahmin widow left her illegitimate child at the door of its reputed father in order to exact from him some payment for her own benefit and not for the support of the child, her act was adjudged to be covered by s. 508, 1886 A. W. N. 63. But the decision would have been different if she only wanted maintenance for the child. A man who persuades another that by his prayers or incantations he will be able to cause the deity to withhold rain or to send a destructive storm, would come within the section. He would not be punishable if he merely induced the other to believe that by refusing to comply with his wishes he was doing a sinful act, which would bring him within the ordinary course of Divine punishment.

The mere pronouncing of a sentence of excommunication, or exclusion from caste, does not come within this section. "A person who is excommunicated does not become an object of Divine displeasure by the act of the priest who pronounces the sentence. The proceeding purports to be a declaration that the person on whom it is passed has, by his own act, committed sin and rendered himself an object of Divine displeasure, and it also purports to be a sentence of interdiction from the means of grace administered by the clergy until on repentance and submission those privileges are restored" *Per Turner, C J*, 8 M at 145

"The accused did not threaten the complainant that he would do any act to render him an object of Divine displeasure. As the

spiritual superior of the complainant, he passed on him a temporal sentence, which is customarily pronounced on those who violate caste usages, but offered to restore him to caste privileges on submission. To constitute the offence punishable under this section, it must be shown that the respondent threatened to do a future act, or illegally to omit to do an act, and that by such threat he induced or attempted to induce the person threatened to believe that by that act or illegal omission the person threatened, or someone in whom the person threatened was interested, would become an object of Divine displeasure." *Per Turner, C. J.*, 6 M. at 394.

225. Intentional insult to provoke a breach of the peace.—Section 504 renders punishable any person who intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence. The essence of this offence consists in the effect which it is likely to produce upon the person to whom the provocation is addressed, not upon any other person who may be present or who may come to know it. See 26 C. 653, at 663; 24 A. 155; Weir I. 620. Public peace can be broken by angry words as well as by deeds. *Holmes, Dears C. C.* 207; 4 Bom. L. R. 78. But a refusal on the part of one sect to associate with members of another sect coupled with the exclusion of the latter from the use of the public well was held not to be an offence under s. 504, 1883 P. R. No. 3. But where a Police Constable asked the complainant not to create a disturbance on the public road and when the latter paid no attention to the admonition, demanded his name and address and when this was refused the Constable called the complainant *sooar* and arrested and dragged him to the Police station the Constable was held guilty under s. 504, 5 Bom L. R. 597.

It is no answer to a charge under this section that the person insulted was in such a state of terror as to feel no disposition to break the peace, provided the provocation was such as would naturally have that result. 10 M. 353; nor would the mere forbearance of the person insulted from being provoked to commit a breach of the peace, Weir I. 621; (1892—

1896) U. B. R 290, be a valid defence. What would be the effect if the insults were addressed to a clergyman, or to a lady, who would not be likely to break the peace? If it was probable that such person would get someone else to take an illegal revenge on their behalf, the requirements of the section would be satisfied. See **Weir I 622**. When a person's possession is sought to be disturbed, he is not entitled to have resort to insulting language S 104, I. P. C., is no defence when such insulting language is made the basis of an indictment under s. 504, 11 C L J 113 11. Cr L. J. 213=5. Ind. Ca. 721 But in cases of vulgar abuse resorted to under provocation, the provisions of s 95, I.P.C., may well be used. 15 Bom L R 1039=15 Cr. L. J. 14 =22 Ind Ca 158. It must also be remembered that mere abuse is not necessarily an offence under s. 504, (1897—1901) I U. B. R. 67 Hence offences punishable under s 10 of Madras Regulation XI of 1816 by a Village Headman are not cognizable by a Court constituted under the Criminal Procedure Code as falling under s. 504

226. Insult to Female Modesty—The intention to insult the modesty of a woman in the essential ingredient of the offence, 5 Bom L R 502, 1892, P R No. 6, 1898 P. R. No 12 If the act is committed in a public place it would be punishable under s 294 as a public nuisance If the act had proceeded to the extent of using criminal force, it would then be punishable under s 354, or if the act of intrusion involves entry into the woman's property, it would be punishable as one of the aggravated forms of criminal trespass, 22 C 391 & 994. S 509 is a residuary provision enacted to punish an act which but for it would go unpunished

This section assumes the modesty of the woman and an intention to insult it; therefore no offence will have been committed where the woman is of a profession, or character, which negatives the existence of scrupulousness. 5 Bom L R 502. Nor, I conceive, would there be any offence, even though the woman were virtuous, if, under the circumstances of the case, the man *bona fide*

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If there is any doubt whether the marriage was a legal one, they are cross-examined, and if their answers leave the matter in doubt, of course the case breaks down. It is difficult to see why the evidence of the alleged husband and wife themselves, if given with sufficient particularity as to time, place, and circumstances, and subject to cross-examination, should not be enough to prove a fact of which they might possibly be the only available witnesses, and as to which their evidence, if believed, was conclusive. In neither of the two cases does their evidence appear to have been in any way questioned, by cross-examination or otherwise. In *9 M. 9*, where the evidence of a marriage was that of the husband, the wife, and the mother of the latter, given in just the same bald and meagre manner, the Madras High Court held it to be sufficient, and refused to be bound by the Calcutta and Allahabad decisions. In a still later case, *20 A. 166*, however, on a charge of enticing away a married woman, where the only evidence of the marriage was that of the complainant and the woman, the High Court referred back the case for further enquiry, saying that in case of this kind, where a false charge may easily be made of enticing away a woman, said to be a married woman, but possibly only a mistress, the Court should require some better proof of the marriage than the mere statement of the complainant and the woman. See also *4 W. R. (Cr.) 31 & (Cr. Let.) 10 7 C. W. N. 143; 1882 P. R. No. 40; 1895 P. R. No. 23; 13 C. L. R. 125; 2 C. W. N. 245, 1893 P. R. No. 17; 1898 A. W. N. 186; 3 A. L. J. 224n; 3 Ou. Ca. 342; 2 Sind. L. R. 22=10 Cr. L. J. 235; 15 Cr. L. J. 78=22 Ind. Ca. 430; 5 Sind. L. R. 270=13 Cr. L. J. 541=15 Ind. Ca. 813; 11 A. L. J. 994; 1894 P. R. (Cr). 5. where 1882 P. R. (Cr). 40 is not followed; 1 Ind. Jur. (N. S.) 8, which would support the proposition that to sustain a criminal charge strict proof of marriage is necessary.*

Identity of the first husband with the person proved to be alive at the time of second marriage may be established by proving a photographic likeness of the first husband shown to witnesses present at the first marriage, *Tolson, 4 F. & F. 103; Maincaring, D. & B.*

132=26 L. J. (M. C.) 10; *Simpson*, 15 Cox. 323. See, however, *Frith v. Frith*, [1896] P. 74.

Where an actual marriage has been celebrated with the *bona fide* intention of making the parties man and wife, the Court will presume everything that is necessary to make the marriage formally legal, on the principle *omnia presumuntur rite esse acta*. See Ev. Act, s. 114, cl. (e). 1 Cr. L. J. 701. In two cases of bigamy, in one of which the marriage was performed in a Wesleyan chapel, in the other in a building adjoining a church which was under repair, the Court presumed that the places were duly registered and duly licensed *R. v Mainwaring*, D & B. 132=26 L. J. (M. C.) 10; *R. v Cresswell*, 1 Q. B. D. 446. In this respect there appears to be no difference between civil and criminal cases. Where a marriage had been celebrated by a duly authorized clergyman in a private house, where it would have been unlawful without a licence from the Bishop, and there was no evidence of any licence, and the Bishop swore that to the best of his recollection he did not give any licence, and that he would not have given one in the particular case, as the parties had been living together in concubinage, the House of Lords held that the presumption in favour of marriage must prevail *Piers v Piers*, 2 H. L. Ca. 331. So in 12 C. 706, where a marriage would have been unlawful by reason of the affinity of the parties, without a dispensation from the Roman Catholic Archbishop, the Court assumed that such a dispensation had been given. See 19 M. 273. In all these cases the clergyman would have been acting in violation of a perfectly well-known duty, and would have been liable to punishment if he had married the parties without the necessary authority.

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is a fact which must be proved by experts, that is, by persons specially skilled in it, either by virtue of their profes-

sion as lawyers, or as holding some office which requires a special knowledge of the branch of law which is to be proved, *Sussex Peerage* case, 11 Cl. & F. 85, at 134. Where it was necessary to prove the validity of a Scotch marriage, it was held that the evidence of the sister of one of the parties, to the effect that she had been married in the same way, and that people in Scotland were always so married, was not merely insufficient, but inadmissible *R. v. Povey*, Dears 32=22 L. J. (M. C.) 19. And the same decision was given where the evidence offered was that of the Roman Catholic priest who performed the marriage, who said that he had performed it in accordance with the law of Scotland, and that he had celebrated numerous marriages in the same way during a period of twelve years. *R. v. Savage*, 13 Cox. 178. On the other hand, where it was proved that a marriage was performed in Illinois between two Roman Catholics, who were English subjects, by a Roman Catholic priest, in a Roman Catholic Church, after the publication of banns, according to a marriage service read from a book, it was held by the majority of the Irish judges to be valid, without any evidence of the law of Illinois. The decision was put upon the ground that the evidence showed a marriage which was valid by English law, and by the law of the Roman Catholic Church, and that it must be assumed, in the absence of evidence to the contrary, that it was not contrary to the law of Illinois. *R. v. Griffin*, 14 Cox. 308.

According to English practice, foreign law must be proved by the oral evidence of the expert relied on. In India the Court may inform itself, or receive information, by means of published collections of the law or law-reports of the foreign country, or by the opinions of experts to be found in their works. Ev. Act, ss. 38, 45, 60, 84, 87.

202. Domicile determines the Forum competent to grant Divorce.—The courts of a man's domicile have complete jurisdiction over his matrimonial *status* in regard to divorce, and their decisions, and all the consequences flowing from them, ought to be accepted by the courts of every other nation.

"As a general rule, it may be stated that jurisdiction in matters matrimonial depends upon the domicile of the parties to a marriage at the time of the commencement of the proceedings for a divorce. The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of such proceedings, and this independently of the residence of the parties, the allegiance of the parties, the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the matrimonial offence or offences have been committed." *Per* Lopes L. J. *Goulden v. Goulden*, (1932) p. 240 at 243.

A remarkable illustration of this rule will be found in the case of *Wilson v. Wilson*, L. R., 2 P. & D. 435. There both parties, at the time of their marriage, and up to the date of their final separation, were resident and domiciled in Scotland. The marriage was in Scotland, and the adultery was in Scotland. Some time after the separation, the husband took up his residence and became domiciled in England. He then brought his suit for divorce in the English court, and it was held by Lord Penzance that the court not only had jurisdiction, but that it was the proper court to sue in. At one time it was supposed that the decision in *Lolley's* case, Russ & Ry. 237 had settled that no foreign court could dissolve a marriage celebrated in England for a ground which would not, in England, justify a divorce *a vinculo matrimonii*. This notion, however, was finally overruled by the House of Lords in the case of *Harvey v. Farnie* 8 A C 43; see *per* Lord Selborne, at 50. There a domiciled Scotchman came to England and there married an English lady. They went to Scotland to live, and the wife obtained in the Scotch court a divorce *a vinculo matrimonii* on the ground of the husband's adultery which in England would only have justified a judicial separation. He returned to England, where he married another English lady during the life of the former. It was held that both the divorce and the second marriage were good. Lord Selborne pointed out that the term "English marriage," as used in *Lolley's* case meant a marriage which, being entered into by a domiciled Englishman, became exclusively subject to English law, that the resort to the Scotch court, in his case, was merely collusive, and that he had undergone no change of domicile which would justify the action of

that court. This ruling was followed in *Armitage v. The Atty-Gen*, [1906] P. 135. There the petitioner, an Englishwoman, first married an American citizen domiciled in New York but temporarily residing and carrying on business in England. She subsequently instituted divorce proceedings in South Dakota and obtained a decree on grounds which neither the English courts nor the New York courts could recognise as valid for a divorce. Subsequently she married one Armitage, and on its being proved that the New York courts would recognise the South Dakota decree of divorce, it was held the English courts were also bound to recognise its validity and the subsequent marriage was therefore valid.

It is equally well settled that no foreign court can effectually divorce parties who, at the commencement of the suit, are only temporary residents within their jurisdiction. Such a decree may operate in the country where it is given, but it will be disregarded by the courts of the domicile, or of any other country. This was first held in England in *Lolley's case*. Russ. & Ry. 237. There a domiciled Englishman was indicted for bigamy, he having married a wife in Liverpool, and, afterwards, having married another woman in the same place during the life of the first. He pleaded that he had gone to live in Scotland, and that there his first wife had obtained a divorce *a vinculo matrimonii* from him on the ground of his adultery. The plea was held bad for the reasons above stated. Similar decisions were subsequently given by the House of Lords. *Dolphin v. Robins*, 7 H. L. Ca. 390; *Shaw v. Gould*, L. R. 3 H. L. Ca. 55. Conversely, the English court refused to grant a divorce where the original domicile, marriage, and cohabitation was in Jersey, and the husband then abandoned his wife and acquired a new domicile in America. The allegation, that the wife, after her desertion, had acquired a domicile in England, assuming it to be legally possible, was held insufficient, as it appeared that the husband had never come within the jurisdiction of the English tribunal. *Le Sueur v. Le Sueur*, 1 P. D. 139. So the English courts have invariably refused to recognize divorces granted by the

American courts, at the suit of a wife against a husband who was not domiciled within the American jurisdiction, *Shaw v. Atty.-Gen.*, L. R., 2 P. & D. 156; *Green v. Green*, (1893) P. 89; see *Armitage v. The Atty.-Gen.*, (1906) P. 135, for a case where the husband had an American domicile

It has been several times laid down in the Scotch and English courts, that, for the purpose of founding valid proceedings for divorce, there might be a matrimonial domicile, which was something short of a complete and actual domicile, and something more than a mere temporary or collusive residence. It was defined as being the permanent matrimonial home of the parties for the time being. *Pitt v. Pitt*, 4 McQueen, 627; *Brodie v. Brodie*, 2 Sw. & Tr. 259=39 L. J. (P. & M.) 185; *Niboyet v. Niboyet*, 4 P. D., 1. This doctrine, however, was finally set aside by a decision of the Privy Council in a case from Ceylon, *Le Mesurier v. Le Mesurier*, [1895] A. C. 517.* The plaintiff was a member of the Ceylon Civil Service, but it was admitted that he retained his English domicile. While on leave of absence, he married a French lady in London, with a view to resuming his residence in Ceylon, as, in fact, he did. Several years afterwards he sued her for a divorce, charging three acts of adultery—one committed on a steamer returning from Europe to Ceylon, one in France, and a third in Ceylon. It was found by the Committee that the Ceylon courts had jurisdiction to grant a divorce *a vinculo*, and the Procedure Code authorized any husband to sue for a divorce on the ground of adultery, in the court in which he was resident. It was admitted that there was no rule of the Roman-Dutch law, which was the *lex loci*, which authorized, nor any statutory provision which conferred a jurisdiction to divorce persons not domiciled in the island. It was contended, however, that international law recognized such a jurisdiction in the courts of the

* The Board on this occasion was designedly constituted so as to include the leading English, Scotch, and Irish law lords, so that it was practically a decision of the House of Lords as of the Judicial Committee, *ibid.* *Sinclair's Divorce* [1897] A. C. 517. *Armitage v. Armitage*, (1898) P. 178; *Roberts v. Brennan*, [1]

matrimonial domicile, and undoubtedly, if such a domicile could exist, it would have been created by the facts of the case. This contention was overruled. Their lordships admitted "that there were unquestionably other remedies for matrimonial misconduct short of dissolution, which, according to the rules of the *jus gentium*, might be administered by the courts of the country in which spouses, domiciled elsewhere, were for the time resident:" for instance, alimony, in the case of desertion, or judicial separation in the case of cruelty. "In order to sustain the competency of the present suit, it was necessary for the appellant to show that the jurisdiction assumed by the District Court was derived, either from some recognized principle of the general law of nations, or some domestic rule of the Roman-Dutch law. If either of those points were established, the jurisdiction of the District Court would be placed beyond question, but the effect of its decree divorcing the spouses would not be the same. When the jurisdiction of the court was exercised according to the rules of international law, as in the case where the parties had their domicile within its marriage ought to be re-civilized country." "On *re a vinculo*, pronounced

by a court whose jurisdiction was solely derived from some rule of municipal law peculiar to its *forum*, could not, when it trenched upon the interests of any other country, to whose tribunal the spouses were amenable, claim extra-territorial authority." Their lordships then proceeded to examine the theory of a matrimonial domicile as distinguished from a domicile of succession, and concluded by stating that they had "come to the conclusion that, according to international law, the domicile for the time being of the married pair afforded the only true test of jurisdiction to dissolve the marriage."

It will be observed that in this case no jurisdiction to dissolve such marriages had been conferred by the Colonial Legislature, and no discussion arose as to what the effect of such an authority might have been. The question might, however, very easily arise in regard to Indian dioceses. By Act IV. of 1869, s. 2, the Indian

courts are authorized to grant divorces *a vinculo matrimonii*, where the marriage has been celebrated or the matrimonial offence has been committed in India. If the offence has been committed in India, it is unnecessary to show where the marriage was celebrated; 20 B. 362. The Act does not apply to Christian converts in respect of a marriage contracted while the parties were Hindus; 17 M. 235. Of course the Indian Divorce Act has no authority in the English courts, and a person so divorced, if domiciled in England, might find, if he married again, that his children would be treated as illegitimate, and that he himself was indictable for bigamy. Should such a case arise, its decision would probably turn upon the answer to the question, whether the exercise of such a jurisdiction trespassed upon the interests of the mother country. In one respect it might be said to do so, as a *status* governed by the law of England would be liable to be dissolved for reasons for which it could not be dissolved by English law. On the other hand, it might be argued that the Indian legislation is only a branch of Imperial legislation. The Act of 1869 was passed in a council, whose powers were given by an Act of Parliament, and every member of which was directly appointed by the Crown. It was assented to by a Viceroy who was the immediate representative of the Crown. It might have been disallowed, and therefore was really confirmed by the Crown acting under the advice of its Government for the time being. The object of the Act was to provide for the rights of European British subjects, the great majority of whom were well known to be domiciled in England. It would seem, therefore, that a jurisdiction conferred in this way must have been intended to be effectual, and it could not be so unless it was concurrent with the English jurisdiction and entitled to full recognition by the English courts.

203 Cohabitation under pretence of Marriage. (s. 493.)—It is difficult to see the distinction between the offence created by s. 493 and those under the three following sections. Everyone who, knowing that he is already married to a woman still living, marries

another woman who believes that he can lawfully marry her does by deceit cause a woman who is not lawfully married to believe that she is lawfully married to him. This is exactly what takes place in ninety-nine cases out of a hundred where a man commits what in England is called bigamy, and in India is defined by s. 494. As cohabitation may be assumed to follow upon a bigamous marriage, this makes up the complete offence under s. 493. The offence defined by s. 495 is only a special form of the deceit which is an essential under s. 493. It might be suggested that s. 493 is intended to meet the case of a man who goes through a mock marriage, which he knows to be a mere nullity, but which he represents to be a genuine and binding marriage. This, however, is specially provided for by s. 496, unless the element of cohabitation, following upon the marriage which is specified in s. 493 and omitted in s. 496, may be supposed to make the difference. Perhaps, again, it may be intended to draw a distinction between cases which are possible under s. 494, where a man really, though mistakenly, believes that he is justified in marrying again, and cases in which he acts with the full knowledge that he is not so entitled. Or perhaps the distinction may be between ss. 493 and 496, and that under the latter section the deceit consists in bringing about a marriage known at the time to be invalid, while under the former section the deceit consists in acting upon a marriage which was supposed to be valid but afterwards found out to be invalid. It has been suggested to me that the offence intended by s. 493 is the personation of a husband, who has perhaps been long absent, by one who induces the wife to believe that he is her husband, and who thereby gets possession of her. But this is rape as defined by s. 375 (4). Though a woman is incapable of committing the substantive offence, she may be convicted of an abetment of an offence under this section, *R. v. Ram*, 17 Cox. 609; but in any event the section has remained a dead letter ever since its enactment as no reported cases are found where the language of this section had to be construed.

204. Bigamy.—The offence which is defined by s. 494 consists in marrying again, *first*, while the person so marrying has a husband or wife living, and *secondly*, where the second marriage is void by reason of its taking place during the life of such husband or wife. *First*, the words "husband or wife" mean persons who are legally such. Suppose a man marries A, and then marries B during the life of A, and then marries C, he commits bigamy by his marriage with B, and again by his marriage with C, if A is still living. But if A had died before the marriage with C, but B was still living, he would not have committed bigamy, because B was never his wife 1 Hale, *P.C.* 693, *R. v. Willshire*, 6 Q. B. D. 366; *Chadwick*, 11 Q. B. 205=2 Cox. 381; *Kay* 16 Cox. 292. A marriage which is voidable, but not void, is a good marriage till it is set aside, and the existence of such a marriage where both parties were living would render a second marriage by either bigamous. *R. v. Jacobs*, 2 Moody, 140. As, for instance, a marriage contracted under such fraud or deceit as would justify a court in setting it aside, *Scott v. Sebright*, 12 P. D., 21, would not entitle the party so deceived or coerced to marry again while the first marriage was in force. Where, however, the option has been exercised, as where a Muhammedan girl, who was given in marriage before puberty, elected to set aside the marriage after puberty, she would commit no offence under s. 494 by marrying again 19 C. 79. Muhammedan law recognises several forms of union just as ancient Hindu law did, grouping them into *approved* and *disapproved* forms of marriage. It has been held that a *Nikah*, 6 W. R. (Cr.) 60, or *Sagat*, 3 C. L. R. 410 & 7 C. L. R. 354, or *Pat*, 2 B. H. C. R. 117, 12 C. P. L. R. 19, are all recognised forms of marriage, but not one celebrated in *Jhingarara* form, 1888 P. R. No. 25; 1890 P. R. No. 90; 1909 P. W. R. (Cr.) 22=11 Cr. L. J. 155=4 Ind. Ca. 1042. Whether marriage with a Muhammedan divorcee during her period of *Iddat* is lawful and therefore not penal under s. 494 has been a moot point, such a marriage was held valid in 9 Bom. L. R. 207, but unlawful and bigamous in 1882 P. R. No. 43, and in 1912 P. W. R. (Cr.) 1=1912 P. L. R. 83=13 Cr. L. J. 136=13 Ind.

Ca. 824. The point has, however, been authoritatively decided in 39 C. 409=16 C. W. N. 451=15 C. L. J. 263=13 Cr. L. J. 257=14 Ind. Ca. 641. In this case a Muhammedan husband embraced Christianity, and under Muhammedan law the marriage became void *ipso facto*. He, however, reverted to Islam during the period of her *Iddat*. The wife had re-married before the expiry of the period of *Iddat*. The High Court held the second marriage though invalid under Muhammedan law by reason of the fact it took place before the period of *Iddat*, was not void by reason of its having taken place during the life of the first husband, and consequently no offence under s. 194 could be made out as the parties acted in good faith on what they believed to be a sound interpretation of a very difficult point of Muhammedan law. As to proof of marriage among Muhammedans see 10 C. W. N. 982=4 Cr. L. J. 152, where it is suggested that the decision in 19 C. 79, would have been different if the marriage of the infant there had been in the presence of the father instead of the mother. Where a Muhammedan husband alleged that he had married six wives, but to dodge the rule of Muhammedan law, that a man could have only four legal wives, he had kept two of the first four partially divorced by pronouncing '*Talak*' only once or twice (and not thrice), it was held no offence under either s. 497 or s. 498 could be committed in respect of the fifth or the sixth wife, 1875 P. R. No. 1; as to Jews, see *Althausen*, 17 Cox. 630 and *Nathan v. Woolff*, 15 T. L. R. 250.

Not only must the first marriage have been originally legal, but it must be in legal force at the time of the second marriage. The Explanation states that "this section does not extend to any person whose marriage has been declared void by a court of competent jurisdiction." Nothing is said as to the case of marriages which have been severed without decree, by some process recognized by the law or usage of the parties to the marriage. The right of Muhammedans to divorce their wives without legal process is undoubted, *Mac N. M. L.* 69, 296, and no wife so divorced could be indicted

for marrying again. Numerous cases have occurred in which Hindu women, charged under s. 494, have pleaded that their former marriage had been put an end to by a proceeding in the nature of a divorce. In a Bombay case the Court held that the custom had been made out, but that the divorce was bad as not being in compliance with the custom. 6 B. 126. In Calcutta the defence was held to be good. 19 C. 627. See, as to the validity of such divorces 17 M. 479; 7 B. H. C. R. (A. Cr.) 133; 11 B. L. R. 129=20 W. R. (Civ.) 49; Stra. H. L. 52. 2 Mac N. H. L. 120, 4 B. 330 & 545; 7 C. L. R. 354; 12 C. P. L. R. 19; 1 C. P. L. R. 18; 2 N. W. P. H. C. R. 300; 3 C. 305. In Madras where a caste custom was set up to the effect that a marriage is dissolved if the husband says that he does not want his wife, and she gives him back her *tali*, but the sessions court, declined to admit the evidence in proof of the custom, on the ground that custom could not be recognised, being immoral, the High Court disagreed with its reasons holding the custom was not immoral and the parties ought to have been allowed to let in evidence. Weir I. 568. In other cases the plea was held bad on the ground that the particular custom relied on was bad, as being contrary to public policy. 2 B. H. C. R. 117 at 124. [See, for a correction in the report, 5 B. H. C. R. (Cr. Ca.), 19;] 1 B. 347. In no case was it suggested that a judicial divorce was in all cases necessary.

It is an essential element in the offence that the case should be one "in which such marriage is void by reason of its taking place during the life of such husband or wife." Persons to whom polygamy is permissible, are not within the law. Therefore a Hindu or Muhammedan man would not be punishable under s. 494, but a Hindu or Muhammedan woman would, since their law admits a plurality of wives, but not of husbands. 6 W. R. (Cr.) 60; 4 B. 330. With some of the hill tribes, as, for instance, the *Tolas* of the Nilgiris, the case is just the opposite, each woman becoming successively the wife of all the brothers of the family.

It has been decided in the *Trial of Earl Russel* by his Peers in Parliament, [1901]. A. C. 446, that a British subject would be amenable to the jurisdiction of the British court even though the ceremony of the alleged second marriage was gone through in a foreign country. There Earl Russel purported to obtain a divorce from his wife in the courts of the State of Nevada and the very next day married a lady there, and on his return to England was indicted for bigamy. On a preliminary objection to an indictment that the ceremony of marriage was gone through outside the British Dominions, Lord Halsbury (Lord High Steward) overruled the objection remarking that the British Legislature was competent to legislate for British subjects wherever they may be. Another question which has been decided in England, but has only occasionally arisen in India, (1876 P. R. No. 19) is this: Whether a second marriage would come within the statute where it was void for some reason applicable solely to the facts of the particular case, and not merely by reason of its being of a bigamous character. In an Irish case, *R. v. Fanning*, 10 Cox. 411, the second marriage was void by statute, as being celebrated by a Roman Catholic priest between a Protestant, who falsely represented himself to be a Roman Catholic, and a Roman Catholic. The Court of Criminal Appeal held that the second marriage was not a marriage at all, and therefore that there could be no conviction for bigamy. This case was *disapproved* of in *R. v. Allen*, L. R., 1 C. C. R. 367. There the second marriage was contracted by the man with the niece of his deceased wife, and was therefore void under the statute 5 & 6 Will. IV., c. 54, s. 2. It was contended on the authority of *R. v. Fanning*, but in opposition to several older English cases, that there was no bigamy. This contention was overruled. Cockburn, C. J., pointed out that the object of the English statute was not to prevent polygamy, that is, the co-existence of two real wives, which was impossible by our law, but bigamy, that is, the co-existence of a real and an unreal wife. "It is obvious that the outrage and scandal involved in such a proceeding will not be less, because the parties to the second marriage may be under some special

incapacity to contract marriage. The deception will not be less atrocious, because the one party may have induced the other to go through a form of marriage known to be generally binding, but inapplicable to their particular case."

"In thus holding it is not at all necessary to say that forms of marriage unknown to the law, as was the case in *Burt v Burt*, 2 Sw. & T. 88=29 L. J. (P. & M.,) 133, (a case of a Scotch marriage celebrated in Australia, no evidence being given that such marriages were recognized by local law,) would suffice to bring a case within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorized person, or in an unauthorized place, would be a marrying within the meaning of the 57th section of 24 & 25 Vict., c 100. It will be time enough to deal with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to, and recognized by, the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case."

This latter decision was again *approved* and *followed* by the Irish Court in *R. v. Griffin*, 14 Cox. 308. The statute upon which all these cases rested, 24 & 25 Vict., c. 100 s. 57. provides that "whoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony." Does the addition of the words which are found in s. 494 make those cases inapplicable? It seems to me that it does not. Each statute is intended to punish bigamy, but the latter at the same time protects polygamy, where it is allowable. The Penal Code was passed before the decision in

R. v. Fanning, and after the earlier English cases, *R. v. Benson*, 5 C. & P. 412; *R. v. Brawn*, 1 C. & K. 144 in which the doctrine affirmed in *R. v. Allen* was laid down. These cases must have been familiar to Sir B Peacock, who passed the Penal Code, and there appears to be nothing in the language of s. 494 to show that a different doctrine was intended to be introduced. See 1869 P. R. (Cr.) 2 & 1876 P. R. (Cr.) 19.

Conflict of Laws.—The various marriage laws which exist in India, and the possibility that the same person may become subject to different laws, may give rise to curious questions under s. 494. In England on an indictment for bigamy, the questions would be (1): Had the accused a living wife or husband; and (2) Did the accused having such living wife or husband purport to go through a form of second marriage? But in India, a third question, which is the crucial question in cases of this class if the first two questions are answered affirmatively, would arise, and on the solution of which would depend the guilt or innocence of the accused; this question is, Is this a case in which the second marriage is void by reason of its having taken place during the life of the other spouse to the first marriage? In the case of women, whether Hindu or Muhammedan or Christian, this third element is of very little importance, *Weir I. 565*; 1882 P. R. No. 43, except in such cases as with the artizans of Malabar or the Todas of Nilgiris amongst whom polyandry is recognised by usage. But the question is of vital importance in the case of men, especially of those who oscillate between monogamous and polygamous forms of religious persuasion. In 10 M. 218, a Hindu girl, who had been baptized in her infancy, and had afterwards reverted to Hinduism, married a Hindu, who subsequently discarded her on account of the baptism. She was then re-admitted into the Christian Church, and married a Christian, her first husband being still alive. It was held that she had committed bigamy. The same decision was given where a Hindu married woman became a convert to Muhammedanism, and then married a Muhammedan. 18 C. 264; see also 4 B. 330; 1870 P. R. No. 32; 1907 P. W. R. (Civ.) 110;

18 C. 252 The argument founded upon the rule of Hindu law, that an apostate wife is civilly dead (*1 Nort. L. C. on H. L. 12*) was sought to be applied that if she was dead such civil death dissolved her pre-existing Hindu marriage, leaving her free to contract a valid Muhammedan marriage, but this contention was overruled, as the operation of the rule is confined to civil rights and cannot affect criminal liability under s. 491 **18 C. 264**. In each case the conclusion was necessary, as soon as it was found that the first marriage was not dissolved by the change of religion. In **3 M. H. C. R. Appx. 7** approved in **4 M. H. C. R. Appx. 3.**, a Christian convert married a wife according to the rites of the Christian religion. He then relapsed into Hinduism and married a second wife, a heathen, according to Hindu usages, his first wife being still alive. The Sessions Judge convicted him under s. 494, but the conviction was quashed on appeal by the High Court. *Holloway, J.*, considered that it was evident that if the prisoner had really come under Hindu law, then his second marriage was not void by reason of the former having taken place, since the Hindu law permits of polygamy. If, however, he still continued under Christian law, then his marriage according to Hindu ceremonial was a mere nullity, and the second marriage was void from its inherent invalidity, and not by reason of the continuance of the former marriage. The soundness of the second reason is no doubt open to question, having regard to the ruling in *R v Allen*, **L. R. 1. C. C. R. 367**, but the first reason still holds good. It was held in *Weir* **I. 563**, that the principle is incapable of being extended to women, as they are restricted to one husband at a time. When a Roman Catholic *Pariah* Christian, having a living wife married according to Christian rites to a Christian woman, renounced Christianity and married a Hindu wife, *Abdur Rahim, J.*, ruled, as a matter of law following **3 M. H. C. R. Appx. 7**, there was no case to go before a jury. **33 M. 371=11 Cr. L. J. 682=8 Ind. Ca. 572**. But if, at the date of second marriage, the husband still remained a Christian, then the existence of his Christian wife would render the second marriage invalid, and he

would be liable, as the second marriage would be merely an adulterous union. 30 M. 550=17 M. L. J. 476=2 M. L. T. 345=6 Cr. L. J. 338. In this case, there is a *dictum* of Benson and Wallis, JJ., to the effect 3 M. H. C. R. (Appx.) 7, is unsound for both the reasons given by Holloway, J., and their decision would have been the same, if the husband had formally renounced Christianity before the second marriage. But this *dictum* did not prevail with Abdur Rahim, J., in the later case cited above. In 30 M. 550, the accused was not represented, and the learned judges had not the benefit of an argument on behalf of the defence. Innes, J., in 3 M. H. C. R. Appx. 7, said: "If, in becoming a Christian, a man took upon himself the obligation of monogamy, *i.e.*, if the Christian religion restricted him, on his embracing it, to one wife, then I should say that if such person married while still a Christian, he could not afterwards throw off his obligations by a mere change of religion. But I do not think that a profession of Christianity *ipso facto*, imposes any such obligation, though, doubtless, the tendency of Christianity is adverse to polygamy." "Then it does not appear to me that the Hindu law could regard the second marriage as void by reason of the wife of the first marriage being still alive, since the Hindu law, in re-admitting the prisoner to caste, would altogether ignore the status which he had just abandoned, together with all obligations contracted under it, and would not recognize anything as a marriage which was not entered upon by him as a Hindu, and with Hindu forms and ceremonies." This may be one reason why the legislature, while providing for men and women entering the Christian fold forsaking their non-Christian wives or husbands, facilities to acquire a new wife or husband, as the case may be, under the provisions of the *Native Converts Marriage Dissolution Act XXI* of 1866, purposely refrained from affording similar facilities to married people forsaking the Christian religion. But there must have been other reasons also for the absence from the statute book of any such legislative provision.

The obligation of monogamy, if any, imposed upon a Christian, arises, not, as Mr. Justice Innes supposed, from the Christian religion, but from the universal law of Christendom founded upon that religion. That law attaches absolutely and permanently to every inhabitant of a Christian country, so long as he is domiciled in such a country. Domicile in India carries with it no such obligation, each class of the community being governed by their own law and usage. Native Christians are bound by the laws and usages of the particular class to which they attach or assimilate themselves, so far as those practices can be reconciled with the profession of Christianity 9 M. L. A. 195=1 W. R. (P. C.) 1; 12 C 706. The obligation of monogamy is certainly a part of the customary law of every class of Native Christians, and it is of the essence of every marriage that can be called a Christian marriage (*ante* § 200 at pp 799-800). Can a Native Christian, who has contracted such a marriage, throw off its obligations, and entitle himself to another wife, merely by becoming a Muhammedan or Hindu? As between himself and his wife he certainly cannot. Such conduct would, under s 10 of the *Indian Divorce Act* IV of 1869, as amended by Act X of 1912, entitle the first wife to a divorce. Independently of the Divorce Act, there can, I suppose, be no doubt that a matrimonial court would treat such second marriage as adultery, for which it would grant the first wife a judicial separation. If the intercourse of a man with a so-called wife can be treated as adulterous, it can only be because his marriage is void, and, in the particular case, that could only be because of the previous marriage. The suggestion of Mr. Justice Holloway, that if Christian law was still binding upon the Christian after he had become a Hindu, the same law would treat the second marriage as absolutely void, seems to be irrelevant to a charge of bigamy according to the decision in *R v Allen*, cited above. A person who professes to be a Hindu, and who may be reasonably supposed to be one, and who contracts a Hindu marriage with a Hindu woman, does an act which is apparently legal; and if, in consequence of circumstances peculiar to himself, it is not legal, he commits the very offence which is the essence of bigamy.

would be liable, as the second marriage would be merely an adulterous union. 30 M. 550=17 M. L. J. 476=2 M. L. T. 345=6 Cr. L. J. 338. In this case, there is a *dictum* of Benson and Wallis, JJ., to the effect 3 M. H. C. R. (Appx.) 7, is unsound for both the reasons given by Holloway, J., and their decision would have been the same, if the husband had formally renounced Christianity before the second marriage. But this *dictum* did not prevail with Abdur Rahim, J., in the later case cited above. In 30 M. 550, the accused was not represented, and the learned judges had not the benefit of an argument on behalf of the defence. Innes, J., in 3 M. H. C. R. Appx. 7, said: "If, in becoming a Christian, a man took upon himself the obligation of monogamy, i.e., if the Christian religion restricted him, on his embracing it, to one wife, then I should say that if such person married while still a Christian, he could not afterwards throw off his obligations by a mere change of religion. But, I do not think that a profession of Christianity *ipso facto*, imposes any such obligation, though, doubtless, the tendency of Christianity is adverse to polygamy." "Then it does not appear to me that the Hindu law could regard the second marriage as void by reason of the wife of the first marriage being still alive, since the Hindu law, in re-admitting the prisoner to caste, would altogether ignore the status which he had just abandoned, together with all obligations contracted under it, and would not recognize anything as a marriage which was not entered upon by him as a Hindu, and with Hindu forms and ceremonies." This may be one reason why the legislature, while providing for men and women entering the Christian fold forsaking their non-Christian wives or husbands, facilities to acquire a new wife or husband, as the case may be, under the provisions of the *Native Converts Marriage Dissolution Act XXI* of 1866, purposely refrained from affording similar facilities to married people forsaking the Christian religion. But there must have been other reasons also for the absence from the statute book of any such legislative provision.

The obligation of monogamy, if any, imposed upon a Christian, arises, not, as Mr. Justice Innes supposed, from the Christian religion, but from the universal law of Christendom founded upon that religion. That law attaches absolutely and permanently to every inhabitant of a Christian country, so long as he is domiciled in such a country. Domicile in India carries with it no such obligation, each class of the community being governed by their own law and usage. Native Christians are bound by the laws and usages of the particular class to which they attach or assimilate themselves, so far as those practices can be reconciled with the profession of Christianity 9 M. I. A. 195=1 W. R. (P. C.) 1; 12 C 706. The obligation of monogamy is certainly a part of the customary law of every class of Native Christians, and it is of the essence of every marriage that can be called a Christian marriage (*ante* § 200 at pp 799-800). Can a Native Christian, who has contracted such a marriage, throw off its obligations, and entitle himself to another wife, merely by becoming a Muhammedan or Hindu? As between himself and his wife he certainly cannot. Such conduct would, under s 10 of the *Indian Divorce Act* IV of 1869, as amended by Act X of 1912, entitle the first wife to a divorce. Independently of the Divorce Act, there can, I suppose, be no doubt that a matrimonial court would treat such second marriage as adultery, for which it would grant the first wife a judicial separation. If the intercourse of a man with a so-called wife can be treated as adulterous, it can only be because his marriage is void, and in the particular case, that could only be because of the previous marriage. The suggestion of Mr. Justice Holloway, that if Christian law was still binding upon the Christian after he had become a Hindu, the same law would treat the second marriage as absolutely void, seems to be irrelevant to a charge of bigamy according to the decision in *K v Allen*, cited above. A person who professes to be a Hindu, and who may be reasonably supposed to be one, and who contracts a Hindu marriage with a Hindu woman, does an act which is apparently legal; and if, in consequence of circumstances peculiar to himself, it is not legal, he commits the very offence which is the essence of bigamy.

Exactly the same point occurred before the Allahabad Court, and came on appeal to the Privy Council, in a case in which it was not necessary to decide it. A lady of Indian extraction married a European British subject, in a Christian church, and during his life professed Christianity. After her husband's death, she formed a connection with a Christian, who is described as an inferior clerk in the Judge's Court, and was probably an East Indian. He was also married, according to Christian law, to a Christian woman, who was still living. In order to legalize their illicit connection, it occurred to him and the widow to become Muhammedans, and then to marry. These facts came out incidentally in the course of an application relating to the guardianship of the daughter of the widow. In delivering the judgment of the committee, James, L. J., said: "The High Court expressed doubts of the legality of the marriage, which their lordships think they were well warranted in entertaining. 14 M. I. A., 309, at 324. See also 4. A. 343.

Several cases have occurred in India of Englishmen, married in the Christian manner to European wives, adopting Muhammedanism, and then marrying again during the life of the first wife. It seems to me that such second marriage would be punishable under s. 494. If the English domicile still continued, the personal *status* would absolutely forbid such second marriage (*ante*, § 200 at pp 799-800). Even if an Indian domicile had been assumed, it would, I think, make no difference. The *status* of an Englishman domiciled in India is a Christian *status* and is governed by all the laws universally recognized in Christendom, which have been adopted in India as regards Christians. Monogamy is certainly one of them. If an Englishman became actually, and not merely colourably, a Muhammedan, it may possibly be that the courts would judge his future proceedings according to the law of his adoption. But it is a very different thing to assert that they would allow him to cast off an obligation which he had previously contracted, and which, at the time of the contract, was indissoluble by any act of his own.

In the Punjab a Muhammedan man and woman, wishing for some reason to be married in Christian form, were baptised and became professing Christians, and subsequently were married in the Protestant church at Meerut by the Chaplain. About two years after, they resumed the Muhammedan faith, and continued to live together till they disagreed and parted, each forming a new connection and having families as the result. On the death of the original husband he was found to have made a will disinheriting his wife, in a manner which was admittedly invalid by Muhammedan law if she continued to be his wife till his death. She sued for her share in the alternative, either as a Christian wife or as a Muhammedan wife. The defence was set up that she had been divorced in the Muhammedan way. This was found against as a fact. It was accordingly held by the Courts in India and by the Privy Council that, as at the time of death the personal *status* of both parties was Muhammedan, the will was invalid, and the widow was entitled to her share under the Muhammedan law. This rendered it unnecessary to decide the point raised by the Civil Judge that the Muhammedan marriage could have no effect upon the *status* created by the Christian marriage, and could not enable the husband to divorce his wife in the Muhammedan way. Lord Watson said: "Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of a divorce, is a question of importance and, it may be, of nicety. In the present case that does not arise for decision, unless it is shown that *Stuart Skinner* did, in fact, divorce *Badshah Begum* according to Muhammedan form." After stating that upon this question their Lordships agreed with the Court, the judgment proceeded to say "In these circumstances, and having regard to the fact that the case (an undefended appeal) has come before them in such a shape as to make an exhaustive argument from the Bar on both sides of the question impossible, they do not think it expedient to express any opinion as to the effect of a change of religion, by the spouses, their domicile remaining the

same, upon the rights of one or other of them which are incidental to marriage. " 25 I. A. 34 at 41=25 C. 537 at 546.

It is evident that nothing in the above remarks offers any encouragement to . . . spouses, for the purpose . . . partner who has made .

A question of considerable difficulty under Hindu law would also arise, as regards marriages of illegitimate children, having regard to the numerical importance of this class and the state of modern Hindu law which purports to ignore the validity of intercaste marriages not otherwise sanctioned by statutory provisions, 28 A. 458=3 A.L.J. 209=1903 A.W.N. 83; 1883 P. R. (Cr.) 17, or marriages recognised as valid under the doctrine of habit and repute as laid down by the Privy Council in *Sastry Velaidier v. Sambecetty*, 6 A. C. 364. A case of this description arose in 34 A. 589=10 A. L. J. 82=13 Cr. L. J. 705=16 Ind. Ca. 513, where the accused charged under s 498 set up the defence the woman taken away was not a wife because she was the offspring of a *Brahmin* father and his *Banya* mistress and under Hindu law there could be no valid marriage between such an offspring and a man of the *Banya* caste. It is needless to add the objection was overruled.

Evidence of Life.—The continued life of the first husband or wife must be proved, like any other fact. If the case is tried by a jury, this question must be left to them upon all the evidence in the case. If by a judge without a jury, it must be decided by him subject to the usual right of appeal. A prisoner was indicted for bigamy, and it . . . husband in 1843, and married . . . red as to whether it . . . 1847.

No evidence was given as to his age. Lush, J., directed the jury that he must be assumed to be still alive. This direction was held to be erroneous. The Court said :

"In an indictment for bigamy, it is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second

marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day, and the jury would, in all probability, find that he was so. If, on the other hand, it were proved that he was then in a dying condition, and nothing further was proved, they would probably decline to draw that inference. Thus the question is entirely for the jury. The law makes no presumption either way.

R. v. Lumley, L. R., 1 C. C. R. 195=38 L. J. (M. C.) 86

In a later case this singular state of facts appeared. The prisoner married A in 1864, and B in 1868, A being still alive. He was convicted of bigamy. He then married C in 1879, and D in 1880, C being still alive. He was indicted in respect of the last marriage, his wife C being still alive. It is evident that if A was still alive at the time of the marriage with C, the latter never was his wife. No evidence was offered that A was either alive or dead in 1879, and the jury convicted the prisoner without any finding on that head, apparently on the principle that the prisoner should have proved she was alive. The conviction was set aside. The Court held that there were conflicting presumptions, first, that A, who was alive in 1868, was still alive in 1879, secondly, that the prisoner in marrying C, was doing an innocent act. That upon these facts the jury should have found whether A was alive in 1879 or not. That it was not for the prisoner to prove she was alive. Lord Coleridge, C. J., said: "The prisoner was only bound to set up the life. It was for the prosecution to prove his guilt." *R. v. Willshire*, 6 Q. B. D. 366. The same decision would, no doubt, have been given in India under s. 107 of the Evidence Act. If *Lumley's* case were to occur in India, the jury would probably be told that although there was a presumption in favour of the continuance of life, this did not relieve them from the necessity of finding that the husband was actually alive, and that, in considering this question, they would have to remember that the prosecution was bound to establish the guilt of the prisoner, and that her innocence should be assumed till the contrary was proved.

Absence for Seven Years.—Even where the former husband or wife is still alive, no offence is committed under s. 494.

"If such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time; provided the person contracting the subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts so far as the same are within his or her knowledge" (s. 494, Explanation).

In reference to the English statute, which contains a proviso exactly similar to the first part of the above clause, Lush, J., in pronouncing the judgment of the Court of Crown Cases Reserved, said: "Where the only evidence is that the party was living at a period which is more than seven years prior to the second marriage, there is no question for the jury. The proviso in the Act, 24 and 25 Vict., c. 100, s. 57, then comes into operation, and exonerates the prisoner from criminal liability, though the first husband or wife be proved to have been living at the time when the second marriage was contracted. The Legislature, by this proviso, sanctions a presumption that a person who has not been heard of for seven years is dead." *R. v. Lumley*, L. R., 1 C. C. R. 196; Evidence Act, s. 108. In order to raise this presumption, however, it must appear that the parties have been continually absent from each other for seven years. Where the only evidence was that the prisoner married his first wife in 1865, that they lived together for some time, but how long was not shown, and that he married a second wife in 1882, and no proof of any actual separation between the first wife and the prisoner was offered, the Court held that the presumption of life continued, and that the prosecution was not bound to show that the prisoner knew that his wife was alive within seven years of his second marriage. *R. v. Jones*, 11 Q. B. D. 118, *Thomas Jones*, [1842] Car. & M. 642. Where a separation of seven years or more is established, the burthen of proving that the prisoner knew of his wife's existence within seven years rests on the prosecution. *R. v. Curgenven*, L. R., 1 C. C. R. 1;

Heaton, 3 F. & F. 819; *Dane*, 1 F. & F. 233; *Cross*, 1 F. & F. 510; *Twynning*, 2 B. & Ald., 386. The rule will apply also to cases when the absence is due to wilful desertion, *Faulkes*, 19 T. L. R. 250. Such knowledge is a question of fact, and must be distinctly found. A finding that the prisoner had the means of acquiring knowledge, if he had chosen to use them, is not sufficient. Such facts might justify a finding that the accused did know that his wife was alive, but is not equivalent to such a finding. *R. v Briggs*, D. & B. 98=26 L. J. (M. C.) 7. Where the prosecution established as a fact that the first husband though absent for seven years was still living and that the wife having the means of acquiring knowledge whether he was dead or alive did not choose to make use of them, she was held liable especially where she also failed to mention the true state of facts to the man with whom she purported to go through the second form of marriage, 4 W. R. (Cr.) 25; 1900 P. R. No. 1 [*contra Cullen*, 9 C. & P. 681]. It must further be remembered that s. 108, Ev. Act, raises no presumption as to the time of a person's death. It was held in 35 C. 25 that he who alleges that a person died at some antecedent time must prove that fact affirmatively. But this difficulty does not arise in the application of the Exception to s. 494. The fact that certain Muhammedan jurists expressed an opinion that a woman is competent to re-marry after the absence of her husband for four years would not save her act from s. 494. The period of seven years mentioned in the Exception to the section would override any rule of Muhammedan law to the contrary, 1878 P. R. No. 27.

A different case from any of those just discussed is where a man marries again within seven years after he has heard of his wife, but believing on reasonable grounds that she is dead. Such a case occurred in England under a statute, 24 & 25 Vict., c. 100, s. 57, which is almost *verbatim* the same as the first clause in the Exception to s. 494. There the Court held that although the case came within the literal terms of the statute, the defendant was excused by virtue of his *bona fide* mistake of fact. Under Indian law a similar decision

would no doubt be given under s. 79, I.P.C. *R. v. Tolson*, 23 Q. B. D. 168; *ante*, § 50 at p. 133. This case overruled *Gibbons*, 12 Cox. 237 & *Bennet*, 14 Cox. 45; see also *Turner*, 9 Cox. 145; *R. v. Horton*, 11 Cox. 670; *R. v. Moore*, 13 Cox. 544; *R. v. Thomson*, 70 J. P. 6.

The further proviso that the prisoner must have communicated his knowledge of the facts of the case to the person whom he was about to marry, goes beyond the English law. The burthen of proving such a communication would apparently rest on the prisoner (*Ev. Act*, ss. 105, 106.)

The priest who helps at a bigamous marriage would be hable, 10 M. 218, but not necessarily people who let a house for the celebration or guests who are invited and present at the ceremony, 6 E. 126; 1864 W. R. (Cr.) 13. A man may be guilty of abetment even though the gul is incapable of committing the offence owing to her age or want of knowledge, 6 C. W. N. 343; 4 C. 10; mere publication of banns is not an attempt, 1 A. 316. It must however be remembered to secure a conviction under s. 494, knowledge on the part of the accused that the previous consort was alive is not essential as the wording of the section is decidedly free from any reference to intention or knowledge, *Jones*, 11 Cox. 358.

Jurisdiction.—Where a charge is brought under s. 494, the offence consists in the second marriage, and is committed in the place where the second marriage took place. Consequently it can only be tried by a court which has jurisdiction over such an offence when committed in such a place. This was decided in the reign of Charles II. *Kelyng*, 79; 1 Hale, P. C. 693. The same ruling was affirmed by the Privy Council in a case from Australia. *Macleod v. Atty.-Gen. of New South Wales*, [1891] A. C. 455. There a Colonial statute provided that "whosoever being married marries any other person during the life of the former husband or wife, wheresoever such second marriage takes place shall be hable, etc." The appellant was married in

N. S. Wales to his first wife. He was divorced from her in Missouri, where he married his second wife during the life of the first. He was indicted for bigamy in N. S. Wales under the above statute, and convicted, the judge having directed the jury that the Australian court could not dissolve the Australian marriage. The conviction was set aside by the Judicial Committee, on the ground that the offence, if committed at all, was committed in Missouri and beyond the jurisdiction of the Australian court. If the statute intended to give such a jurisdiction, which their Lordships held it did not, it was so far *ultra vires* and void. *Cf.* the case of Earl Russell, tried before the Peers in the House of Lords, [1901] A. C. 446.

No court shall take cognizance of any offence falling under ss 493—496, both inclusive, of the Indian Penal Code, except upon a complaint made by some person aggrieved, s. 198, Cr P C. The brother-in-law of a woman who has committed bigamy is not a person aggrieved under that section, 10 B. 340; 25 A. 132; the husband is 26 C. 336; 25 A. 209.

205. Adultery.—Adultery is defined by s 497 as being sexual intercourse with a woman who is, and whom the defendant knows, or has reason to believe, to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to rape. Exactly the same question would arise as to the original or continued validity of the marriage as have been already discussed under the head of bigamy. It is not necessary the accused should know whose wife the woman is. It is enough if he knew she had a living husband, 21 W. R. (Cr.) 13. But there must be proof that the accused knew or had reason to believe that the woman was a married woman, *Priske v. Priske*, 29 L. J. (P. & M.) 195; *Manton v. Manton*, 34 *ibid.* 121.

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A different question arises where it is admitted that a ceremony of marriage took place, but where it is asserted that, by the custom of the country, the woman was at liberty, notwithstanding it, to have intercourse with

anyone at her pleasure. Here the essence of the objection is, that no marriage, within the meaning of the Code, ever took place, 4 M. H. C. R. 196. In a case under the *Alya Santana* law of Canara, where it is customary to celebrate marriages, but the woman is at liberty to leave her husband at her own pleasure, and to marry again, the Court held that there was no marriage which would support a conviction under s. 498. Referring with approval to the case last cited, they said: "The customary cohabitation of the sexes under the *Alya Santana* law appears to us to do no more than create a casual relation, which the woman may terminate at her pleasure, subject perhaps to certain conventional restraints among the more respectable classes." 6 M. 374.

The belief of the defendant as to the woman being the wife of another is a question of fact. Where a husband brought a suit against his wife for restitution of conjugal rights, and a decree was given in his favour, leaving her the option either to return to her husband or to pay him a sum of money, and she took the latter course, after which the alleged adultery took place, it was held that the defendant might have believed the woman was free to marry, and, if so, had committed no offence. 5 B. H. C. R. (Cr. Ca.) 17.

Evidence of Adultery.—In a case in Calcutta, *R. v. Ward*, (1862) a question was raised in the course of the trial as to the evidence necessary to establish sexual intercourse. It was contended that the same proof was required as in the case of rape, viz., of actual penetration. The point was reserved, but it became unnecessary to decide it. It is plain that the words in the Explanation to s. 375 are limited to cases of rape, and also that the object of them was the same as in Stat. 9, Geo. IV., c. 74, s. 66, viz., to do away with proof of emission which used formerly to be required; the object of the provision is to limit, not to extend, the evidence for the prosecution. I conceive the rule will be exactly the same as it is in the Divorce Court, where intercourse is inferred from acts of guilty familiarity, or even from opportunities sought for, and created by, the parties.

under circumstances which leave no reasonable doubt of criminal intention. 21 W. R. (Cr.) 13; 7 W. R. (Cr.) 59; 17 W. R. (Cr.) 5; 1874 P. R. (Cr.) 1. Of course, stronger evidence will be required under this Code than in the English Divorce Court, for the wife can be called as a witness against the adulterer under s. 497, 6 W. R. (Cr.) 92, whereas she cannot in a suit for dissolution of marriage. But her admissions, or confessions, out of court will not be evidence against him. *Robinson v. Robinson*, 29 L. J. (Mat.) 178.

To convict a man of an attempt to commit adultery it is not sufficient to prove that he was found in a place in which adultery might have been committed and that he was minded to commit it, *Weir* l. 569. Conversely where a married woman went to visit a man, but before adultery was committed she was taken away by her husband, it was held the man could not be convicted, 1879 P. R. No. 13; 1902 P. R. No. 25. For circumstances where commission of adultery may be presumed, see *Best v. Best*, 1 Ad. 437; *Ricketts v. Ricketts*, 1 Hagg. Const. 303; *Davidson v. Davidson*, 1 Deane 132; *Loreden v. Loreden*, 2 Hagg. Const. 2; *Williams v. Williams*, 1 Hagg. Const. 290; *Grant v. Grant*, 2 Curt. 67; *Harris v. Harris*, 2 Hagg. Const. 379; *D'Aguilar v. D'Aguilar*, 1 Hagg. Const. 777; *Richardson v. Richardson*, *ibid* 11 & *Heathcote's Divorce Bill*, 1 Macq. H. L. Ca. 277.

It often happens that acts of criminality are spoken to by witnesses who are strangers to the parties. It then becomes necessary, if the parties themselves are not present at the trial, to establish their identity with that of the persons spoken to by the witnesses. This is often done by showing them photographs of the parties. It has, however, been laid down in England that, in matrimonial cases, unless under very special circumstances, the Court will not act upon identification by photographs only. *Frith v. Frith* (1896) P. 74.

Connivance.—Another question arises as to the nature of the evidence which will amount to consent, or conni-

vance, on the husband's part. In the case of *Allen v. Allen*, 30 L. J. (Mat.) 2; the law upon this point was laid down as follows: "To find a verdict of connivance, you must be satisfied from the facts established in evidence that the husband so connived at the wife's adultery as to give a willing consent to it. Was he, or was he not, an accessory before the fact? Mere negligence, mere inattention, mere dulness of apprehension, mere indifference, will not suffice; there must be an intention on his part that she should commit adultery. If such a state of things existed as would, in the apprehension of reasonable men, result in the wife's adultery—whether that state of things was produced by the connivance of the husband, or independent of it—and if the husband, intending that the result of adultery should take place, did not interfere when he might have done so to protect his own honour, he was guilty of connivance." See also *Rogers v. Rogers*, 3 Hagg. Eccl. 57; *Philips v. Philips*, 1 Rob. 144; *Croft v. Croft*, 3 Hagg. 312; *Ricks v. Ricks*, *ibid.* 76.

In a later case, *Glennie v. Glennie*, 32 L. J. (P. & M.) 17, Cresswell, J., laid down the law a little more cautiously. He said: "I think that to establish connivance it is requisite, not that the party conniving should be actually an accessory before the fact, so as to have taken any active measures to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transactions that he approved of and consented to; and that, therefore, on the principle *volenti non fit injuria*, he cannot complain of any act he passively assented to."

But where the husband, after some angry discussion with his wife respecting the impropriety of her conduct, told her that she could not lead this life any longer, and that she must either give up her paramour or give him up, and that she could not live with him any longer if she continued her intimacy with the former, after which she deliberately left her husband, with full knowledge on his part that she was going to join the adulterer, and without his making any effort to prevent it, this was

held not to amount to connivance. Sir C. Crosswell said: "I cannot construe that into a willing consent that the adultery should be committed. It is an unwilling consent, given because she would not comply with the condition he insisted upon of giving up the improper intimacy. By connivance I understand the willing consent of the husband, that the husband gives a willing consent to the act, although he may not be an accessory before the fact, that, although he does not take an active part towards procuring it done, he gives a willing consent and desires it to be done. What this man desired was, not that the act should be done, but that she should not torment him by keeping up an

Tr. 530; see also *Stone v. Stone*, 1 Rob. Eccl. 99 at 101; *Moorson v. Moorson*, 3 Hagg. Eccl. 95; *Gulpin v. Gulpin*, ibid 150; 1 C. W. N. 498; 3 C. 688.

The Penal Code merely uses the word "consent," not "willing consent," but I conceive that the above construction must be put upon the term. An unwilling consent is not a consent at all. It is simply a submission to what is unavoidable.

On the other hand, evidence of merely passive acquiescence in a state of adultery after full knowledge of it, and without taking any steps to procure redress, has been held to be evidence of consent amounting to connivance, so as to disentitle the acquiescing party to a divorce, *Boulting v. Boulting*, 33 L. J. (Mat.) 33=3 Sw. & Tr. 329, because a divorce is only granted when the applicant is feeling, and suffering under, a sense of wrong, when the complaint is preferred. It has also been held in England that consent may be given after the act, which, if it amounts to condonation of the act, has the same legal effect as consent, *Wilson v. Glossop*, 20 Q. B. D. 354; *Keats v. Keats*, 28 L. J. [P. & M.] 57; 1879 P. R. No. 27; 4 W. R. (Cr.) 31; 1 Ind. Jur. (N. S.) 8. But it may be questioned whether, under the Penal Code, an *ex post facto* acquiescence can be used except as evidence of an

acquiescence previous to the act. If there was no consent, or connivance, up to the time the act was committed, then the offence is complete, and it is difficult to see how it can be obliterated by any subsequent consent.

This section is intended to protect the husband's rights, and, therefore, any consent, or connivance, which shows an abandonment by the husband of his claim to continence on the part of his wife, will bar an indictment, even though the consent, or connivance, be to a different adultery from that which is specifically charged. Therefore, it is held that a consent to his wife's adultery with one man is a bar to proceedings in the Divorce Court against another man, or against the same man for a subsequent act of adultery. *Gipps v. Gipps*, 32 L. J. (Mat.) 78; in House of Lords; 11 H. L. Ca. 1=33 L. J. (Mat.) 161. This rests on the presumption that an assent once given continues. But a case might occur where a sinful wife might become reconciled to her husband, and resume a life of chastity, while he might resume his efforts to protect her virtue, and then, I conceive, the right to prosecute would revive.

Can a second prosecution be maintained against the same man for adultery with the same woman, she not having in the meantime returned to her husband's protection? The case actually arose in the 4th Sessions of 1864, Bombay, and Hore, J., directed the jury that the prosecution was maintainable, and that the former conviction was rather an aggravation of the offence. There the woman had left her home before the first conviction, and lived in the prisoner's house the whole time he was undergoing his punishment. I conceive that the prosecution would be maintainable in the second

soon as the prisoner was released. With regard to the learned judge, I conceive that no prosecution was maintainable. As Lord Chelmsford said in the case of *Gipps v. Gipps*, 11 H. L. Ca. 1=33 L. J. (Mat.) at 169 "It must be borne in mind that the offence of adultery is complete in a single instance of guilty connection with a married woman. It is the first act which constitutes the crime, and though the adulterous intercourse between the parties should

continue for years there is not a fresh adultery upon every repetition of the guilty acts, although all and each of them may furnish evidence of the adultery itself. The inference which I draw from this view of the subject is, that if a husband, having the right to divorce his wife for adultery, abandons that right in consideration of a sum of money received from the adulterer, he can never afterwards be a petitioner for a divorce on the ground of his wife's criminal intercourse with the same person."

It seems to be an equally legitimate inference that a husband who, having a right to institute a prosecution for adultery, does so, and enforces the full penalty of the law against the offender, cannot punish him a second time for a renewal of intercourse which inflicts no fresh injury upon himself. See **Ratanlal 150**, where however it was held the subsequent act is in the nature of an aggravation calling for more condign punishment. Of course, it would be different if he had condoned the offence, and taken the wife back again into his society. See *per Lord Westbury*, 33 L. J. (P. & M.) at 164.

206. Taking or enticing away a Married Woman — The offence constituted by s. 498 consists in (1) taking or enticing away, or concealing, or detaining, (2) with intent that she may have illicit intercourse with any person, (3) any woman who is or is known or believed to be the wife of any other man. (4) from that man, or from any person having the care of her on behalf of that man. The elements of the crime are the same as those of kidnapping from lawful guardianship, as defined by s. 361, see the discussion upon that section, *ante*, Chap. IX, §166 at p. 564 except as to the intent. The section is intended to protect the rights of the husband. The consent of the wife is perfect^{ly} immaterial. The fact that she is married with another is no excuse for the offence. The offence can be charged against a woman. The gist of the offence is the taking or enticing away of the husband, and not the enticement to any definite person. Hence, if an old woman takes away a wife from her

husband's house, with intent that she may be able to make some money out of any one desirous of having illicit intercourse with the wife, the offence is complete even though no definite person was in view, or the wife thus enticed away never met any person desirous of having illicit intercourse with her. **1899 P. R. No. 9.** In a case where the jury found as a fact that the woman asked the prisoner to allow her to go with him, that all the solicitation proceeded from her, and that the prisoner for some time refused to yield to her request, but that finally he met her when she left her husband's house, and went off with her by railway; it was held that the offence was complete. Scotland, C. J., said, "If whilst the wife is living with her husband a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, that I think is a *taking* from the husband within the meaning of the section. The wife's complicity in the transaction is no more material on a charge under this section than it is on a charge of adultery." **2 M. H. C. R. 331.** Similarly the fact the woman accompanied him of her own free will does not diminish the criminality of the act. **4 Bom. L. R. 435.** The same would be the result if she left her husband's house, and went of her own accord to the accused's house, and he allowed her to live with him as his wife. Such allowing would be treated as constructive taking, as she would not have been emboldened to leave her husband's house and remove herself from his control, but for the asylum offered by the accused **7 Mad. Jur. 133.** (Contrast this case with **1 C. W. N. 498**, where from lapse of time desertion and connivance were also inferred. See *R. v. Olfier*, **10 Cox. 402** below.) The same rule applies where the offence charged is that of enticing away a married woman. In this case the defendant is an active agent in the transaction, but the enticing may exist though the wife is willing and ready to be enticed. Therefore, where a procuress induced a married woman of twenty to leave her husband, and the facts showed that "she had made her deliberate choice, and was determined of her own free will to leave her husband and become a prostitute in Calcutta," the

Bengal High Court held that no conviction could be maintained under s. 366, but that there was quite sufficient evidence to convict the prisoner of enticing under s. 498, "for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interfered." 1 W. R. (Cr.) 45. It will thus be seen that the offence under s. 198 is a minor offence to one under s. 366, and therefore, on a trial under the latter section, a conviction may rest on the former under the operation of s. 238, Cr P C, 20 C. 483. It is, however, necessary that the final act which severs the connection between the wife and her husband should be one in which the defendant takes part, either by way of influence, advice, or assistance. If a woman of her own accord, and without any persuasion or inducement held out to her by the defendant, and without any complicity on his part, were to leave her husband and go to the defendant, who allowed her to remain with him, this would not be an offence under s. 498. Though it might be his moral duty to restore her to her home, the statute does not say that he shall restore her, but only that he shall not take her away. *R v Olufier*, 10 Cox. 402; *ante*, § 166 at p. 564.

The words "conceal or detain" refer to some active conduct on the part of the accused beyond that of merely permitting her to remain in his house. It is possible to conceal a woman with her own consent, but it is not possible to detain her when she is willing to remain. In such a case the Madras High Court said "The words of the section, '*conceals or detains*,' may and were, we think, intended to be applied to the enticing and inducing a wife to withhold or conceal herself from her husband, and assisting her to do so, as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife for the purposes of illicit intercourse is the gist of the offence, just as it is of the offence of taking away a wife under the same section, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments. Here there is no reasonable evidence to show that the woman had not perfect

freedom to leave the house, or that any allurements, or persuasion was required or used, to induce her to remain." **4 M. H. C. R. 20; 1895 P. R. (Cr.) 23.** Straight, J., in **10 A. 580** construed, the words "such woman" in this clause of the section as not meaning "such woman so enticed as aforesaid," but to mean "such woman whom he knows or has reason to believe to be the wife of any other man." He seems to dissent from the construction apparently put in **3 A. 251** by Pearson and Oldfield, JJ., as meaning 'an enticed woman.' The Punjab Chief Court in **1891 P. R. No. 16** was inclined to accept the view of Straight, J. If a woman were to come to another person without his doing any act amounting to a taking or enticing, and he were then to conceal or detain her with the intent defined, he would have committed an offence under the second part of s. 498; **1913 P. W. R. (Cr.) 36=1913 P. L. R. 319=14 Cr. L. J. 595=21 Ind. Ca. 467; 1911 P. W. R. (Cr.) 29=1911 P. L. R. 224=12 Cr. L. J. 500=12 Ind. Ca. 220.**

The wording of the section as to intent shows that the offence may be committed either by an intending adulterer, or by a procurer who intends to pass the woman on to some other person.

It is essential to the offence that the woman should be taken from the husband or someone who has the care of her on his behalf. *Prima facie* a wife who is conducting herself properly is always under the control, or in the legal possession of her husband. It is not essential that he should be living with her. He may be absent on business, or his employment may compel him to live apart. **5 W. R. (Cr.) 50.** Thus, taking away the wife, when she was with her mother, was held to be an offence under this section, when it was proved there was no quarrel between the husband and the wife. **Weir I. 573.** This would be the case with the vast majority of baby wives who are left with their parents until they attain proper age. Under Hindu law the husband is the proper guardian from the moment of marriage and the parents of the child have custody on his behalf. It is not necessary to make marriage complete

that there should be co-habitation, 1874 P. R. (Cr.) 4, *overruling* 1867 P. R. (Cr.) 48. If, however, in the course of a quarrel the wife had been turned out of the house, and she was living in her mother's house, it could not be said the taking was from the husband, or from any person having the care of her on his behalf, 1883 P. R. No. 15. See also 1910 P. L. R. 33=11 Cr. L. J. 597=8 Ind. Ca. 226; 1914 P. W. R. (Cr.) 20=1914 P. L. R. 123. It cannot make any difference whether the house is hired by him, or by her, or by someone else, so long as it is occupied by her as his wife, living under his protection, and subject to his rights over her. If, however, the wife had abandoned her husband, and was living apart from and in defiance of him, and *a fortiori* if she had taken to a criminal life, it could not be said that by any act of another she was taken or enticed from her husband. See 4 W. R. (Cr.) 6; 2 W. R. (Cr.) 35, and cases cited, *ante*, 166, at pp 567-568.

It has been held in 26 M. 463 that a wife cannot be convicted of abetting the "enticing away" of herself under s. 498, but the Court did not decide whether she might be convicted of abetting the "taking away" of herself. Enticing involves the producing of an effect *ab extra* upon the mind of a woman, but if she induces another to entice her, the effect has already been produced. The offence of taking is consistent with a previous consent on the part of the woman (see p 846 *supra*). There is no provision in s. 498, as there is in s. 497, that the wife shall not be punishable as an abettor. But the Punjab Chief Court has taken the view that the offence under s. 498, is minor to the offence under s. 497, and therefore the wife could not be punished under this section also as an abettor. 1871 P. R. No. 6 & 8 *overruling* 1865 P. R. No. 17. See 1883 P. R. No. 4.

Where it is doubtful which of the offences enumerated in the section the accused has committed, the finding may be in the very words of the section, though such a finding should be avoided if possible. 22 W. R. (Cr.) 72.

No court shall take cognizance of an offence under s. 497 or s. 498, except upon a complaint made by the

husband of the woman, or in his absence by some person who had care of such woman on his behalf at the time when such offence was committed. (For further discussion on this matter, see the Editor's commentaries on the Code of Criminal Procedure under s. 199.) But the death of the husband does not terminate a prosecution which has been once instituted by him. 4 M. H. C. R. Appx 55. The fact that the husband has appeared as a witness to prosecute a prisoner charged with committing rape upon his wife, does not amount to such a complaint by him as will sustain an alternative charge against the same prisoner for committing adultery with the wife. 5 A. 233; 29 C. 415. Where it appeared that after the act complained of and before lodging the complaint, the husband had divorced the wife, the complaint was held rightly dismissed, as there is no reason to afford remedy in the criminal court when the doors of the civil court are closed. 1879 P. R. No. 27.

CHAPTER XIII.

A—DEFAMATION.

I. WHAT IS DEFAMATION ?

207. Law of Criminal Defamation.—The authors of the Code designedly made a departure from the English Common Law of libel and slander, in the first place by refusing to maintain the distinction between the two, **8 M 175, 2 W. R. (Cr.) 36**, and secondly, by omitting to ground criminal liability on the tendency of defamation to cause a breach of the public peace according to the time-honoured notions of the English Common Law. It was held in *R v Adams*, **L. R., 22 Q. B. D. 66**, that defamatory matter even though communicated only to the person defamed will support an indictment provided it is likely to provoke a breach of the peace. But under the Code this would not be defamation for want of publication though it may amount to an offence under s 504 or s. 506, I P.C. See also *R v Brooke*, **7 Cox. 251**. In administering the law of the Code, two divergent schools of thought have come into existence, the one holding as its fundamental creed that the Code is exhaustive of the Law of Criminal Defamation or in the words of Knox, C.J. "It appears to me that since the Code was enacted, the question (privilege) is one that has to be decided by the Indian Penal Code and by the Evidence Act of 1872 and not by any maxim however excellent that maxim may be which has been universally recognised in England but has not obtained universal recognition in this country unless indeed it can be shown beyond room for reasonable doubt that the question was never considered in either Code," **29 A. 685 at 696=1907 A.W.N. 235=4 A. 815**.

133

11

the other hand the recent ruling of a Full Bench of the Madras High Court in **36 M. 216=23 M. L. J. 39=11 M. L. T. 416=[1912] M. W. N. 393=13 Cr. L.J. 275=**

14 Ind. Ca. 659, clearly lays down that the canons of construction laid down by Lord Herschell in the *Bank of England v. Vagliano Brothers*, [1891] **A. C. 107**, at **144 & 145** are inapplicable. Section 499 was enacted not in codifying the doctrines of English Law but in creating a new offence of criminal defamation and while dealing with the various classes of qualified privilege, the authors of the Code left intact the well-established doctrine of *absolute privilege* which has been recognised to be the law of this country as regards civil liability by the ruling of the Privy Council in **11 B. L. R. 321**. And since this rule exists apart from the provisions of s. 499 the latter cannot be said to be exhaustive of the law of defamation and the doctrine of absolute privilege as understood in the Indian and English Law is applicable to determine criminal as well as civil liability. The Calcutta High Court however refused to be bound by the reasoning of the Madras Full Bench. See **40 C. 433 = 17 C. W. N. 297 = 14 Cr. L. J. 100 = 18 Ind. Ca. 660**. This view of the Calcutta High Court was fully anticipated with regard to the trend of the opinion of that court as could be gathered from **32 C. 756 = 9 C. W. N. 911 = 2 C. L. J. 105 = 2 Cr. L. J. 459 ; 36 C. 375 = 13 C. W. N. 340 = 9 C. L. J. 259 = 9 Cr. L. J. 165 = 1 Ind. Ca. 147 and 14 Cr. L. J. 528 = 20 Ind. Ca. 1008**.

S. 499 only applies to attacks made upon individuals. Imputations of a seditious character directed against the Government are provided for by s. 124A, which has been already discussed (*ante*, §§ 35-97, at pp. 293-308). Blasphemous libels are not punishable at all, unless so far as they consist in words or acts which constitute an offence under s. 298. See as to oral imputations of unchastity, which though not actionable are criminally punishable, **28 C. at 464, disagreeing with 8 M. 175**.

The mode in which the imputation is conveyed is quite immaterial. The language may be vituperative, **9 A. 420**, or suggestive of the complainant having committed a crime, **4 C. 124**, or incurred social obloquy as by saying that he is an outcaste, **33 M. 67**, or to call a *Pursutia Kaisth*, a '*Kori Chamar*,' **11 Cr. L. J. 413 = 6 Ind. Ca. 876**, or to speak of one as a *Kulabrushtha*, *i.e.*,

prostitute's son, [1911] 2 M. W. N. 8=10 M. L. T. 96=2 Cr. L. J. 497=12 Ind. Ca. 217 or even an accusation of anonymous letter writing, 7 Mad. Jur. 253. It may be defamation to publish a magazine-article as if it were written by a well-known man of letters, while as a matter of fact it was the production of a common-place writer. If it could be proved that any one reading the article would take the plaintiff for a common-place scribbler whereby the plaintiff could be damaged even though the damages likely to be sustained were not capable of present proof, it has been held to be actionable, *Ridge v The English Illustrated Magazine, Ltd*, 29 T. L. R. 592. But to say that the complainant's caste is not quite so high as that of the accused is a mere expression of opinion and does not harm the reputation of the caste said to be low—*per* Muthuswamy Iyer, J, in *Weir* I. 575. To speak of a Muhammedan that he killed a cow in his compound would in no way affect his reputation, 5 C. P. L. R. 53, though it would be quite different if the same imputation had been made in regard to a professing Hindu. A man is entitled not to associate with other castes or even with members of his own caste, but it would be defamation to call a man an outcaste, 19 M. L. J. 714; 15 M. 214, 6 A. L. J. 472=9 Cr. L. J. 535=2 Ind. Ca. 226. Many matters at which people feel annoyed or imagine they are injured are often taken to criminal courts as defamation, courts will do well to consider whether there has really been an injury to reputation. Thus a statement that the complainant disobeyed some one and treated him with disrespect, is not *prima facie* defamatory, 6 M. H. C. R. Appx. 46; *Weir* I. 593. However the case reported in 1909 P. W. R. (Cr.) 3=9 Cr. L. J. 154=1 Ind. Ca. 99, would serve as an illustration. One *Abdulla*, a tailor, addressed a post card to Sergeant Clarke claiming a sum of money and had a demand note admittedly executed by Clarke to support his claim. However the District Magistrate had the claimant arrested and brought to court in handcuffs for the high offence of having addressed a post card making a demand upon the Sergeant. He was told he would be let off if he withdrew his claim, but as he

persisted in urging the validity of his claim, he was charged with defaming the Sergeant. The Chief Court however intervened and quashed proceedings before the accused could be convicted by the District Magistrate. The words may even profess to be words of praise, provided they are so framed as to show that an opposite meaning is intended. As Buller, J., said in *R. v. Watson*, 2 T. R. 206. "Upon occasions of this sort I have never adopted any other rule than that which has been frequently repeated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel as men of common understanding, and say whether in their minds it conveys the idea imputed. Exactly the same rule applies where the imputation is not contained in a statement, written or spoken, but in some representation or by signs. Where the meaning of the imputation is ambiguous, or where it does not on its face apply to the complainant, evidence is admissible to explain its meaning, or to show who was the person really meant. Where a person is slandered by insinuation, or without mention of his name, it is everyday's practice to call witnesses and ask them whom they understood to be aimed at by the libellous matter. The ultimate question, whether the complainant really was intended, is of course a question of fact for the tribunal." *Per* Lord Mansfield, *R. v. Shipley*, 4 Doug. 164; *LeFanu v. Malcomson*, 1 H.L. Ca. 637 *per* Lord Campbell, at 668. See also *Boydell v. Jones*, 4 M. & W. 446; *Brown*, 11 Mod. 86. In all such cases the English practice is to state in the charge the meaning which the prosecution intends to affix to the libel, by means called *innuendoes*.

on its face is clear and specific. Where such averments appear to be material and necessary, as without them the defendant would not know what charge he had to meet, and therefore if the prosecution fails to make out the meaning which it has attached to the statement, the Crown cannot repudiate it at the trial and set up another meaning. *Williams v. Stott*, 1 C. & M. 675. See the observation of Lord Hershell in *Australian News Co. v. Bennett*, [1894] A. C. 284 at 287, 288. When the person defamed is only indicated by his

initials, *Du Bost v. Beresford*, 2 Camp. 512, or the name left blank, *Burke v. Warren*, 2 C. & P. 307, evidence may be given complainant was really the person hit. See the observations of Lord Cottenham in *Lefanu v. Malcomson*, 1 H. L. Ca. 637 at 664; 9 Cr. L. J. 425. As laid down by the House of Lords in *Hulton & Co. v. Jones*, [1910] A. C. 20, it is no defence to show the defendant did not intend to defame the plaintiff if reasonable people would think the language defamatory of the plaintiff. In this case a London Newspaper called the *Sunday Chronicle* published an article which contained statements defamatory of 'Artemus Jones', the writer believing him to be a fictitious personage with an unusual name, but unknown to the writer there happened to be a London Barrister bearing this name who was fortunate enough to obtain very heavy damages, the House of Lords approving of the dictum of Coleridge, C. J., in *Gibson v. Evans*, 23 Q. B. D. 384 at 386: "It does not signify what the writer meant; the question is whether the alleged libel was so published by the defendant that the world would apply it to the plaintiff." Of course this might be done by altering or amending the charge in the manner authorized by the Criminal Procedure Code (ss 226—232). The office of an *innuendo* is to explain the meaning which the defamatory matter was intended to convey, and was capable of conveying, not to extend its natural meaning, or to add to it some meaning which it is incapable of bearing. "Suppose the words to be 'a murder was committed in A's house last night,' no introduction can warrant the *innuendo* 'meaning that B committed the murder,' nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly." *Per curiam*, *Solomon v. Lawson*, 8 Q. B. 823; *per* Lord Campbell, *Lefanu v. Malcomson*, *ut. sup.*, see, further, *post*, § 223. On the other hand, the meaning of any words, representation, or signs, is that which they would convey to persons of ordinary common sense, who are possessed of the information which would enable the statement to be understood. This is the meaning which affects the complainant, and the defendant is not allowed

to set up any non-natural sense different from that which the rest of mankind would understand by what he said or did. See the cases cited *ante*, Chap. V, § 95, p 300-304; 3 A. 664; 3 Bom. L. R. 188. When the defendant said of the complainant that he had stolen his apples he was not allowed to explain it away by saying complainant removed under an unfounded claim of right, *Rowcliffe v. Edmonds* 7 M. & W 12; see also *Marks v. Samuel*, [1904] 2 K. B. 287; *Weir* l. 612.

These principles received a remarkable illustration in the case of *Monson v. Tussaud*, [1894] 1 Q. B. 671.

Monson had been tried in Scotland for the murder of Lieutenant Hambrough, who was found with his brains blown out in the course of a shooting party. The theory of the prosecution was that he had been shot by *Monson*; that of the defence was that his gun had gone off by accident. The jury returned a verdict of "not proven," which meant that they could not make up their minds whether the prisoner was innocent or guilty. The defendant was the proprietor of a well-known waxwork exhibition. A figure representing *Monson*, and near to which was a gun, described as his, was exhibited by the defendant in a room next to one known as the *Chamber of Horrors*. In the same room with him were figures of Napoleon I., Mrs. Maybrick, a convicted murderess, Pigott, a perjured witness and suicide, and Scott, who had been accused as an accomplice of *Monson* in the murder. The *Chamber of Horrors* was devoted to murderers and reles connected with murders. In it was a representation of the place where the body of Lieutenant Hambrough was found, with a description, "*Ardnamont Mystery. Scene of the Tragedy.*" Mr. *Monson* sued *Tussaud*, alleging that the whole exhibition was a libel on him. An application for an injunction pending the hearing was made and granted by Mathew and Collins, JJ., who held that the exhibition was so managed as necessarily to convey the imputation that the plaintiff was connected with a crime, and not that he was a spectator of an accident. On appeal, further affidavits were filed, which tended to show that the plaintiff was himself a consenting party to the exhibition, and mainly on the basis of these the injunction was dissolved. Lord Halsbury expressed his entire approval of the judgment below. The other judges do not seem to have disapproved of them. The case came on for hearing, on the 30th of January, 1895, before another O.J., in the course of his charge to the jury, said: "See the doubt that the exhibition conveyed in a clear and unambiguous manner, that this is *Monson*, the man who was tried for the murder of Lieutenant Hambrough by a jury in Scotland; was not the perpetrator of the crime; and against whom a verdict of 'not

proven" only was passed." If it meant that—and it could not mean anything else—could the jury have any hesitation in saying that it was a libellous publication?" The jury found a verdict for the plaintiff, but assessed the damages to his character at one farthing. For other instances of defamation by visible representation, see *Eyre v. Garlic* (burning in effigy) 42 J. P. 68; *Jeffries v. Dumcombe*, 11 East 226 (fixing up gallows against a man's door). In 2 N.-W. P. H. C. R. 435, the making and publicly exhibiting of the effigy of a person and beating it with shoes was held to amount to defamation.

Intention to injure—By s. 499 the person who defames another must be "intending to harm, or knowing, or having reason to believe, that such imputation will harm the reputation" of the person defamed. It is probable that this clause throws no greater burthen upon the prosecution than arises under English law from the word "malicious," which is part of the definition of a libel. "In the English law of libel, malice is said to be the gist of action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice is meant, while by legal malice, as explained by Bayley, J., in *Bromage v. Prosser*, 4 B. & C. 247 at 255, is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published." Per Cockburn, C. J., in *Wason v. Walter*, L. R., 4 Q. B. 73, at 87. In a case where it was found as a fact that the defendants by their servant had published a libel, Lord Escher said "If the matter stood there without more the law would infer malice, the meaning of which really is that it does not signify what the motive of the person publishing the libel was, or whether he intended it to have a libellous meaning or not." *Nerill v. Fine Arts Insurance Co.*, [1895] 2 Q. B. 156, at 163; *affd* [1897] A. C. 68. Everything which reflects on the character of another and is published without lawful justification or excuse is a libel whatever the intention may have been, *O'Brien v. Clement*, 15 M. & W. 435 at 437. Similarly in *Weir* L. 613, where the accused attributed to the complainant *crim. con.*, with a Pariah woman with

the result that his intended marriage was broken off, but the magistrate found absence of ill-will, the High Court said that this finding does not lead to the conclusion accused acted *bona fide* and that conscious violation of the law to another's prejudice is sufficient though there is no malice in fact. Legal malice must be presumed until a case of privilege is made out by the accused. As remarked by the Punjab Chief Court in 1913 P. W. R. (Cr.) 34=1913 P. L. R. 317=14 Cr. L. J. 606=21 Ind. Ca. 478, it is not necessary that there should be an intention to harm the reputation. It is sufficient if there was reason to believe that the imputation made would harm the reputation. See also 4 Bur. L. T. 48=12 Cr. L. J. 129=9 Ind. Ca. 775. The mode of rebutting the inference of malice is by disproving the state of things from which the law infers malice, either by showing that the statement is not a libel at all, or that it comes within one of the classes of cases to which no legal presumption of an intention to injure is attached. "The accused may be able to show that, though the matter is defamatory, it was published on a privileged occasion, or he may be able to avail himself of the statutory defence that the matter complained of was true, and that its publication was for the public benefit; and those classes of cases were meant to be excluded from the purview of the section by the use of the word 'maliciously.'" *Per* Lord Russell, C.J., on the construction of the Libel Act, 1843, 6 & 7 Vict. c. 96, s. 5; *R. v. Munslow*, [1895] 1 Q. B. 758, at 761. Hence the question for the jury, in cases tried by a jury, is whether the statement complained of is a libel, and the correct mode of putting this question to them is that stated by Best, J., in *R. v. Burdett*, 4 B. & A. at 120. "With respect to whether this was a libel, I told the jury that the question whether it was published with the intention alleged in the information was peculiarly for their consideration; but I added that this intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to

produce." See *per Jenkins, J.*, 1 C. W. N. 465; 7 A 906; **Ratanlal 140** When the fact of a libel is found according to these directions the case is over, unless the defendant sets up some special defence "The judge ought not to leave to the jury whether the defendant intended by a libel to injure the plaintiff Every man is presumed to intend the natural and ordinary consequences of his act. If the tendency of the publication was injurious to the plaintiff, the law will assume that the defendant, by publishing it, intended to produce the injury which it was calculated to effect " *Per Lord Tenterden, C J.*, *Haire v Wilson*, 9 B. & C. 643; *R v Harvey*, 2 B. & C. at 267, *per Holroyd, J*

It seems to me that there is nothing in the language of the Code which leads to any different conclusions When a defendant says that he did not intend to damage the reputation of the prosecutor, what does he mean? Does he mean that he did not intend by his language to convey anything that would harm the character of the prosecutor or that he was justified in saying what he did, but that his object was not to injure the complainant, but to discharge a duty, or, that in using language of a defamatory nature, he had no wish to hurt him, and did not suppose he would be hurt? It is obvious that in the first case what he really asserts is that a false construction has been put upon his words *Prima facie*, a man's words must be judged according to the meaning which is ordinarily put upon them But in every country there are numerous terms of abuse which literally convey the imputation of a crime, but which, when used by one angry man to another, merely show that he wants to insult him, and are understood to mean nothing more Thus it was held in **Weir I. 607** words *prima facie* defamatory used in a street quarrel were mere vulgar abuse and would not amount to an offence under s 499 as under the circumstances no one could infer an intention to harm the reputation of the person defamed, 1883 A. W. N. 36, 46 & 167; *Penfold v. Westcote*, 2 Bos. & P. (N R) 335, *Minors v Leaford*, **Cro. Jac. 114**. Where however the defendant in the course of a quarrel told the plaintiff, 'you are a thief,

you robbed Mr. Lake of £30,' the court held the words to be too specific to amount merely to abuse, *Hankinson v. Bulby*, 16 M. & W. 442; *Tomlinson v. Brittlebank*, 4 B. & Ad 630; *Rowcliffe v. Edmonds*, 7 M. & W. 12. The result would have been otherwise if he had stopped with the general abuse 'you are a thief,' *Read v. Ambridge*, 6 C. & P. 308; *Martin v. Loci*, 2 F. & F. 654; *Stowman v. Dutton*, 10 Bing. 402. So the mere fact that defamatory words are used as a jest is in itself no defence, for, as Sergeant Hawkins says, "jests of this kind are not to be endured, and the injury to the reputation of the party grieved is in no way lessened by the merriment of him who makes so light of it." *1 Haick, P. C. 546*; *Donoghue v. Hayes, Hayes, Jr. Exch. 265*. But it would be very material to show that the words were spoken as a jest to persons who received them as a jest, for this would show that they never had a defamatory meaning. And in this respect there will be a great difference according as the words are spoken to a few, or to a large and mixed company, or according as they are written or spoken. Words used jestingly to a few friends will be understood as they were meant. The same words spoken in public will be taken up by half of the hearers as solemn earnest. Again, a man who speaks will be judged according to the effect produced on those to whom he speaks. He is not answerable for the effect produced on those to whom his words are repeated, unless he intended them to be repeated. *Parkes v. Prescott, L. R., 4 Ex. 169*, or addressed them to a person whose duty it was to repeat them. *Kendillon v. Maltby, 1 C. & Mar. 493*. A person who writes, addresses a wider audience, and is responsible for the acceptance in which his language will be received by the general public who read his words. *Foster v. Clement, 10 B. & C. 472*; *Hulton & Co v. Artemus Jones* [1910] A. C. 20. See *ante*, Ch. V, § 95, at p. 300. Possibly it might be a good defence to show that the defendant did not understand his own words, as, for instance, if he was using a language with which he was imperfectly acquainted. In all such cases the real defence is that the words used had not a defamatory meaning, and before there can be a conviction this defence must have been negatived by those upon whom

the decision depends. The question of intention, as an independent line of defence, can in this point of view never arise.

The second line of defence is a perfectly good one. It amounts to saying that the case comes within one of the Exceptions to the general rule. It has to be remembered that truth in itself is no defence; the English rule 'the greater the truth the greater the libel' being sound law under the code, having regard to the limitations implied in Excep 1, 5 C. P. L. R. 55; see § 213 *infra* at p. 896. When this is made out, an express intention to injure must be established by the Crown, and cannot be assumed.

The third line of defence is obviously untenable. It is not necessary to show that the defendant intended to hurt the man he maligns. It is sufficient under the Code to show that he knew, or had reason to believe, the imputation would do harm. This must be judged of by the nature of the act done, just as if the accused had stabbed the prosecutor with a knife. As Sir James Stephen says: "I don't think the rule in question is really a rule of law, further or otherwise than as it is a rule of common sense. The only possible way of discovering a man's intention is by looking at what he actually did, and by considering what must have appeared to him at the time the natural consequence of his conduct." 2 *Steph Crim L* 111, see *per* Mahmood, J, 10 A at 451, 456; 6 N.-W. P. H. C.R. 86; 28 C. 63; Weir I. 575 & 594; *R v Tibbits*, [1902] 1 K. B. 77 at 78.

208 Defamation by injuring the reputation of the dead.—Expl 1. In order to bring within the terms of this section defamatory matter relating to a deceased person, it will be necessary to show, not only that the deceased might have complained of it, but also that it was written, or spoken, with the intention of insulting his surviving relations. I conceive that the words "intended to be hurtful," etc., in Explanation 1, must be taken as meaning an express and primary intention, as distinguished from a legal and implied intention. It would be indictable to rake up the vices of a dead man for the sake of deliberately wounding his family, but no

statements, however injurious, would be criminal, if made in the course of a *bona fide* history, or biography, the subject of which was dead. *R. v. Topham*, 4 T. R. 122, *per* Lord Kenyon; *Labouchere*, 12 Q. B. D. 320; *Critchley*, 4 T. R. 129 n.; *Eusor*, 3 T. L. R. 366; see the charge of Abbott, C.J., in *Hunt*, 2 St. Tr. (N. S.) 69. It has been held in such a case that a suit for damages cannot be sustained, 5 B. 580, and this is reasonable as even a prosecution for defamation abates on the death of the defamed, 1908 P. W. R. (Cr.) 21=7 Cr. L. J. 290; 31 C. 993; 26 B. 259. It is also well recognised that one man however nearly related cannot sue for injury done to another by way of defamation. 1 M. 383; 11 A. 104; 18 M. 250; 17 B. 573.

209. Defamation of a Company or a collection of persons.—Expl. 2. Where proceedings are taken for the defamation of a company or association, the matter complained of must be such as damages its reputation as such (Expl. 2). "The words complained of in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals who compose it. A corporation or company could not sue in respect of a charge of murder, or incest, or adultery, because it could not commit those crimes. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position." *Per* Lopes, L. J., *South Hetton Coal Co. v. N. E. News Association*, [1894], 1 Q. B. 133 at 141. Where a collection of persons is defamed as such, there must be some definite body of persons, e.g., certain Jews lately arrived from Portugal and living near Broad street, *Osborn*, 2 Barnard (K. B.) 138 at 166=2 Kel. 230; or the religious society called the 'Scotton Nunnery,' *Gathercole*, 2 Lewis 237; *Booth v. Briscoe*, 2 Q. B. D. 496, capable of being identified, and to the whole of whom it can be asserted that the defamatory matter applies. Otherwise no distinct issue could be presented for trial, and the defendant would not know what charge he had to meet. Where the

defendants were indicted for publishing a false and scandalous libel against divers good subjects of the King to the jurors unknown, the indictment was held bad, as the jury could not say that the libel was false and scandalous, when they did not know the persons of whom it was spoken, nor could they say that anyone was defamed by it *R. v. Orme, or Alme*, 1 *Ld. Raym.* 485=3 *Salk* 224. *Eastwood v Holmes*, 1 *F. & F.* 347 at 349 On the other hand, an indictment was held good which defamed all the English Bishops, *R. v. Baxter*, 1 *Ld. Raym.* 879, and all the clergy in Durham *R. v. Williams*, 5 *B. & A.* 595. This was the ground of the decision in the *Nil Durpan* case, which caused much excitement in Calcutta many years ago. There, the pamphlet said, "I present the indigo planters' mirror to the indigo planters' hands Now let every one of them, having observed his face, erase the freckle of the stain of selfishness from his forehead" Upon these words Sir B. Peacock is reported to have observed "This certainly appears to me to represent to the indigo planters that if they look into this paper, they would see a true representation each of himself Is not this a reflection on a certain class?" Each of them was to look at it to find his own picture "

And, again, the Chief Justice said "It is unnecessary to decide in this case which of the indigo planters was alluded to in this publication, because every one of them is asked to look into the mirror. Any one of them could say, 'I am one of the men alluded to, and I have thereby suffered damages which I wish to recover. Then comes the question as to the class itself' Is this court to be inundated with suits from each individual member of that class? Has not the class itself a right to be protected in a criminal prosecution, to obviate the necessity of each party suing separately? I therefore think the class has been sufficiently described" *Sup Court, Calcutta, July 24, 1861*

Where a libel which is really aimed at an individual professes to refer to an undefined class of persons, evidence may be adduced to show who is the person

referred to and the libel will then be treated as against him alone. *Lafano v. Malcolmson*, 1 H. L. Ca. 637. On the other hand a libel on a specified individual may furnish a cause of action to an association as where bankruptcy is attributed to a member of a firm. Such an imputation of facts affects the credit of both, *Harrison v. Berington*, 8 C. & P. 708; *Cook v. Batchellor*, 3 Bos. & P. 150; *Forster v. Lawson*, 3 Bingh. 452; *R. v. Jenour*, 7 Mod. 400.

As regards defamation by a corporation the subject is not of much importance. In the absence of a statutory power, the funds of the corporation are not available to pay fines on conviction or damages in a civil action. Proceedings therefore will have to be taken against the individual members of the corporation present at and taking part in proceedings alleged to be defamatory, as in 1 B. 477 at 483. Difficulty of the same order may not be felt as regards voluntary associations, but then it is a question entirely for private arrangement whether reparation is made by the offending members personally or out of the association funds. The rulings in 27 B. 169, 28 B. 314, etc., that the Secretary of State for India cannot be sued in Tort may furnish arguments by way of analogy. See *per Blackburn, J., Pharmaceutical Society v. London & Pro. Supply Asso*, 5 Q. B. D. 310, reversing 4 Q. B. D. 313 and on appeal, 5 A. C. 857.

II. PUBLICATION.

210. Publication essential to constitute the offence.—The next element in the law of defamation is that the imputation should be made or published. Whatever the difference may be between making and publishing, each act must have the quality of communicating the defamatory matter to some third person, as where defamatory matter is printed on handbills and distributed broadcast, 15 M. 214, or when a libellous drawing is set up in a public place, *Hard v. Wood*, 38 Sol. J. 234; *Spale v. Massey*, 2 Stark 559. So long as such matter is unknown to anyone but the author of it, no imputation is made at all. So long as it is only

made to the person defamed, it cannot harm his reputation, unless he himself chooses to divulge it, in which case the harm is his own act, not that of the defamer. It is probable that the words "make and publish" are only different phases of the idea which is conveyed in English law by the term "publication". A man makes an imputation when it is disseminated by the very act which brings it into existence, as when he utters it in the presence of others, or makes a sign, or chalks up a representation which conveys a defamatory idea. He publishes it when he gives currency to defamatory matter which had previously existed, as by repeating a conversation, or by posting a letter, or printing an article in a newspaper.

In *Pullman v. Hill*, [1891] 1 Q. B. 524 at 527, Lord Esher said, with reference to written matter, "What is the meaning of 'publication'?" The making known the defamatory matter, after it has been written, to some person other than the person of whom it is written "e. g., sending a post-card to the person defamed, 6 M. 381; *Smith v. Crocker*, 5 T. L. R. 441, or in a telegram, *Whitford v. S. I. Railway*, [1858] E. B. & E. 115. *Somerville v. Hawkins*, 10 C. B. 585. *Robinson v. Robinson*, 13 T. L. R. 564, *Robinson v. Jones*, L. R. 4 Ir. Ex. 391. As regards post-cards it has to be remembered that publication consists in actual communication to a third person and not in affording bare opportunity for it, so that there would be no publication if it could be proved that none but the addressee of the post card ever actually read it, *Clutterbuck v. Chaffers*, 1 Stark, 474, or none but the addressee could make out the innuendo meant to be conveyed by the language employed in the post-card or that there was nothing to connect the plaintiff with the libel, *Sadgrove v. Hole*, [1901] 2 K. B. 1, *It v. Holt*, 5 T. R. 444, *It v. Watt*, 8 Mod. 123, *It v. Paine*, 5 Mod. 165, *It v. Harney*, 8 B. & C. 257. These exceptions must be borne in mind in applying the general rule about post-cards enunciated in 6 M. 381 and in *Williamson v. Freer*, L. R. 9 C. P. 393, 15 M. 214; *Chattel v. Furner*, 12 T. L. R. 360; *Beamish v. Dairy Supply Co.*, 13 T. L. R. 484. In the case of defamation by printed matter, all that the complainant has to do to prove publication is to produce a printed copy. The court may well infer that the printed copy was produced by the manuscript being handed over to the printer which would be sufficient publication, *Weir* 1. 579, similarly in the case of written matter, by proving that it is in the handwriting of some one other than the maker or sender, *Weir* 1. 580, *Day v. Bram*, 2 Moo. & Rob. 54. If the statement is sent straight to the person of whom it is written, there is no publication of it, for you cannot publish a libel of a man to himself 10 W. R. (Civ.) 184, 7 A. 205, (see the dissenting judgment

of *Duthoit, J.*) 30 C. 402=7 C. W. N. 74; 1910 P.R. No. 10; 6 N. W. P. H. C. R. 38; 18 B. 205. If there was no publication, the question whether the occasion was privileged does not arise. If the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk, and takes away the libel and makes its contents known, I should say there would not be a publication. If the writer of a letter shows it to any person other than the person to whom it is written, he publishes it. In the case from which these remarks are taken, the publication consisted in the giving a letter to be copied, where the privilege attaching to the occasion did not authorize such a step. *Heckford v Galatin*, 2 Hyde 274.

As regards the effect of unintended publications as where a man writes something *prima facie* defamatory intending to communicate it only to the person concerned or to some one privileged to receive the same, but by mistake posts it in a wrong cover, as in *Thompson v. Dashwood*, 11 Q. B. D. 43, or *Fox v. Broderick*, 14 Ir. C. L. R. 453, or inserts a notice regarding dissolution of a partnership under the wrong heading of 'First Meetings under the Bankruptcy Act,' in England it has been held there is a difference as regards civil and criminal liability. While holding him liable in an action for damages, *Shepherd v. Whitaker*, L. R., 19 C. P. 502, *Stubbs v. Marsh*, 15 L. T. 312, negligence has been held to be an answer to a criminal prosecution, see per Lord Russell, C. J., in *Q. v. Munslow*, [1895] 1 Q. B. 758 at 761; *Blake v. Stevens*, 4 F. & F. 232; *Lord Abingdon*, 1 Esp. 226; *Brett v. Watson*, 20 W. R. 723; *Paine*, 5 Mod. 167. Under the Code intention to injure the complainant's reputation being essential for criminal liability the same principle would be followed. Thus if a man write libellous matter and communicates only to the person defamed and the latter publishes it to several of his friends, the author of the libel cannot be held liable, *Barrow v. Lewellin*, Hob. 62. In *Stubbs v. Russell*, [1913] A. C. 386, defendants published in their Weekly Gazette plaintiff's name as one of the persons against whom an ex-parte decree had been passed in the Small Debts Court, while the real fact was the suit was dismissed for want of prosecution as the claim had been settled before the hearing date. The plaintiff averred that the representation carried with it the in-

nuendo that he was unable to pay his just debts. But the House of Lords held, *overruling* the Courts in Scotland that the entry which was coupled with an explanatory note (to the effect that the entry did not imply inability to pay on the part of the person named) was incapable of bearing the defamatory meaning ascribed to it and there was no case to go to the jury. In 10 Bur. L. R. 304=1 Cr. L. J. 982, the accused wrote a letter apparently defamatory of the complainant but there was nothing to indicate that he meant to send it to the person who got it in due course through the post office or that he posted it. It was held the accused was entitled to an acquittal in the absence of proof that he published it, but if the prosecution had proved publication, there would be no difficulty in inferring intention to injure. In the case of a newspaper article, proof that the original was in the handwriting of the accused has been held to be sufficient evidence to show that he published even though there was no evidence adduced to show that the printing or publication was under his direction. *Lorett*, 9 C. & P. 462. The production of the printed copy is sufficient proof of publication, *Weir* 1. 579. Sending a libel regarding a man to his wife is a sufficient publication. *Wenman v. Ash*, 13 C. B. 836=22 L. J. (C. P.) 190; 4 C. L. J. 390; *Jones v. Williams*, 1 T. L. R. 572, though uttering a libel by a husband to his wife has been held to be not publication, *Wennhack v. Morgan*, 20 Q. B. D. 635; 1910 P. R. No. 10=1910 P. W. R. (Cr.) 6=11 Cr. L. J. 281=5 Ind. Ca. 892. In the last case the accused in answer to a lawyer's notice sent a reply defamatory of the client on whose behalf the lawyer had issued the notice and it was held as the defamatory matter was altogether irrelevant to the subject of the notice, the pleader could not be identified with the client and the publication must be deemed to be publication to a stranger. The reason for holding communication to the person concerned not to be defamation is self-esteem is something different from reputation and s. 499 deals only with harm to reputation. As regards communication by husband to wife the English Law based it on the fiction husband and wife

aid but one person. It is difficult to imagine why under the terms of s. 499 such communication is not a publication intended to harm the complainant's reputation. If the Legislature intended having regard to the freedom of domestic life, to save such communication from amounting to publication, one would expect to find an express provision to that effect as in s. 212, I. P. C. If a husband communicates information defamatory of the complainant to his own wife and the latter embodies the same in a writing addressed to the complainant there is no reason why the husband should not be liable. In **17 M. 401**, *Muttuswami Iyer & Best, J.J.*, held with reference to a case of theft that there is no presumption in the code that the husband and wife constituted in law but one person, and even in England, when a letter is addressed to the defamed himself at his ordinary place of business, and is opened in the usual course of business by a partner or clerk, it has been held to amount to defamation. *Pullman v. Hill*, [1891] **1 Q. B. 524**; *Gomersale v. Davies*, **14 T. L. R. 430**. Where several persons unite in an act of defamation, as where one states the libellous matter, another writes it down, a third carries it away, and a fourth prints it, each is guilty of the publication. *5 Bac. Abi. 206*; ss. 34, 37, I. P. C., *ante*, § 82 at p. 237; **10 B. 97**; *ante*, § 97 at p. 306. The publisher is as much liable as the author of the libel, **19 B. 703**, *Ratanlal 769*; where a libel is printed the disposal of each copy would constitute a distinct publication and a fresh offence and there is nothing in law to prevent as many prosecutions as there are number of copies sold, **1883 P. R. No. 12**. But this does not apply to one who is an innocent agent in carrying out part of the transaction; as, for instance, a porter who carries libellous handbills in ignorance of their contents; *Day v. Bream*, **2 M. & Rob., 54**, or a mere news vendor who does not know, and had no reason to know the contents of the paper; *Emmens v. Pottle*, **16 Q. B. D. 354**; *Mallen v. Smith*, **9 T. L. R. 621**; or a compositor who sets up the type of a libel mechanically, and without any intelligent perception of its meaning. *R. v. Mertens*, *150* held by Stephen, J., *2 Steph. Crim. L. 262n.* This aspect of the case is discussed at great length by *Romer*,

L. J., in *Vizetelly v. Mudie's Select Library, Ltd.*, [1900] 2 Q. B. 170 at 180. See *per Wills, J.*, in *Munslow*; [1895] 1 Q. B. 758 at 765. On the same principle every repetition of a libel furnishes a fresh cause of action, 12 B. 167. The fact the rumours repeated were prevalent and did not originate in the accused is no excuse, *Waithman v. Weaver*, 11 Price 257n; *Kerr*, 8 C. & P. 177. When a person uttered a defamatory statement and four months later repeated the same when examined as a witness in the course of a judicial proceeding, it was held that the repetition was absolutely privileged was no ground for exempting him from liability for the first offence as the doctrine of merger has no place in criminal law, *Weir* I. 530 & 535; cf § 205 *supra* at p 839 in connection with adultery.

Under English law a person who sells, in the ordinary way of his business, any defamatory publication is liable both civilly and criminally, even though he proves that he knew nothing of its nature, and supposed it to be of an innocent character. This was well illustrated in one of the political prosecutions of the last century. *Cuthell* was a bookseller, who only dealt in old and rare books, and who never dealt in political works. He had often published books of a learned theological nature for the Rev. Gilbert Wakefield, and finally published the production for which he was indicted, supposing it to be one of the same stamp. It turned out to be a flaming political pamphlet. For this he was prosecuted, and, according to the fashion of the time, the indictment charged him with every rebellious and wicked intention which the draftsman could imagine. The Attorney-General told the jury that if a man publishes a libel, his knowledge of its contents is only material in estimating his punishment, just as it would be in the case of a chemist who, by mistake, sold poison instead of medicine. Eiskine delivered an ingenious and elaborate argument in support of the proposition, that even if he had published negligently and inadvertently, he ought to be acquitted if he was found to have none of the intentions which were stated in the indictment. Lord Kenyon, C. J., in charging the jury,

met all this with the simple remark, "God only knows the hearts of men, and we can collect their meaning only from what they do. These are fallible modes of arriving at knowledge; but we have no better, and we must pronounce men innocent or guilty according to this standard." *R. v. Cuthell*, 21 St. Tri. 641, pp. 655, 663, 674; *Gutch Moo. & Malk.* 548; *Keenslow* [1895] 1 Q. B. 758. The ground of this rule appears to be, either that the law could be set at defiance if a person could disperse libels abroad with impunity, by concealing the import of them from an illiterate publisher; *1 Hawk. P. C.* 545. [See however *Smith v. Streetfield*, [1913] 3 K. B. 764 where the innocent printer was also made liable where the author's privilege was defeated by proof of malice,] or that a person who makes a profit out of his business is bound at his peril to conduct it in such a manner as not to be injurious to others (*ante*, §§ 11 & 97). The severity of the law was mitigated in England as regards newspapers and other periodical publications by allowing the defendants to prove, among other things, that the libel had been inserted without actual malice, and without gross negligence. 6 & 7 Vict. c. 96, s. 2. In a recent case an action for libel was brought against the Trustees of the British Museum, because they had allowed a pamphlet containing a libel on the plaintiff to be lent in the ordinary manner to one of the public for perusal. The case was dismissed, on the ground that the defendants had only done what the statute under which they acted required them to do. It was admitted by the Court that a person who sold books across the counter, or who delivered them to be sold in the street, would be liable, even though ignorant of their contents; but it was said that no case had been cited in which a private person, who innocently lent a book out of his library, had been held liable as publishing a libel. *Martin v. Trustees of British Museum*, 10 T. L. R. 338. The principle of this decision was carried further in *Walden v. Times Book Co.*, 28 T. L. R. 143. The defendants who are book-distributors sold two French books published in Paris and which the plaintiff alleged contained libellous statements regarding her. The jury found the defendants were ignorant of the contents

of the book and it was not through their negligence they were so ignorant and the book was not of such a character as to put them upon inquiry. *Cozens Hardy, M. R.*, held while there may be a duty to examine some books carefully because of their titles or of the recognised propensity of their authors to scatter libels abroad, there is no general obligation on distributing agents to read every book they sell in order to ascertain whether or not it contains libellous statements.

Under the Penal Code a person is only liable for making or publishing an imputation when he does so "intending to harm, or knowing or having reason to believe" that such imputation will do harm. These words cannot mean less than the wilful intention to do a wrongful act (*ante*, p. 857) or the connivance at, or tacit permission to publish libels of the sort complained of, which would amount to an authority to publish any particular libel. *R v Holbrook*, 4 Q. B. D. 42. Accordingly, in a charge against a newspaper editor, the Madras High Court held "that it would be a sufficient answer to the charge in this country, if the accused showed that he entrusted in good faith the temporary management of the newspaper to a competent person during his temporary absence, and that the libel was published without his authority, knowledge, or consent" 9 M. 387; 1883 P. R. 12; 35 C. 945; 22 B. at 131. *ante* Chap V § 97 at p. 304 See ss 501, 502 I. P. C.; *Stanger, L. R.*, 6 Q. B. 352, *Hart v. White*, 10 East 94. The law was laid down in 3 A. 342 at 345 according to the strict English rule by Stuart, C. J. The only authority referred to was an English text-book, and no notice was taken of the special terms of s. 493. It is no answer to an editor to say that the author is a correspondent whom he regarded as trustworthy. *De-Crespigny v Wellesley* 5 Bing. 392 at 402; or that he merely extracted from another respectable journal. *Talbutt v. Clark*, 2 M. & Rob. 312, *Watkin v. Hall, L. R.*, 3 Q. B. 396; *M'Pherson v. Daniells*, 10 B. & C. 270; *Saunders v. Mills*, 6 Bing. 213; *Holt*, 8 Cox. 411. A man who repeats a rumour is as much liable as one who originates it. *Davis v. Lewis*, 7 T. R. 17; *Spigels*.

v. Gorney, 63 L. J. (Q. B.) 231 and even if the originator was privileged and therefore, not liable, the man who repeats may be liable. *Titelman v. Ainslie*, 10 Ex. 63; *Mills v. Spencer*, Holt, (N. P.) 533; *McGregor v. Thwaites*, 3 B. & C. 24.

The place of publication is only material with regard to jurisdiction. When a defamatory petition is sent to a public officer who in the ordinary course of official routine sends it to some subordinate for enquiry, there is a publication at the place where the enquiring officer receives it for which the petitioner may be held responsible, whether or not he expressly asks for enquiry, 1889 P. R. No. 14. Where a libel is posted in one district, and received and opened in another, the offence of publication takes place, and may be tried in the latter district. 3 A. 342; 22 B at 129; 15 B. 286; 5 W. R. (Cr.) 44. In *Burdett's* case, the libel was written in Leicester, and was delivered unsealed by A to B in Middlesex, there being no evidence as to where or how A received it. The case was tried in Leicester, and it was held that it might be assumed that A received it in Leicester, and that whether it was delivered to him open or sealed, there was a publication in Leicester. *R. v. Burdett*, 4 B. & Ald. 95. Where a libel is put into course of delivery in one district, and is actually delivered in another district, the case would come within ss. 179 or 182 of the Criminal Procedure Code and be triable in either district.

Under s 198 of the Crim. P. C. no Court shall take cognisance of any offence falling under Chap. XXI of the P. C., except upon a complaint made by some person aggrieved by such offence. A husband is aggrieved by an imputation of unchastity made against his wife. 14 M. 379. 25 B. 151=2 Bom. L. R. 665 overruling *Ratanlal* 327; 12 M. C. C. R. 201=10 Cr. L. J. 263; 15 M. L. J. 224=2 Cr. L. J. 381; 1891 A. W. N. 188. *contra* 1884 P. R. No. 22; 1887. P. R. No. 39. The principle has been extended to other members of the family with whom a female relation has been residing as a dependant, 32 C. 425=3 C. L. J. 38=1 Cr. L. J. 445. But it was held in 1893. A. W. N. 207. that a mother and

son are not in the same position as wife and husband, and a son has no *locus standi* to prosecute if his mother's character is assailed. The President of a Municipal Corporation is not aggrieved by defamatory statements affecting his subordinates. 26 M. 43.

Under Act XXV of 1867, s 5, the printer and publisher of a newspaper is required to make an official declaration that he is such. By s 7 the production of an authenticated copy is sufficient evidence, unless the contrary is proved, as against the person whose name is subscribed to such declaration, that he is the printer or publisher, as the case may be, of every portion of every periodical work of a corresponding title. Such evidence throws upon the defendant the burthen of disproving the actual publication by himself, and leaves it open to him to show any circumstances which would negative the presumption of intent, which the law infers from such publication 9 M. 387.

III. CIRCUMSTANCES IN WHICH IMPUTATIONS *Prima*

Facie DEFAMATORY ARE NOT PUNISHABLE

211. Exceptions: their Nature and Scope.—The ten exceptions to s 499 state cases in which an imputation *prima facie* defamatory may be excused. There may be said to be five groups of exceptions, all relating to occasions as to which qualified privilege is recognised. Exception 1 corresponds to the plea of justification being a bare statement of truth for public good. Exceptions 2, 3, 5 & 6 correspond to the plea of fair comment on a matter of public interest. Exception 4 covers the plea of a fair report of public proceedings. Exceptions 7 & 8 cover the cases of censure by a lawful authority, passed in good faith and accusation made to a lawful authority in good faith. Exceptions 9 & 10 cover the cases of imputation made in good faith by a person for the protection of his interest or for the public good, and the case of caution intended for the good of the person to whom it is conveyed or for the public good. Looking at the matter from a different aspect, it may also be stated that the ninth Exception states a general principle of

which Exceptions 7, 8 and 10 are particular instances, so that the last four Exceptions include the whole of what are known to the English law, as communications made on a privileged occasion, i.e., one made in the discharge of a duty or protection of an interest in the person who makes it. It will be convenient to deal with these Exceptions *seriatim*, after some general discussion of privilege, considered in its broad aspects and of the doctrine of "absolute privilege," the law relating to which is left in an unsatisfactory state owing to the divergence of views on the part of the several High Courts. It must be remembered no magistrate is entitled to discharge a case of defamation *prima facie* made out, solely on the ground the accused might have had some ground for making the imputation. The *onus* is on the defence to bring the case within one or other of the Exceptions by offering affirmative proof, 13 Cr. L. J. 488=15 Ind. Ca. 488; [1911] 2 M. W. N. 8=10 M. L. T. 96=12 Cr. L. J. 497=12 Ind. Ca. 217. But where an alleged defamatory statement is said to be embodied in an official confidential report falling within the scope of ss. 123-125 of the Evidence Act, and there is no likelihood of proving the communications by primary or direct evidence a dismissal of the complaint under s. 203, Cr. P. C., may be justified, 1910 P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

The phrase "privileged communication" is a loose but convenient way of denoting a communication made on a privileged occasion. As Parke, B., said: "The term 'privileged communication' is not perhaps quite a correct expression. The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it on him to prove that there was malice in fact; that the defendant was actuated by personal spite or ill-will, independent of the occasion on which the communication was made." *Wright v. Woodgate*, 2 C. M. & R., at 577; per Lord Esher, *Clarke v. Molyneux*, 3 Q. B. D., at 246. An occasion is privileged when the person who makes the

communication has an interest, or a duty, legal, moral, or social, to make it to the person to whom he does make it, and the person who receives it has a corresponding duty or interest to hear it. Both these conditions must exist in order that the occasion may be privileged.—*Per* Lord Esher, *Pullman v Hill* [1891], 1 Q. B. 524, at 527; *per* Lord Campbell, C. J., *Harrison v. Bush*, 5 E. & B. 344=25 L. J. (Q. B.). 25; 24 B. 13; 26 M., 464. It is further essential that the statement complained of should be delivered in the honest belief that the party was performing his duty in making the communication. *Per* Erle, C. J., *Whitely v Adams*, 15 C. B. (N. S.) 392=33 L. J. (C. P.), 89, 491; *per* Bramwell, L. J., *Clarke v Molyneux*, 3 Q. B. D. at 244. The words "moral or social duty" have been defined by

[1891] 2

Q. B., at 350. Anything which a person may say or write in maintaining his own interests may also be said or written by his solicitor, or agent, or any other person to whom the protection of those interests is entrusted. *Baker v Carruth*, [1894] 1 Q. B. 838. When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them, relevant to the same subject, though at a time and place different from those at which the confidential relation began, may be entitled to protection as well as what passed at the original interview, and it is a question for the jury whether any further conversation on the same subject, though apparently causal and voluntary, does not take place under the influence of the confidential relation already established between them, and is therefore entitled to the same protection.—*Per* Pollock, C. B., *Beatson v Shene*, 5 H. & N. 838, at 855=29 L. J. Ex. 430.

Probably the most instructive and exhaustive judgment on the subject of privilege is that of Willes, J., in *Henwood v. Harrison* L. R., 7 C. P. 606. The following instances of the application of the rule may be useful. An

employer published a weekly circular addressed to his servants, in one issue of which the dismissals of a servant for misconduct, and the charges alleged against him were stated. *Hunt v. Great Northern Ry. Co.*, [1891] 2 Q. B. 189; *Somerville v. Hawkins*, 10 C. B. 583=20 L. J. (C. P.) 131. A *gwh* addressed a letter to the villagers directing that a woman should be excommunicated for illicit intercourse with a man of a lower caste. 22 C. 46. Both statements were held privileged. They are instances of Exception 7, as to which see § 219 *infra* at p. 913. So where petitions were presented by the creditors of a defendant in a suit suggesting that the claim was collusive; 2 M. 13, or by villagers praying for retention of a village moonsiff, and asserting that a Zemindar who was trying to get him removed was actuated by improper motives. 12 M. 374. These would come under Exception 8. See § 220 *infra* at p. 914. Statements attributing unprofessional conduct to a medical man; 3 A. 342, a letter by the defendant to the complainant's partner accusing the complainant of misappropriating money which ought to have been paid over to the defendant, 15 B. 351; 1910 P. W. R. (Cr.) 6, were held privileged under Exception 9. See § 221 *infra* at p. 916. Under the same head would come the case of statements made in the course of judicial or quasi-judicial proceedings which will be referred to hereafter in § 212 at p. 885 as, for instance, statements made before a panchayet which was investigating the imputations made upon the character of a villager. 7 M. 36. On the same ground, where an insurance company intimated to the owner of a ship, that if the plaintiff continued in command they would refuse to insure it, the communication was protected, as it appeared that the company had been informed that he was of intemperate habits. *Hamon v. Falle*, 4 A. C. 247.

A typical instance of cases protected by Exception 10 is that of characters given, or statements made in reference to the character of a servant or other person in a subordinate position, made by his former employer to one who is about to engage him, or by one who has taken him into his service to the person who recommended

him. Such statements are privileged, whether asked for or volunteered, but when volunteered, this is a circumstance which may be taken into consideration with reference to a question of actual malice *Pattison v. Jones*, 8 B. & C., 578; *Child v. Affleck*, 9 B. & C. 403; *Fryer v. Kinnersley*, 33 L. J. (C. P.) 96; 15 C. E. (N. S.) 422. See § 222 *infra* at p 919

Mutuality of Interest.—Numerous cases have arisen out of the rule, that the person who receives a communication made by a person interested in any matter must himself have a corresponding interest. For instance, after an election, the defeated candidate or his constituents have an interest in exposing any malpractices which have affected the election. But if they address their complaints to the newspapers, or to persons who have no authority to afford redress, their complaints, if untrue, will be defamatory, even if they *bona fide* suppose that the person addressed has authority in the matter. *Duckenson v. Hilliard*, L. R., 9 Ex. 79; *Hebditch v. McIlwaine*, [1894] 2 Q. B. 54. But if the person addressed has an interest or a duty which would require him to examine into the truth of the charge, and to take steps to have the offender punished, a communication to him is privileged, though he is not the immediate authority through whom redress is administered. *Harrison v. Bush*, 5 E. & B. 344=25 L. J. (Q. B.) 25. See *per Parke*, B. *Toogood v. Spying*, 1 C. M. & R. 181 at 193. The same principle applies where, in the process of making a communication on a privileged occasion, the matter is divulged to persons who are strangers to the matter. A communication which would be protected if made by A to B in his own room, or by letter, would be defamatory if made in the presence of a general company, or by telegram or postcard. *Williamson v. Freer*, L. R., 9 C. P. 393; 6 M. 381; 15 M. 214. It is not defamation for a man to communicate to his own wife statements affecting the character of a servant, *Wennhak v. Morgan*, 20 Q. B. D. 635. The decision was put on the ground that husband and wife are one person, but the more sensible reason appears to be, that the matter was one in which

husband and wife are equally interested. So if a man is making, in presence of another person, a serious charge against him, he is justified in calling in a third person for his own protection to witness what takes place *Taylor v. Hawkins*, 16 Q. B., 308=20 L. J. (Q. B.) 313. Where the defendant, a member of a board of guardians, at a meeting where the claims of one of the servants of the board came under consideration, grounded his opposition to the claim on a statement that the servant had been robbing public money, and the jury found that the words were spoken honestly, in the discharge of a public duty and without malice, it was held that the privilege attaching to the occasion was not affected by the presence of reporters, over whom the defendant had no control, and whom he could not remove, *Pittard v. Oliver*, [1891] 1 Q. B. 474. It would have been otherwise if the speaker had invited some outsiders to be present to hear his speech.

The same question has arisen several times where in the ordinary course of business a letter passes under the eyes of different persons before it reaches its destination. In *Pullman v. Hill*, [1891] 1 Q. B. 524, the defendants wrote a defamatory letter to the plaintiff, who was a member of a mercantile firm. The letter was *prima facie* privileged, but it was dictated to a shorthand clerk, who then copied it out by a typewriter, from which it was prescopied by an office boy. On reaching the plaintiff's firm, it was opened in the usual course of business by one clerk, and shown to another, before it reached the principal for whom it was intended. These circumstances were held to deprive the letter of its protection. The Court held that neither the practice of business nor the necessities of the case made any difference. A person who writes of another what is *prima facie* libellous must at his own peril keep it from all persons to whom he is not privileged to show it. This case was distinguished in a later one, where a solicitor acting for his client wrote to the plaintiff a letter containing matter defamatory of her, and gave it to his clerk to copy. It was held that this did not destroy the privilege. Lopes, L. J., said: "The ground of the decision in *Pullman v. Hill* was, that it was

not the usual course in a merchant's business to write letters containing defamatory statements, and to communicate them to a clerk in the office. I adhere to what I said in that case as to there being neither a duty nor an interest in a merchant to make such a communication as was there made. The case of a solicitor seems to me to be certainly different. The business of a solicitor's office could not be carried on unless it were communicated to the clerks in the office, and it is common knowledge that such is the usual course " *Boxsius v Goblet Freres* [1894] 1 Q. B. 842, followed in *Edmondson v. Birch and Co., Ltd.*, [1907] 1 K. B. 371=76 L. J. (K. B.) 346 where *Pullman v Hill* is discussed and distinguished; 1910 P. R. (Cr.) 10=1910 P. W. R. (Cr.) 6=11 Cr. L. J. 281=5 Ind. Ca. 892. And so if it was necessary or proper to communicate matter to a large number of persons and the occasion is such that if the matter is defamatory it would be privileged, it is allowable to have the matter printed for circulation, as being a necessary and reasonable mode of communicating it to those who have an interest in receiving it *Lawless v. Anglo-Egyptian Co*, L. R., 4 Q. B., 262; *Andrews v Nott-Boicer* [1895], 1 Q. B. 888. No doubt the same decision would be given if, on a privileged occasion, it became necessary to use the telegraph. As, for instance, if one police-officer had to direct another to arrest a supposed criminal who was about to leave the country.

Good Faith—It will be remarked that in Exceptions 7, 8, 9, and 10, it is always stated that the imputation must be made in good faith. Taking the ordinary meaning of the words, this is nothing more than is required by the English law "To entitle matter otherwise libellous to the protection which attaches to communications made in the fulfilment of a duty, *bona fides*, or, to use our own equivalent, honesty of purpose, is essential and to this again two things are necessary first, that the communication be made not only in the course of duty, that is, on an occasion which would justify the making of it, but also from a sense of duty; secondly, that it be made with a belief in its truth."—*Per Cockburn, C. J., Dawkins v Lord Paulet*, L. R., 5 Q. B., at 102

per Lord Coleridge, C. J., *Stevens v. Simpson*, 5 Ex. D. 53. And even an actual belief in the truth of the statement is not necessary, if the statement is of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. *Per* Bramwell, L. J., *Clarke v. Molyneux*, 3 Q. B. D., at 244; *James v. Boston*, 2 C. & K. 4. So Lord Esher said: Though what is said amounts to a slander, it is privileged, provided the person who utters it is acting *bona fide*, in the sense that he is using the privileged occasion for the proper purpose, and is not abusing it. *Royal Aquarium Society v. Parkinson*, [1892], 1 Q. B., 431 at 443. Under the Penal Code, however, by s. 52, "nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." Then by s. 105 of the In Ev. Act, "when a person is accused of any offence, the burthen of proving the existence of circumstances bringing the case within any special exception or proviso contained in any other part of the same Code, or in the law defining the offence, is upon him, and the Court shall presume the absence of such circumstances." It is probable that in practice this definition of good faith will make little difference in the proof required in England and in India. Due care and attention in arriving at any belief is exactly the same thing as reasonable and probable cause, which it has been decided depends upon the whole circumstances of the case, and not upon the omission to make any specific inquiry which might have thrown light upon it. *Perryman v. Lister*, L. R., 4 H. L. 521. It will, however, in many cases affect the procedure at the trial. According to English law, "It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burthen of showing actual malice is cast upon the plaintiff; but unless the defendant does so, the plaintiff is not called upon to prove actual malice." *Per* Lord Esher, *Hellicott v. Mollicane* [1894], 2 Q. B., at 58. See 3 C. L. R. 122 as to the state of the law in India regarding the onus of proof. The reason of this is, that in English law the essence of the offence is an intention to do a wrongful act. As soon as it appears that the occasion

was privileged, the intention which the law infers from the defamatory nature of the statement is rebutted, and then an express intention must be made out. But the privileged character of the occasion carries with it no presumption that the accused had made the statement, not only innocently, but after due care and attention. Apparently, therefore, till this has been shown the burthen of proof is not shifted from the defendant to the plaintiff. Accordingly, it has been held in India that in order to establish a *prima facie* case in his favour, the defendant must show, not only that he believed the statements which he made on a privileged occasion, but that "he had some reasonable ground for making the imputation, either by showing that it was true, or that, if false, he had reasonable ground for believing it to be true, looking to the source from which the information was obtained" 4 C. 124; 6 A. 220. The absence of reasonable cause for making an imputation is evidence of the absence of good faith, Weir I. 607. The mere absence of ill-will does not of itself prove that the imputation was made in good faith, Weir I. 613; 11 Bom. L. R. 638=10 Cr. L. J. 372. See also 2 W. R. (Cr.) 35; 19 B. 717. The recent English case of *Smith v. Streetfield*, [1913] 3 K. B. 764, illustrates this principle. The defendant, Canon Streetfield on a privileged occasion published a printed pamphlet by circulating it to persons interested with him, concerning the business of the plaintiff a surveyor of ecclesiastical dilapidations. The jury found the writer was actuated by malice but the printers were not. It was held the malice of the writer defeated the privilege both for him as well as for the printers though the latter merely printed in their usual course of business and without malice, they were liable as joint tort-feasors with the writer. Of course the whole of this, regarding the *bona fides* of the defendant may come out on the case for the prosecution, in which event the defendant need do nothing till the Crown has taken the next step. But if it does not come out, the defendant will have to go into his case at once 1910 P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

per Lord Coleridge, C. J., *Stevens v. Simpson*, 5 Ex. D. 53. And even an actual belief in the truth of the statement is not necessary, if the statement is of such a character that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Per Bramwell, L. J., *Clarke v. Molyneux*, 3 Q. B. D., at 244; *James v. Boston*, 2 C. & K. 4. So Lord Esher said: Though what is said amounts to a slander, it is privileged, provided the person who utters it is acting *bona fide*, in the sense that he is using the privileged occasion for the proper purpose, and is not abusing it. *Royal Aquarium Society v. Parkinson*, [1892], 1 Q. B., 431 at 443. Under the Penal Code, however, by s. 52, "nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention." Then by s. 105 of the In Ev. Act, "when a person is accused of any offence, the burthen of proving the existence of circumstances bringing the case within any special exception or proviso contained in any other part of the same Code, or in the law defining the offence, is upon him, and the Court shall presume the absence of such circumstances." It is probable that in practice this definition of good faith will make little difference in the proof required in England and in India. Due care and attention in arriving at any belief is exactly the same thing as reasonable and probable cause, which it has been decided depends upon the whole circumstances of the case, and not upon the omission to make any specific inquiry which might have thrown light upon it. *Perryman v. Lister*, L. R., 4 H. L. 521. It will, however, in many cases affect the procedure at the trial. According to English law, "It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burthen of showing actual malice is cast upon the plaintiff; but unless the defendant does so, the plaintiff is not called upon to prove actual malice." Per Lord Esher, *Hebditch v. McIlwaine* [1894], 2 Q. B., at 58. See 3 C. L. R. 122 as to the state of the law in India regarding the onus of proof. The reason of this is, that in English law the essence of the offence is an intention to do a wrongful act. As soon as it appears that the occasion

was privileged, the intention which the law infers from the defamatory nature of the statement is rebutted, and then an express intention must be made out. But the privileged character of the occasion carries with it no presumption that the accused had made the statement, not only innocently, but after due care and attention. Apparently, therefore, till this has been shown the burthen of proof is not shifted from the defendant to the plaintiff. Accordingly, it has been held in India that in order to establish a *prima facie* case in his favour, the defendant must show, not only that he believed the statements which he made on a privileged occasion, but that "he had some reasonable ground for making the imputation, either by showing that it was true, or that, if false, he had reasonable ground for believing it to be true, looking to the source from which the information was obtained" 4 C. 124; 6 A. 220. The absence of reasonable cause for making an imputation is evidence of the absence of good faith, Weir I. 637. The mere absence of ill-will does not of itself prove that the imputation was made in good faith, Weir I. 613; 11 Bom. L. R. 638=10 Cr. L. J. 372. See also 2 W. R. (Cr.) 35; 19 B. 717. The recent English case of *Smith v. Streetfield*, [1913] 3 K. B. 764, illustrates this principle. The defendant, Canon Streetfield on a privileged occasion published a printed pamphlet by circulating it to persons interested with him, concerning the business of the plaintiff a surveyor of ecclesiastical dilapidations. The jury found the writer was actuated by malice but the printers were not. It was held the malice of the writer defeated the privilege both for him as well as for the printers though the latter merely printed in their usual course of business and without malice they were liable as joint tort-feasors with the writer. Of course the whole of this, regarding the *bona fides* of the defendant may come out on the case for the prosecution, in which event the defendant need do nothing till the Crown has taken the next step. But if it does not come out, the defendant will have to go into his case at once. 1910 P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

be false, he could not be charged for defamation. And it would make no difference that he did not believe the information, if it came to him in such a shape that he was bound to pass it on to his superior.

Where the statement made on a privileged occasion is not compulsory, but optional, so that proof of express malice is sufficient, this proof is not afforded merely by showing that the statement was false. The plea of privilege always assumes that the statement is in itself defamatory, and generally that it is false. 2 M. 13. The falsity of the statement is an element in determining the existence of malice, but does not by itself establish it. The question still remains whether the defendant was using or abusing his privilege. "If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion. 19 B. 51. But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held to have abused the occasion, and in that sense to have spoken maliciously. If a person from anger, or from some wrong motive, has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion." *Per Lord Esher, Royal Aquarium Society v Parkinson*, [1892] 1 Q. B. at 442. On the other hand, the evidence must be such as to warrant an absolute finding that there was express malice. The matter must not be left upon an even balance. In *Sommerville v Hawkins*, 10 C. B. 583=20 L. J. (C. P.) 131, the Court said "It is true that the facts proved are consistent with the presence of malice, as well as with its absence. But this is not sufficient to entitle the jury to have the question of malice left to the jury; for the existence of malice is consistent with the evidence in all cases, except those in which something inconsistent with malice is shown in evidence, so that to say that in all cases where the evidence was consistent with malice it should be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not

disproved, which would be inconsistent with the admitted rule that in case of privileged communications malice must be proved, and therefore its absence presumed till such proof is given. It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than its non-existence." See 27 B 585.

The use of extravagant and excessive language in conveying imputations which are themselves privileged, has been held to destroy the privilege. In one case this was so held, even though *bona fides* was found, and malice was negatived. *Fryer v. Kinnersley*, 15 C. B. (N. S.) 422=33 L. J. (C. P.) 96. Possibly this would be so under the Code, if the words were held not to have been used with due care and attention, and therefore not in good faith. Under English law, however, the better view seems to be that the only questions in such a case are, privilege or no privilege, malice or no malice. A man who is making a statement on a privileged occasion may incorporate with it statements against others, or even against the party concerned, which are wholly irrelevant to the privileged occasion, and as to which there is no privilege at all. *Warren v. Warren*, 1 C. M. & R. 250. But when there is only an excessive statement having reference to the privileged occasion, and which therefore comes within it, then the only way in which the excess is material is as being evidence of malice. If the jury refuse to find malice, a finding that the language was excessive is not one from which malice can be inferred by law. If the law did infer so, it would often be inferring what is not true. A man may use excessive language and yet have no malice in his mind. See *per* Lord Esher, *Nevill v. Fine Arts Insurance Co.*, [1895] 2 Q. B. at 170; *per* Lopes, L. J. *ib* 172; *affd.* [1897] A. C. 68; *Cowles v. Potts*, 34 L. J. (Q. B.) 247 at 250; *Spill v. Maule*, L. R., 4 Ex. 232.

Evidence of other libels upon the prosecutor, either before or after the libel complained of, is admissible for the purpose of proving actual malice. The more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question merely affects the weight, not the admissibility, of the evidence. See the answers of the judges in *Barrett v Long*, 3 H. L. Ca. 395; *Hemmings v Glasson*, E. B. & E. 346=27 L. J. (Q. B.) 352, 22 B. 112; 20 A 55; *ante*, Part II, Chap. V, § 95, at p. 461.

212. Absolute Privilege.—Regarding the real nature of what is known as absolute privilege Channell, J., said, in *Bottomley v Brougham*, [1908] 1 K. B. 584. "I do not think that it is a very accurate expression, and I am sure that calling it a 'privilege' is sometimes misleading. Privilege means in the ordinary way, a private right. Now there is no private right of a judge, or a witness, or an advocate to be malicious. It would be wrong of him, and if it could be proved, I am by no means sure that it would not be actionable. The real doctrine of what is called 'absolute privilege' is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not. It is not that there is any privilege to be malicious, but that, so far as it is a privilege of the individual—I should call it rather a right of the public—the privilege is to be exempt from all inquiry as to malice, that he should not be liable to have his conduct inquired into to see whether it is malicious or not—the reason being that it is desirable that persons who occupy certain positions as judges, as advocates or as litigants should be perfectly free and independent, and, to secure their independence, that their acts and words should not be brought before tribunals for inquiring into them merely on the allegation that they are malicious. I think there is something more in that distinction than mere words, and the reason that this peculiar doctrine of 'absolute privilege' is sometimes complained of is that it is not thoroughly understood. The explanation of the doctrine will be found here."

and there in many of the cases, although it never seems to have been put into the head note." There are some cases in which the "*privilege*" is so absolute as to amount to a complete immunity, even where there is the most express malice. One of these cases is that of speeches made in Parliament or petitions addressed to Parliament. *1 Com. Dig.*, 390; per *Ld. Denman*, *Stockdale v. Hansard*, 9 A. & E., at 114. This privilege has been held to extend even to one who prints and publishes an extract from or an abstract of a Parliamentary paper though in doing so he does not act by or under direction of either House of Parliament, *Mangena v. Edward Lloyd*, 98 L. T. 640, followed in *Mangena v. Wright*, [1909] 2 K. B. 958. This, however, appears to be part of the ancient law and custom of Parliament, which cannot be claimed by subordinate legislative assemblies, unless they have been expressly endowed with Parliamentary privileges. *Doyle v. Falconer*, L. R. 1 P. C. 328; *Speaker of Legislative Assembly of Victoria v. Glass*, L. R., 3 P. C. 560. Of course if any charge of defamation was made against a member of an Indian Legislative Assembly, or a person petitioning it, the case would come under Exception 9, and the presumption in favour of good faith would be overwhelming.

A more common instance is the immunity attaching to statements made in judicial proceedings. Neither party, [9 Cr. L. J. 385, 15 M. 414, 31 M. 400, 17 B. 573, Weir L. 612 & 587, 6 M. L. T. 15; 5 M. L. T. 256=9 Cr. L. J. 276=1 Ind. Cx. 248, 9 B. 269, 22 A. 234, *Hodgson v. Scarlett*, 1 B. & A. 244] witness, [11 M. 477; 30 M. 222=6 Cr. L. J. 130; 17 B. 127, 19 B. 51 at 62, 27 C. 262, 32 C. 956; *Watson v. McEwan*, [1905] A. C. 450, *Barratt v. Kearns*, [1905] 1 K. B. 504; 3 O. C. 80] counsel, [10 M. 28, 2 L. B. R. 130; *Butt v. Jackson*, 10 Ir. L. R. 120; *Flint v. Pike*, 4 B. & C. 473] jury, nor judge, [17 M. 87, *Laic v. Llewellyn*, [1906] 1 K. B. 487; *Bottomley v. Brougham*, [1908] 1 K. B. 584] can be put to answer civilly or criminally for any words used orally or in writing, in the discharge of his respective function. Per Lord Mansfield, *B. v. Skinner*, Lofft. 55; *Hart v. Gumpach*, L. R. 4 P. C. at 464. The rule applies to

every court of justice, as, for instance, to a County Court, or the court of a coroner, *Scott v Stansfield*, L. R. 3 Ex. 220; *Thomas v Churton*, 2 B. & S. 475=31 L. J. (Q. B.) 139 and to proceedings held under Bankruptcy Act on the examination of a debtor who was held in custody. *Ryalls v Leeder*, L. R. 1 Ex. 296; *Dicas v Lord Ingham*, 6 C. & P. 249. The same doctrine extends to cases where there is an authorized inquiry which, though not before a court of justice, is before a tribunal which has similar attributes, as a military court of inquiry, *Duckins v. Lord Rokeby*, L. R., 7 H. L. 744; *Hodgson v. Puse*, [1899] 1 Q. B. 455, or a Medical Council to which a statutory jurisdiction had been given to adjudicate on cases of professional misconduct. *Allbutt v. General Council of Medical Education*, 23 Q. B. D 400; or to the vice-chancellor of a university when sitting as a judge in the university court, *Kemp v Nerulle*, 10 C. B. (N. S.) 523. It does not apply to proceedings of a municipal body, although they are deciding a question entrusted to them by statute, upon which they take evidence in an informal manner, and upon which they have to exercise a judicial discretion. *Royal Aquarium Society v Parkinson*, [1892] 1 Q. B. 431 at 442. *London County Council*, 71 L. T. 633. Similarly, it has been held Governors of a Jockey Club hearing a dispute are not absolutely privileged, though they adopt judicial forms and methods. *Hope v. Lanson*, 18 T. L. R. 201. A recent Full Bench of the Madras High Court held that defamatory statements made before a Registrar in an inquiry held in connection with the execution and presentation of a document is not entitled to absolute privilege, 23 M. L. J. 50=[1912] M. W.N. 478=13 C. L. J. 508=15 Ind. Ca. 552, and the same view was taken by the Bombay High Court in 19 B. 51 at 62, with respect to a statement made in the course of an inquiry made by a Collector acting under the orders of Government into a charge of corruption and bribery. The privilege has been held to extend to masters of the supreme court in England, *Pedley v. Morris*, 61 L. J. (Q. B.) 24, but not to a magistrate's clerk who is not a judicial officer, *Delegal v. Highley*, 3 Bing. (N. C.) 950.

The immunity of parties and witnesses applies to all statements which they make in that capacity during the course of the judicial proceeding, (see *ante* § 118 at p. 372) whether given in open court, or by way of pleading or affidavit. *Henderson v. Broomhead*, 4 H. & N. 569=28 L. J. (Ex.) 250. The Madras High Court which has always taken a view most favourable to the doctrine of absolute privilege held in 1910 M. W. N. 155=8 M. L. T. 55, that there is no difference between evidence given in the box and affidavit evidence, and both are equally entitled to the protection of an absolute privilege. This is also English Law; the Chief Courts of Punjab and Lower Burma have with equal consistency adopted the opposite view, 1887 P. R. No. 21, 13 Eur. L. R. 96. As to Sind see 5 Sind L. R. 133=3 Cr. L. J. 25=13 Ind. Ca. 217. That of counsel extends to all persons, who act in that capacity whether barristers, pleaders, vakils, or attornies. *Mackay v. Ford*, 5 H. & N. 792=22 L. J. (Ex.) 404.

This immunity as already stated is not based on any presumption however violent, that the words spoken have been uttered in good faith. It rests upon the higher principle that it is essential to the full and fearless administration of Justice, that those who are protecting their own interests, or discharging duties in a judicial proceeding, should be under no apprehension of ulterior proceedings from the opposite party. "It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty." *Per Fry, L. J., Munster v. Lamb*, 11 Q. B. D. 583 at 607. This rule still leaves ample protection against abuse. A judge who exceeds his duty is liable to censure and removal by the Executive. A false witness may be prosecuted for perjury. An advocate may be reprimanded and stopped in court by the presiding judge, and his conduct may be brought to the notice of the authority which controls his branch of the profession. (Ev Act, s. 150.) Accordingly, it is long since

established that no proceedings for libel or slander can be brought against judge, party, or witness, in respect of words spoken in the course of a judicial proceeding, although they are uttered falsely and maliciously, and without reasonable and probable cause. As to judges see *Scott v. Stansfield*, L. R., 3 Ex. 220; *Fray v. Blackburn*, 3 E. & S. 576, and *per Brett*, M. R., *Munster v. Lamb*, 11 Q. B. D., at 603, 608, *overruling* the dictum of Lord Denman in *Kendillon v. Maltby*, 1 Car. & M. 402; *Anderson v. Gorrie*, [1895] 1 Q. B. 668; *ante* §§ 53—55 at pp 138 to 149. As to witnesses, *Heris v. Smith*, 18 C. E. 126=25 L. J. (C. P.) 195; *Anderson v. Broomhead*, 4 H. & N. 569; 28 L. J. Ex. 250. *Seaman v. Netherclift*, 1 C. P. D. 540; 2 C. P. D. 53. The same rule to its fullest extent was laid down as to counsel in *Munster v. Lamb*, in which the whole law upon the subject was reviewed by the Court of Appeal. There Brett, M. R., said

‘For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client. I shall assume that the words were uttered without any justification, or even excuse, and from the indirect motive of personal ill will or anger towards the prosecutor, arising out of some previously existing cause, and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered, nevertheless, inasmuch as the words were uttered with reference to, and in the course of the judicial inquiry which was going on no action will lie against the defendant, however improper his behaviour may have been. 11 Q. B. D., at 599.

A privilege of so wide an extent must be strictly limited in the cases to which it applies. It a judge, whether sitting on the bench or not, hears and answers applications for advice by parties who have no cause pending, over which he has jurisdiction, his remarks have nothing but the ordinary and limited privilege, *McGregor v. Thwaites*, 3 B. & C. 24; *per* Lord Campbell C.J., *Lewis v. Lery*, 27 L. J. (Q. B.) at 283=E. B. & E. 537; *Kibbey v. Simpson*, 10 Exch. 358; *Gillen v. Hall*, 2 H. & N. 379; *Thomas Picton*, 30 St. Tr. 225; *Law v. Llewellyn*, [1906] 1 K. E. 437. And this would

apply to any case where the judge chooses to make observations which have no bearing upon any judicial proceeding in which he is engaged. So the statements in a writ of summons have not the same immunity as would apply to a plaint or written statement. *Bank of British North America v. Strong*, 1 App. Ca. 307. The same principle was applied where a party, who was defended by counsel, chose to interfere during the examination of a witness, and make grossly defamatory remarks upon his character, 15 M. 414. but where a party got his counsel to put to a witness under cross examination a question containing defamatory suggestions, it was held in *Weir*. 1. 587, that he was not answerable for defamation. See also *Weir*. 1 589. So the mere fact that a man is standing in the witness-box does not protect statements which he might make, not as part of his evidence, nor in his character of witness, though if they are made in that character, they would not be deprived of immunity because they were irrelevant to the inquiry before the court. *Per Cockburn, C.J., and Bramwell, J., Seaman v. Netherclift*, 1 C. P. D. 549, 2 C. P. D., 53; *Goffin v. Donnelly*, 6 Q.B.D. 307; *Bottomley v. Brougham*, [1908] 1 K.B. 584, 8 C. W. N. 292=1 Cr. L. J., 122. It has even been laid down that the remarks of a witness in the box wholly irrelevant to the inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously for his own purpose is not protected, 32 C. 756=9 C. W. N. 911=2 C. L. J. 105=2 Cr. L. J. 453, following 21 C. 332. see 2 W. R. (Cr.) 36, 3 W. R. (Cr.) 45, 5 C. W. N. 293; 32 C. 1060. In England also an observation made by a witness while waiting about the Court before or after he has given his evidence is not privileged, *Trotman v. Dunn*, 4 Camp 311; *Linam v. Gowing*, 6 L. R. Ir. 259. Still less would there be any privilege where the witness had left the witness-box and finished his deposition. 10 A. 425 at 455.

The Penal Code makes an attempt to reconcile two rival principles. In the first place it is for the public welfare that the privilege of resorting to court for redress of injuries ought not to be hampered, and on

the other hand it is equally for the public welfare that the procedure of courts of justice should not with impunity be used as the means of indulging in personal spite, 3 C. L. R. 122. This attempt at reconciliation has resulted in a conscious departure on the part of the framers of the Code from the doctrine of absolute privilege. The language of Exceptions 7 and 9 certainly does not import any such absolute immunity as is recognized by English law. The illustration appended to Exceptions 7, 8 and 9 make this abundantly clear. Each of those Exceptions uses the term "good faith" as an element in the definition, and this is repeated in each of the illustrations annexed. Accordingly, in a case where a party to a criminal prosecution had used defamatory expressions against the opposite party with reference to the charge, and, as a part of the proceeding, the statements were held to be punishable, as not being made with due care and attention, and, therefore, not in good faith. 2 W. R. (Cr.) 36; 3 W. R. (Cr.) 45; and see *per* Straight, J., 3 A. 815; 9 B. H. C. R. 451; 3 C. L. R. 122. In a later case, where a defendant in a civil suit had filed a petition, asking that a witness might be recalled for further examination, and in the petition made defamatory statements against him, the Calcutta Court held that he was properly convicted under s. 509, and was not protected by Exception 9, as he had not acted in good faith. Phear, J., based his judgment upon the fact that the Penal Code alone should be looked to, and not the English cases, so far as they went beyond the provisions of s. 499. 14 W. R. (Cr.) 27 *folld.* in 23 C. 867. See 5 C. W. N. 293. On the other hand, it has been expressly laid down by the Judicial Committee, as regards civil suits in India, that, on grounds of public policy, "witnesses cannot be sued in a civil court for damages in respect of evidence given by them upon oath in a judicial proceeding. The ground of it is this: that it concerns the public and the administration of justice that witnesses, giving their evidence on oath in a court of justice, should not have before their eyes the fear of being harassed by suits for damages, but that the only penalty which they

should incur, if they give evidence falsely, should be an indictment for perjury." 11 B. L. R. 321 at 328=17 W. R. (P. C.) 283 followed in 15 C. 264; 8 C. W. N. 292=1 Cr. L. J. 122. Of course the rule as regards witnesses is only an instance of the wider rule already discussed. Hence the English rule, to its full extent, has been followed by the Indian courts in suits against a judge, 17 M. 87, party, or witness, for defamatory expressions used in the conduct of a suit. 14 B. 97. It would be singular if the public policy which forbids such persons to be harassed by civil suits, would allow them to be harassed by prosecutions. See *per* Shephard, J., 11 M. 477 at 479. This was evidently the *ratio decidendi* in the recent Full Bench ruling of the Madras High Court, 36 M. 216=23 M. L. J. 39=11 M. L. T. 416=13 Cr. L. J. 275=1912 M. W. N. 393=14 Ind. Ca. 659, though in arriving at this result the judges had to hold that ss 499 to 503 were not exhaustive of the law of criminal defamation in India. See also 30 M. 222=6 Cr. L. J. 130; 9 Cr. L. J. 276; 17 B. 127 & 573. The Allahabad High Court, 22 A. 234, 24 A. 635, 10 A. 425, 1890 A. W. N. 170; 3 A. 815, 29 A. 635=1907 A. W. N. 235=4 A. L. J. 695=6 Cr. L. J. 197 and the Punjab and Lower Burma Chief Courts, 1889 P. R. 34 & p. 131 n.; 1893 P. R. 14; 1913 P. R. No. 5=1912 P. W. R. Cr. 31=1912 P. L. R. 244=13 Cr. L. J. 434=15 Ind. Ca. 494; 1911 P. W. R. 7=12 Cr. L. J. 193=10 Ind. Ca. 682; 13 Bur. L. R. 96=5 Cr. L. J. 382, also entertained the view that the Code is exhaustive and they are not entitled to go beyond the terms of s 499 which do not embody any case of absolute privilege. 3 L. B. R. 265. As to Mysore, see 15 M. C. C. R. 275. It is necessary that the Legislature should set at rest this unseemly conflict of the two chief courts and the Allahabad High Court on the one hand and the other High Courts which rightly or wrongly relying on the dictum of the Privy Council have to hold the Code to be incomplete in order to permit of the application of the rules of English law in the administration of criminal justice. The urgency for this step will be all the more apparent as the more recent view of the Calcutta High Court as expressed in 40 C. 433=

17 C. W. N. 297=14 Cr. L. J. 100=18 Ind. Ca. 600 is against the view of an absolute privilege as enunciated by the Madras High Court. 38 C. 880=15 C. W. N. 917=11 Ind. Ca. 311 and a number of previous Calcutta rulings as 15 C. 264, 27 C. 262 were *distinguished* on the ground that those were cases of civil liability where perhaps the English rule may be resorted to as embodying the principles of justice, equity and good conscience. And the decision to the contrary in 40 C. 441n.=17 C. W. N. 449=14 Cr. L. J. 69=18 Ind. Ca. 340, was *distinguished* on the ground that the Calcutta judges instead of deciding the question of absolute privilege, were merely of opinion that the Madras Full Bench ruling rendered the propriety of the conviction doubtful. The law is thus left in an exceedingly dubious state and no counsel can advise a client with any degree of confidence. If a witness makes a defamatory statement totally irrelevant to the enquiry in a Madras Court he will go *scott free*, but if the same evidence is given in Benares he may be held liable. It is highly inconvenient that the interpretation of the language of s. 499 should thus be made a function of the latitude and longitude where the defamatory statement is made and published. Where an application was made to the High Court of Madras, to call upon counsel to answer for language used by him while defending his client on a criminal charge, the application, so far as it came within the controlling powers conferred by s. 10 of the Letters Patent, was refused, and Collins, C. J., laid down the general principle, following *Munster v Lamb*, "that an advocate in this country cannot be proceeded against, either civilly or criminally, for words uttered in his office of advocate." 10 M. 28 at 35; see the observations of Earle, C.J., in *Kennedy v Brown*, 32 L. J. (C. P.) 137 at 146; *Mackay v Ford*, 29 L. J. (Ex.) 404=5 H. & N. 702; *Baker v Carrick*, [1894] 1 Q. B. 838. In *Pennel's* case however the Lower Burma Chief Court said, an advocate cannot shelter himself behind his clients when he allows himself to be made the medium of reckless imputations on a Court of Justice, 2 L. E. R. 130 (F. B.) The same principle was laid down by the

same court where a witness had been convicted for defamation. Collins, C. J., referring to the English cases and the *dictum* in 2 M. 13, said: "The judges there said that the principle of public policy guards the statement of a witness against an action whether the statements were malicious or not. I think the same observations will apply if the criminal law is set in motion, and proceedings taken under s. 500 of the Indian Penal Code. If the petitioner gave false evidence, he can be punished for that offence." 11 M. 479. The same ruling was followed where a man who had answered questions put to him by the police under s. 161 of the Cr. P. C. was indicted for defamation. 16 M. 235; see as to civil action, 28 C. 794. In England, this privilege has been held to extend to statements made by a witness to a party or solicitor in preparing his 'proof' for trial, *Watson v. M'Ewan*, L. R. [1905] A. C. 480. These cases again were followed in Bombay, where witnesses had been erroneously convicted under s. 500 by the trial courts for statements contained in their depositions. See 17 B. 127 & 573; folld. in 27 C. 263; 19 B. 51 at 62; *per Subramania Iyer, J.*, in *Weir* l. 589; 15 M. 414, 31 M. 400; 19 M. L. J. 217=6 M. L. T. 15=9 Cr. L. J. 385=1 Ind. Ca. 799.

In 19 B. 340, (*followed* in 36 C. 375=13 C. W. N. 340=9 C. L. J. 259=9 Cr. L. J. 165=1 Ind. C. a. 147,) a pleader had been convicted of defamation for the very mild offence of calling the witnesses for the prosecution "loafers." The decision was reversed, as the High Court held that if the word was defamatory, there was no evidence of express malice, which could not be presumed, and that in the absence of such proof, "a Court, having due regard to public policy, would be extremely cautious before it deprived the advocate of the protection of Exception 9." See also as to pleaders, 9 Bom. L. R. 1287=6 Cr. L. J. 387; 2 N. W. P. H. C. R. 473; *Weir* l. 594.

As to the question under discussion, however, the Court seemed inclined to revert to the early decisions, which laid down that the English law could not be resorted to

where it went beyond the terms of s. 499. They considered that judges were already protected by s. 77 of the Code, and that witnesses were protected by Exception 9, unless where they deliberately stated what they knew to be untrue. In such a case, they ought to be charged for giving false evidence, on the general principle laid down in 13 B. 502, that it is an evasion of the law to treat an aggravated as an ordinary offence, and thus introduce a different jurisdiction, or a lower scale of punishment.

In 22 A 234 certain parties were charged for a defamatory statement contained in a petition asking that a Magisterial proceeding might be transferred to another Court, the High Court of Allahabad said that the remarks complained of were in themselves defamatory, but were undoubtedly pertinent to the case which was pending against them in the Criminal Court. According to English Case law, the accused could not, therefore, be proceeded against, either civilly or criminally for using these expressions. After examining several of the Indian decisions, the judgment proceeded "The Indian Legislature might, had it chosen, have so framed s. 499 of the Indian Penal Code as to afford to parties, counsel and witnesses in this country the same protection against indictment for defamation which they have in England. The fact remains that it has not seen fit to do so. The case must therefore be decided according to the Indian Penal Code." Judging it by that Code, they held that, as the statement complained of might have been reasonably supposed to be true, though it was in fact false, it was made in good faith for the protection of the interests of the accused, and was therefore protected by Exception 9. As to defamatory matter in petitions addressed to a Court see the Conflicting rulings in 11 M. L. T. 431 = 13 Cr. L. J. 293 = 14 Ind. Cas. 757 & 40 C. 441n & 433; 4 Sind. L. R. 67 = 8 Ind. Ca. 220.

On the whole, it cannot be said that the law as to parties or counsel is finally settled in India. The Privy Council in (23 I. A. 18) expressed a strong opinion that the direct words of an Indian Act ought not to be

frittered away by reference to English cases laying down a different rule.

213. First Exception—truth—for public good.—It is a serious question which the advocate for the defence has to face at a very early stage of the case, before deciding to rely on justification as a defence whether he will admit the making or publication of the libellous matter with intent to harm the reputation of the complainant. Though the Code of Criminal Procedure is silent on the point, no person could both deny as well as justify a libel with any likelihood of his plea being accepted by a court. A plea of not guilty under the Code, no doubt, would technically involve one of confession and avoidance. But in ordinary practice, it would be as illogical and dangerous for the accused to deny and justify in the same breath, as it would be for a man charged with murder to set up an *alibi*, and at the same time plead provocation or self-defence. See *Rassam v. Budge*, (1893) 1. Q. B. 571 at 574, 575, and *Bremridge v. Latimer*, 12 W. R. 878.

Nothing is said in the definition of a defamatory imputation, to imply that it must be false. For this purpose it is necessary to resort to the first Exception: "It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact."

The result of the definition and of the Exception is to assimilate the law of India to that of England, since *Lord Campbell's Act*, 6 & 7 Vict., c. 95. The general rule in England was that, on an indictment for libel, its truth could not be pleaded as a defence to the charge, nor even proved after conviction in mitigation of punishment, though it might be shown for that purpose that the defendant, when he published the charges contained in the libel, believed, and had reasonable ground to believe, that the charges were true. *R. v. Halpin*, 9 B. & C. 65. Under *Lord Campbell's Act*, which is, in substance, the same as the above Exception, the

defendant was allowed in such a case to prove that the statement was true, and that it was for the public benefit that the matters alleged should be published. Both parts of the plea have to be established. A remarkable instance of the success of such a defence was the collapse of the prosecution brought against the Marquis of Queensberry by *Oscar Wilde*, in 1895. The same doctrine once existed in civil cases, where the action was for slander in writing, 5 *Bac. Abr.* 203, though it has long since been settled that in all suits for defamation the truth of the libel may be pleaded as a justification. Even in such cases, however, the purely wanton raking up of the past events of a man's life appears not to be always capable of justification.

In an early case, *Cuddington v. Wilkins*, *Hob* 67 at 81, the plaintiff sued for defamation, the defendant having said of him, "He is a thief, and why will you take his part." The plea was that the plaintiff had stolen a sheep; to which it was replied, that the King had issued a general pardon, and that he came within its terms. This replication was held good, even though the defendant did not know of it, on the ground that a royal pardon cleared the offender of the crime and infamy. The Court said that a person who did not know of a secret pardon might arrest a man for felony, "because it is an advancement of justice, but so it is not to call him a thief, for that is neither necessary, nor advanceth nor tends to justice."

In a recent case, where, in an interchange of amenities between newspaper editors, one called the other a *felon-editor*, and was sued accordingly, it was pleaded that the defendant had been convicted of felony and sentenced to twelve months' imprisonment. Replication that the conviction had taken place many years ago, and that the plaintiff had endured his punishment, and by virtue of stat 9 Geo IV, c. 32, s. 3, was in the same position as if he had been pardoned. The replication was held good. The Court, referring to *Cuddington's* case, said that the Legislature deliberately adopted the view of the judges, it was considered to be proper that a person who had endured the punishment for his offence, should not be liable to have reflections made upon him. Such questions could be put in cross-examination, where it was

necessary, for purposes of justice, to test his credibility, "but needlessly to rake up the past misfortunes of another person, shows a malignant and wicked frame of mind." *Leyman v. Latimer*, 3 Ex. D. 352.

In *Monson v. Tussads*. Lord Halsbury, after citing the above decisions, said: "It seems to be thought that because it could be said that it was true that the applicant was tried for murder, this is of itself a sufficient answer. It seems to me that this is no answer at all. Because the applicant was tried for murder, and because the circumstances of the trial are commonly known by the report of proceedings in a court of justice—privileged, be it observed, because they are such reports,—this does not justify the unauthorized and unproved repetition as a narrative of circumstances of suspicion, or of evidence, which certainly were urged by the p

[1894] 1 Q. B.

2 Steph.

as guilty of murder,

Sir James Stephen,

remarks of Benson, J.

in which he treated a statement that the complainant had been convicted and sent to jail for theft, as covered by Exception 4 to s. 499, as a true report of proceedings in a court of justice seem clearly wrong.

The expression public good denotes the common convenience and welfare of society or a considerable section thereof as opposed to the convenience of individuals. See *Whitely v. Adams*, 15 C. B. (N. S.) 392 at 418, and *Macintosh v. Dunn*, L. R. [1908] A. C. 390 at 399=77 L. J. (P.C.) 13. The denouncing of a Brahmin for providing alcoholic refreshment at a wedding-reception for those of his guests who desired to partake of such beverages was held not to be for public good, 4 Bur. L. T. 148=12 Cr. L. J. 125=9 Ind. Ca. 775.

Even where it is for the public benefit—that is, for the benefit of a portion of the public—that certain facts should be made known, the privilege conferred by Exception 1 may be taken away, if the facts are disseminated to a circle of readers wider than those who can possibly be interested in the facts communicated. This would warrant a finding that the statement was not for the good of the public actually addressed. 19 B. 703; *Ratanlal* 769; 5 C. P. L. R. 59; a privilege does not justify a publication in excess of the purpose or object which gives rise to it, 6 M. 381 at 395, *Parcell v. Souler*, 1 C. P. D. 781 & 2 C. P. D. 215; 15 M. 214.

As the *onus* of making out a justification so as to get the benefit of an Exception is specially cast on the accused (s 105, Ev. Act). 2 Agra H. C. R. 87, where it is intended to rely on the truth of a libel as a defence to the charge, it is necessary to plead specially justifying it, so that the prosecutor may know what the case is that he has to meet, and he will be entitled to full particulars as he has no other opportunity to rebut the case for defence *Speck v Phillips*, 5 M. & W. 279. When the prosecutor is examined as a witness, he should be distinctly cross-examined upon all the facts which it is intended to prove against him 6 A. 220.

Where a libel contains several distinct defamatory statements, and a justification is pleaded to the whole, if it fails as to some, judgment must be given against the defendant. *It v Neuman*, 1 E. & B. 558; 3 A. 664; *McGreger v Gregory*, 11 M. & W. 287; *Fleming v. Dollar*, 23 Q. B. D. 388. Where, however, a plea of justification as to a particular assertion is supported by several instances, some of which are not proved, judgment may still be given for the defendant, if those which are made out amount to a substantial proof of the charge which is justified as where the defendant published, L. B. and G. are a gang who live by card-sharping, and proved two specific instances where persons had been cheated by them, *R v Labouchere*, 14 Cox 449; *Morrison v Harmer*, 3 Bing. (N. C.) 767; *Edsall v Russell*, 4 M. & G. 1090; *Alexander v. N E Ry Co.*, 34 L. J. (Q.B.) 152 *Cf Gwynn v S E Ry Co.*, 18 L. T. 738; *Biggs v G. E. Ry Co.*, 16 W. R. 908; *Helsham v Blackwood*, 11 C. B. 128. But where the plaintiff was described as a libellous journalist, proof that in a single instance he was mulcted in £100 damages for a libel was held insufficient, *Wakely v. Cook & Healey*, 19 L. J. (Ex.) 91. See also *Bishop v Laimers*, 4 L. T. 775; *Clarkson v Lawson*, 6 Bing. 266.

214 Second Exception: Fair criticism in public interest.—As remarked by the Privy Council in *Arnold's case*, 18 C. W. N. 785=26 M. L. J. 621, the distinction between the second and the first exceptions

is the first deals with allegation of fact and the second deals with expressions of opinion. In all the cases previously discussed in §§ 211 & 212, the nature of the privilege consists in this: that statements of a defamatory nature, embodying assertions of fact which are not true, are yet protected by virtue of the occasion on which, and the purpose for which they were made. There is, however, a completely different class of cases which is provided for by the second and the following Exceptions.

It will be seen that in all these cases what is protected is opinion not assertion, and that only in regard to persons or things which affect the public by their nature or their interest. They are all particular instances of the general principle of English law, that fair comment upon public men, or upon matters of public interest is not libellous. In the language of Parke, B: "There is a difference between publications relating to public and private individuals. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his commentary a cloak for malice and slander; but any imputation of wicked or corrupt motives is unquestionably libellous." *Parmiter v. Coupland*, 6 M. & W. 105; *Seymour v. Butterworth*, 3 F. & F. 372. Cases which come within this rule are not privileged, in the sense of being libels which cannot be punished. They are not libels at all. They are acts done in the exercise of a right, given by our constitution though not by the constitution of other countries, and upon which, more than upon anything else, depends the reality of what we call liberty. "The defence in such a case is that the words are not defamatory, that fair and proper criticism is not libel. It is only, as was said by Bowen, L. J., in *Merivale v. Carson*, 20 Q. B. D. at 283, when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all." *Per Lopes, L. J., South Hetton Coal Co. v. North-Eastern News Association* [1894], 1 Q. B. at 141. When, therefore, such a defence is set up, it is necessary to show (1) that the matter was of public

interest; (2) that the statements of fact were accurate; and (3) that the comment was fair.

Matters are of public interest either by their own nature, or because the person criticized has chosen to make them so. Matters connected with the state of the nation, the government, the administration of justice, the management of municipalities, the character and conduct of public men are necessarily such. So is the sanitary condition of the cottages let by a Colliery Company to its workmen, *South Hetton Coal Co. v. North-Eastern News Association* [1894], 1 Q. B. 133, the professional behaviour of a medical practitioner *Allbutt v. Council of Medical Education*, 23 Q. B. D. 400, the conduct and management of a church by its incumbent, *L. R.*, 1 Q. B. 699, the acts and language of persons attending a public meeting for a public object *Davis v. Duncan*, *L. R.*, 9 C. P. 396. The mode in which a purely private charity is managed is not a matter of public interest *Gathercole v. Miall*, 15 M. & W. 319.

The private life and opinions of anyone are not matter of public interest, unless so far as they affect his fitness for the discharge of any public duties. Exceptions 2 and 3 appear to limit criticism of the character of a public servant or public man to his conduct in such capacity. Cases in which it was for the public good to publish acts of private misconduct which showed his unfitness for his position, would be protected by Exception 1. A man may make his private life or opinions public property by writing and publishing a book about them, and he may make his management of his private business public property, by publishing advertisements or handbills about it, *Paris v. Levy*, 9 C. B. (N. S.) 342=30 L. J. (C. P.) 11.

It is essential to this defence that the alleged facts upon which the criticism rests should be accurate. The comment must not be based upon a perverted text

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distinction cannot be too clearly borne in mind, between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a publicman, and quite another to assert that he has been guilty of acts of misconduct." *Per Lord Herschel, C., Davis v. Shepstone*, 11 A. C 187 at 190; *Purcell v. Souler*, 2 C P. D. 215.

Nor has a newspaper any greater licence in this respect than a private individual. In the case last cited, a newspaper editor had received a deputation, which came up to London to complain of certain alleged offences committed by a public man, and, having heard their statements, published an article which assumed, falsely, that they were true.

If newspaper men in this country were under the delusion that the law has accorded them a special privilege the judgment of the Privy Council in *Arnold's case*, 18 C. W. N 725=26 M. L. J. 621 will serve to open their eyes. In delivering the judgment of the Privy Council, Lord Shaw said: "Their Lordships regret to find that these appeared on the one side in this case the time worn fallacy that some kind of privilege attaches to the profession of the press as distinguished from the members of the public. The freedom of the journalist is an ordinary part of the freedom of the subject, and to whatever lengths the subject in general may go, so also may the journalist, but, apart from Statute law, his privilege is no other and no higher. The responsibilities which attach to his power in the dissemination of printed matter may, *as in this case* make him more his com- or subject No privilege attaches to his position. See also *Couch, J.* 1 B. H. C. R. Appx. 85, at 91, and 3 A. 815.

In *Campbell v. Spottiswoode*, 3 B. & S. 769=32 L. J. (Q. B.) 185, the *Saturday Review*, in criticising letters, in which the owner of a religious paper sought subscriptions for it, as a means of converting the Chinese, imputed to him that he had published a false subscription list. The jury found that this was untrue, but that the writer of the article did believe the imputations in it to be well founded. This was held to be no justification. Blackburn, J., pointed out that this was not a case of privilege in which such a defence was admissible. Crompton, J., said: "I have always in my experience

heard it laid down that although you may attack a public person for anything he has done publicly, the moment you go beyond that and impute wickedness to him, then you come within the rule with regard to all who publish a libel, which is that you must prove that the imputations are true." Nor is it any justification that the false statement had appeared in and been copied from another newspaper 12 B. 167.

Lastly, the criticism must be fair. Probably no better explanation of what is fair criticism could be furnished than the summing up of Cockburn, C. J., in the case of *Wason v. Walter*, L. R., 4 Q. B. 73 at 96, which was held by the Court to be perfectly correct.

"The jury were told that they must be satisfied that the article was an honest and fair comment on the facts. In other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice; but this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion. That a person taking upon himself publicly to criticize and condemn the conduct or motives of another, must bring to the task not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of the censure." See also the summing up of Bramwell, B., in *Kelly v. Sherlock*, L. R., 1 Q. B. 689, cited and approved in *Kelly v. Tinning*, L. R., 1 Q. B. 699, and *per Lord Esher*, *South Hetton Coal Co. v. North Eastern News Association* [1894], 1 Q. B. 133 at 140.

In an action against a paper which had published a criticism on a play, Bowen, L. J., said

"It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong and exaggerated or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism. In the case of literary criticism, it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author he

reviewer, *McQuire v. Western Morning News Co., Ltd.* [1903] 2 K.B. 100; *Cookery v. Edrcaim*, 14 T. L. R. 34; *Wason v. Walter*, L. R., 4 Q. B. 73; *Dunne v. Anderson*, 3 Bing. 88, where it was held the presentation of any subject to parliament would make it a fit subject for public comment; so also evidence offered before a Royal Commission. See *per Wickins, V.C. Mulheruv. Ward*, 13 Eq. 622; or proceedings at a public meeting, *Davis v. Duncal*, L. R., 9. C.P. 396. While opinions are protected, a statement of what is not true as a fact is not covered by the Exception, e.g., to impute conduct to a person amounting to a criminal offence can by no stretch of imagination be called an honest expression of opinion. See 36 C. 883 at 897-899, 35 C. 495; *Popham v. Pickburn*, 7 H. & N. 891 at 898; where comments are professedly based upon what the writer calls credible information received, if it can be proved as a fact accused never received any information, credible or otherwise, his liability becomes conclusive, *Calthorpe*, 27 J. P. 581, *Andrew Grey*, 26 J. P. 663; *Davis v. Shepstone*, 11 A. C. 187 at 190; when positive facts are asserted, there is no other defence except an absolute justification. Good faith, though a good defence to one's opinions is no defence for an allegation as a fact of that which never was a fact, *Peters v. Bradlaugh*, 4 T. L. R. 467, *Brennen v. Ridgeway*, 3 T. L. R. 592; *Bryce v. Rusden*, 2 T. L. R. 435; *Lefroy v. Burnside*, 4 L. R. Ir. 557; *Hunter v. Sharpe*, 4 F. & F. 983.

The public career of a member of a legislative council or of a local or municipal board, may no doubt be the subject of comment, however harsh or severe it may be, but none has a right to peep into his private life-history, not material to his public life, and no one has a right to publish to the world facts injurious to a person merely because he happens to stand as a candidate. *Duncombe v. Daniell*, 8 C. & P. 222. But it may be necessary in public interest to expose the intemperate habits of a clergyman or the immoral habits of a physician or the dishonest habits of an attorney because in their cases, the private vice becomes material as affecting the discharge of their public duty, *Kelly v. Tintling*, L. R., 4

Q. B. 699. It has also been held the conduct of a private trust is not a matter of public interest, though it would be otherwise if one takes upon himself to expose the mismanagement of Hindu and Mahommedan religious endowments of a public or a quasi public character. See *Walker v. Brogden*, 19 C.B. (N.S.) 65, *Gathescole v. Miall*, 15 L. J. (Ex.) 179; *Booth v. Briscoe*, 2 Q. B. D. 496.

216. Fourth Exception; Reports of Proceedings.—

It must not be supposed that whenever one person is protected in making a defamatory statement, another person will be protected in publishing it. Whether he may do so or not will depend upon a completely different question, whether the persons whom he addresses, whether (limited in number, or the general public,) if the matter appears in a public print, have such a right or interest to know the particular matter as will justify its being spread abroad, the general principle being the advantage to the public in having these proceedings made available would more than counterbalance the inconvenience if any to private persons whose conduct may be the subject of such proceedings, *Wright*, 8 T. R. 293 at 298; 26 M. 464. But this benefit ought not to be made the cloak for ulterior purposes. Thus when a series of seditious articles were reprinted and published when one of them had been made the subject of a prosecution against the editor, this was held not justified as the other articles were not used as evidence in the case under trial, 35 C. 141 at 154. The strongest case of this sort is that of judicial proceedings. These are provided for by the fourth Exception: "It is not defamation to publish a substantially true report of the proceedings of a court of justice, or of the result of any such proceedings."

"*Explanation.*—A justice of the peace, or other officer holding an inquiry in open court, preliminary to a trial in a court of justice, is a court within the meaning of the above section."

As to such reports, Lord Halsbury, C., said:

"The ground on which the privilege of accurately reporting what takes place in a court of justice is based is, that judicial

proceedings are in this country public, and that the publication of what takes place there, even though matters defamatory to an individual may thereby obtain wider circulation than they otherwise would, is allowed, because such publication is merely enlarging the area of the court, and communicating to all that which all had the right to know." It follows that the report must fairly represent to the reader what he would have learnt for himself if he had been present. The report of the evidence on one side without the evidence on the other; of the examination of a witness without the cross-examination; of the summing-up or judgment, where such summing-up or judgment gave only a one-sided view of the case would not be a fair report and therefore would not be privileged. *MacDougall v Knight*, 14 A. C. 194 at 200, *Flint v. Pike*, 4 B. & C. 473 at 482. When the defendant's counsel referred to the plaintiff's attorneys as 'Messrs. Quirke, Gammon, and Snag, referring to the notorious firm of pettifogging attorneys of that name in the well known novel 'Ten Thousand a year' and a newspaper-man reproduced this description without any reference to the evidence adduced to rebut such a statement, the comment was held to be too one sided to be fair, *Woodgate v. Ridcutt*, 4 F. & F. 202.

It is not, however, necessary that the report should be complete, in the sense of being *verbatim*, if it is substantially fair and correct. *Hoare v Silverlock*, 9 C. B. 20=19 L. J. (C. P.) 215. It is immaterial whether the proceedings were *ex parte* or not or whether the court had jurisdiction or not, *Usill v Hales*, 3 C. P. D. 319, which overrules *McGregor v. Thwaites*, 3 B. & C. 24. The reporter ought not to mix up comments of his own, *Fisher*, 2 Camp 563. Where a report of proceedings was headed by a sensational head-line 'Shameful conduct of an Attorney,' this was held to be not justified, *Clement v. Lewis*, 3 B. & Ald. 702. See also *Boydell v Jones*, 4 M. & W. 446; *Lewis v. Levy*, 27 L. J. (Q. B.) 282; *Lewis v. Walter*, 4 B. & Ald. 605, *Roberts v. Brown*, 10 Bing. 519. The proceedings should be kept distinct from comments if there any *Fleet* 1 B. & Ald. 379, *Andrews v. Chapman*, 3 C. & K. 286. The report must not be one-sided or highly coloured, *Styles v Nokes*, 7 East. 493. A newspaper article affecting the conduct and character of persons under trial which would have been inadmissible in evidence against them, published during the proceedings would not be within this Exception, *R. v Tibbitts*, [1902] 1 K. B. 77.

It was held in a case in England that the privilege of publishing proceedings of courts of justice was not absolute, and that if it was shown that the report was sent to a paper for the mere purpose of injuring the person concerned, he would be liable to an action *Sterens v. Sampson*, 5 Ex. D. 53. This, however, seems opposed to the language of Lord Halsbury, in a much later case above quoted. In Exception 4 nothing is said as to good faith, the only requisite being that the report should be substantially true. Such a report may, however, be punishable under s. 292, if it contains obscene matter *Steele v. Drannan*, L. R., 7 C. P. 261. *Hicklin*, L. R., 3 Q. B. 360. In *re the Evening News*, 3 T. L. R. 255; or is blasphemous, *Carlisle*, 3 B. & Ald. 167, or the publication of which is for other reasons prohibited by the Court, *Clement*, 4 B. & Ald. 218. But in the absence of express prohibition the right of reporting is in no way affected merely because the proceedings are not in open Court but in Chambers, *Smith v. Scott*, 2 C. & K. 580 or in jail, *Ryalls v. Leader*, L. R. 1 Ex. 296.

As to preliminary proceedings, see *Ryalls v. Leader*, above and *Kimber v. Press Association*, [1893] 1 Q. B. 65. We have already seen (§ 214 at p. 902) a newspaper has no higher privilege than any other means of publication, say, a pamphlet, *Milissich v. Lloyds*, 13 Cox. 575; *Solomon v. Isaac*, 20 L. T. 885.

The result of judicial proceedings, the publication of which is permitted by this Exception, must be the result on the date of publication, so that if a conviction had been reversed in appeal, this fact ought to be stated; or if a decree-debt had been satisfied, a mere report that a decree had been passed would not be covered by this Exception, *Williams v. Smith*, 22 Q. B. D. 134.

In England reports of debates in Parliament are privileged on the same principle as judicial proceedings, viz., on the public policy which entitles everyone to know what is going on in Parliament *Wason v. Walter*, L. R., 4 Q. B. 73. But, again, the report must be a fair

one. The report of a single speech which contains defamatory matter, without the others which might explain or contradict it, is not privileged, unless the speech is *bona fide* published by a member for the benefit of his constituents. In that case there is the mutuality of interest which creates privilege. *R v Grevy*, 1 M. & S. 273; *per Cockburn, C. J., L. R., 4 Q. B. D. 94*. In the great case of *Stockdale v. Hansard*, 9 A. & E., 1., which led to a conflict between the House of Commons and the courts of law, the Queen's Bench decided that the House of Commons had no privilege entitling them to publish papers of a defamatory nature, not being the statement of their own actual proceedings. Such publications are now directly authorized by 3 & 4 Vict., c. 9. The judgment of Lord Denman upon the law apart from statute, is always referred to as embodying the soundest principles of law. See *per Willes, J., in Henwood v. Harrison*, L. R., 7 C. P., at 625=41 L. J. (C. P.) 206, *per Cockburn, C. J., in Wason v. Walter*, L. R., 4 Q. B. at 86.

Reports of the proceedings of a quasi-judicial body, which is entrusted with the control of persons and matters, in which the public are interested, and in respect of which they are entitled to information, are also privileged. *Allbutt v Council of Medical Education*, 23 Q. B. D. 400. So are Government proceedings relating to matters of national importance, as, for instance, where the Admiralty published a minute after the loss of the turret-ship *Captain*, to explain the circumstances under which it had been sent out, and the general policy of the Board as to the construction of the Navy, which contained a letter reflecting upon the plans of a naval architect. *Henwood v. Harrison*, L. R., 7 C. P. 606. Whether a report of the proceedings of a municipal body, in the course of which aspersions are cast upon an individual, would have any privilege on the ground of public interest, seems not quite settled. See *Davidson v. Duncan*, 7 E. & B. 229=26 L. J. (Q. B.) 104; doubted in *Davis v. Duncan*, L. R., 9 C. P. 396. No such privilege exists where an *ex parte* statement is made as to a person who is not present to defend himself, and as to which no proof is offered and no decision is given. *Purcell v.*

Souler, 2 C. P. D. 215. Even where the public body is directed by statute to publish an annual statement of its proceedings, this does not authorize a report by anticipation of the proceedings at a particular meeting at which charges are made, which might in the authorized annual statement be rebutted or explained. *Popham v. Pickburn*, 7 H. & N. 891. The charge delivered by a Bishop to his clergy is privileged as between himself and them, and if he is attacked in public in respect of anything supposed to have been said in such charge, he is justified in sending the charge to the newspapers in self-defence. *Laughton v. Bishop of Sodor and Man*, L. R., 4 P. C. 495.

It is probable that in India similar decisions would be given in all the above cases under Exceptions 9 and 10

217. Fifth Exception. Fair comment on cases adjudged in open Court.—This Exception protects *bonâ fide* comment on cases adjudicated, while curtailing the freedom of comment when they are still *sub judice* (s. 228B) *R. v. Tibbits* [1902] 1 K. B. 77. The comment should however be fair and *bonâ fide*. See the observations of Cockburn, C.J., in *Woodgate v. Rideout*, 4 F. & F. 202, at 216 & 223 and in *Tanfield*, 42 J. P. 423 at 424. Judges are apt to err like any other people, and it would not be a contempt of Court if the criticism of judges be honest. See *per* Fitzgerald, J., in *Sullivan* 11 Cox 44 at 57; also *Dar v. Ely*, L.R. 7 Eq. 49; *White*, 1 Camp 359n. *per* Lord Russell, C.J., in *Gray*, [1900] 2 Q.B. 36 at 49. But it is not fair criticism to say of an accused person tried and acquitted that he is really guilty, for men are not tried by newspaper scribblers but by duly constituted tribunals. *Riskallah Bey v. Whitchurst*, 18 L. T. 615; *Lewis v. Walter*, 4 E. & Ald. 605; though it would be right to point out reasons why there had been a miscarriage of justice or in what respects the trial judge had erred, it would be intolerable if personal or corrupt motives are attributed to judges every time they go wrong *Hibbins v. Lee*, 4 F. & F. 243; 1887 P. R. No. 21, following 1879 P. R. (Civ.) No. 16.

Not only may the action of judges be the subject of temperate and reasonable criticism, but so also the conduct of parties, counsel and witnesses, provided care is taken not to exceed the limits of fair comment. Thus when a servant girl, who had given birth to a bastard child, failed to get it attributed on her master, a clergyman, it was held to be improper for a newspaper editor to uphold the girl's story, alluding to the clergyman as a gay deceiver, *Roberts v Owen*, 5 T. L. R. 11. Similarly a mere newspaper man would be exceeding the limits of fair criticism if he chooses to characterise a witness as a maliciously or recklessly false witness. *Felkin v Herbert*, 33 L. J. (Ch.) 294; *Roberts v Brown*, 10 Bing. 519; *Littler v Thomson*, 2 Bev. 129; and no one would be justified in commenting upon a person not examined or a document not exhibited. *Helsham v Blackwood*, 11 C. E. 111; *Hope v Sir W. Leng & Co*, 23 T. L. R. 243; *Andrien Grey*, 26 J. P. 663. The right to comment on terminated judicial proceedings is a right shared by the newspaper writer with the ordinary subject. He has no higher right by reason of the fact that he earns his livelihood by spreading information regarding facts and opinions. When a defendant in certain criminal proceedings after the termination of the proceedings, reiterated to his pleader what was substantially his plea in defence, this reiteration was held to be privileged both under this Exception as well as on the ground it was communication made by a party to his legal adviser at a time when the relationship of legal adviser and client cannot be said to have ceased, and under such circumstances the communication cannot be said to have been made with intent to injure the reputation of any one, 13 C. W. N. 1087=10 Cr. L. J. 475=4 Ind. Ca. 27.

218. Sixth Exception Opinion on performance subjected to public judgment.—Lord Ellenborough said in *Tobart v Tipper*, 1 Camp 350 at 351, "Liberty of criticism must be allowed or we should neither have purity of taste nor of morals. Fair discussion is essentially necessary to the truth of history and the advancement of science, that publication therefore I

shall never consider as a libel which has for its object not to injure the reputation of any individual but to correct misrepresentations of fact, to refute sophistical reasoning, to expose a vicious taste in literature, or to censure what is hostile to mo

the appreciation (.

the criticism is

public appreciation and the opinion expressed, however adverse it may be, is a possible inference therefrom, *Strauss v. Francis*, 4 F. & F. 939 & 1107 at 1114 but no one can tolerate the inference from a badly constructed syntax of words that the author was a swindler or a libertine, 31 B. 293=9 Bom. L. R. 230 at 235=5 Cr. L. J. 237. A critic may be illogical, or capacious, or his inferences and opinions may be obtuse, but provided he acts in good faith, i.e. with due care, and attention, he has got every right to attempt to mould public opinion in accordance with his own taste on the work subjected to the appreciation of the public. No one can expect an ordinary newspaper writer or reviewer to possess a calm and philosophical mind or a refined taste, but if his opinions and conclusions are honest, he is protected. But if he bases his opinions on what is not subjected to public criticism, his good faith cannot save him from liability; similarly if his opinions are grounded on misstatements of fact, however *bona fide*, see *Thomas v. Bradbury Agnew & Co., Ltd.*, L. R. [1906] 2 K. B. 627. In this case, Mr. H. W. Lucy (Toby M.P.) reviewed in the *Punch*, a biography written by the plaintiff. The review contained a misstatement of fact to the effect that the materials available for a delightful biography were abundant. It was held by the Court of Appeal on a full consideration of the rulings in *Campbell v. Spottiswood*, 3 B. & S. 769=32 L. J. (Q.B.) 185; *Hentwood v. Harrison*, L. R., 7 C. P. 606, and *Merical v. Carson*, 20 B. D. 275, that this misstatement of fact made the case a fit one to go before a Jury and that as the Jury inferred malice which would put the review beyond the pale of fair comment, the verdict could not be interfered with. Thus to give room to the plea of fair comment the facts must be truly stated. In *Duplany v. Davis*, 3 T. L. R. 184 a critic advised an actor to return

to 'his old profession, that of a waiter,' and was held liable when the plaintiff proved that he had never been a waiter. If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails, *Hunt v. The Star Newspaper Co., Ltd*, [1908] 2 K. B. 309 at 320=77 L. J. (K. B.) 732. See also *Peterwalker & Son v. Hodson*, [1909] 1 K. B. 239; *Digby v The Financial News*, [1907] 1 K. B. 502 at 507; 36 C 883 at 897-898. 'To prove malice extrinsic evidence of malice is not necessary. The words of the libel and the circumstances attending its publication may themselves afford evidence of malice,—per *Fletcher, J*, 36 C. 907 at 915 where English authorities on the subject are referred to. See also *Dakhyl v Labouchere*, [1908] 2 K. B. 325n=77 L. J., (K. B.) 728. Where the plaintiff was caricatured as an author bowing beneath the weight of his books, it was held to be no libel, *Garr v Hood*, 1 Camp. 355n, though a personal caricature of him as he appeared in private life would have been.

A tradesman's advertisement or handbill or placard is as much open to fair criticism as a literary or artistic publication or an architect's design for a public building, *Thomson v Shackall*, M. & M. 187; *Paris v. Levy*, 9 C. B. (N. S.) 342=30 L. J. (C. P.) 1; *Soane v Knight*, Moo. & Mal. 74.

219. Seventh Exception : Censure by superior on the conduct of subordinate.—The class of cases often arising in India under this exception is in the exercise of spiritual authority vested in a guru over his disciples, 6 M. 381, 8 B. H. C. R. (Cr. Ca.) 168, 11 Bom. L. R. 638=10 Cr. L. J. 372=3 Ind. Ca. 744, 6 M. H. C. R. Appx. 46, 24 B. 13, 22 C. 46, or of social authority vested in the headman of a caste as in *Ratanlal* 387. In both classes of cases the privilege would be lost if the publication was unduly wide, *Simpson v Downs*, 16 L. T. 391; *Harb v. Gatherall*, 14 L. T. 801; *Pears v Ellis*, 6 Ir. C. L. R. 55. In England it has been held a Bishop's charge to his clergy is privileged, *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495

The position may also arise out of a lawful contract. Thus in *Humphries v. Stilwell*, 2 F. & F. 590, the plaintiff was under a contract to supply butcher's meat to a public school of which defendant was the governor. A warning given by the defendant to the school-steward that the plaintiff had been known to sell bad meat was held privileged. In the Illustration to this Exception, the very first instance is that of a judge censuring the conduct of a witness. If a judge is absolutely privileged as held by the Full Bench of the Madras High Court in 36 M. 216, it is difficult to imagine why this instance was put in under this Exception where only a qualified privilege is accorded to a Judge. It is difficult to follow the Madras High Court in its reasoning that in carrying out a large scheme of successful codification, the framers of the Code left untouched the cases of what is known in English law as absolute privilege. As White, C. J., remarks, the framers must have been aware of this doctrine and the Illustrations to this Exception, to Exception Eight, and Illustration (b) to Exception Nine, indicate a conscious departure from the rule of English Law.

220. Eighth Exception: Complaint made to superior touching conduct of subordinate.—As stated in the discussion in s. 212 *supra* at p 886 this Exception need not be resorted to when the accusation is one of an offence punishable under law and made with a view to initiate a judicial proceeding. If the complaint is a false complaint, there is the ordinary remedy provided by s 211. I.P.C. The scope of the Exception is therefore restricted to those accusations which are made not with a view to initiate judicial proceedings, and where the accusation is not absolutely privileged, good faith is an essential pre-requisite. But the illustration appended to this Exception includes the case of a complaint before a magistrate, thus implying that ordinary complaints falling within s. 4 (h), Cr. P. C., are protected only by virtue of this Exception, if they are made bona fide, 3 A. 815. This lends some support to the views of the Allahabad High Court and of the Chief Courts of Panjab and Burma, and the recent view of the Calcutta High Court and it is a matter for regret, attention of the

Court was not drawn to the illustration to this Exception in 36 M. 216 (F.B.)=23 M. L. J. 39=11 M. L. T. 416=[1912] M. W. N. 393=13 Cr. L. J. 375=14 Ind. Ca. 659. The case of a party initiating a judicial proceeding is certainly within the English rule and though that is the very case dealt with by the illustration the learned Chief Justice based his conclusion on the absence of any such indication either in the Exceptions or in the Illustrations

Whatever may be the scope of the Exception, good faith (see § 211 at p. 879 *supra*) is essential to get the benefit of it *Proctor v Webster*, 16 Q. B. D. 112 at 114; 1913 P. W. R. (Cr.) 34=1913 P. L. R. 317=14 Cr. L. J. 606=21 Ind. Ca. 478. A letter written by a Brahmin to the members of his own community to obtain their opinion on a matter affecting his religious interest would come under this Exception, 8 B. H. C. R. (Cr. Ca.) 168. See also *Weir* I. 575. But proof of malice will take away the privilege, *Proctor v Webster*, 16 Q. B. D. 112. or excessive publication without proper investigation, *Ratanlal* 474, 1910 P. W. R. (Cr.) 4, where 1880 P. R. No. 23 is distinguished. Honesty of purpose is essential for protection and the imputation when not substantially true must have been honestly believed to be true. 11 C. W. N. 390 at 392=5 Cr. L. J. 160. But even a true statement would not be protected if made to a person who has no lawful authority in the matter, *Weir* I. 612. The onus of proving good faith is upon the accused, *Weir* I. 608. The mere fact that rude country folk used language which is inaccurate would not necessarily negative good faith, *Weir* I. 639, 4 W.R. (Cr.) 22. See *per* Lord Esher, M. R., in *Nevill v. Fine Arts, etc., Co.*, [1895] 2 Q. B. 156 at 168.

Even where an accusation has been made to the person in authority, but who is not the authority who could directly deal with the matter of complaint, as when a petition is sent to the Home Secretary for the removal of a magistrate when it should have been more properly addressed to the Lord Chancellor.—*Harrison v. Bush*, 25 L. J. (Q. B.) 25, the occasion has been held to

be privileged; see also *Blagg v. Stuart*, 10 Q. B. 899; *Jenoure v. Delmege* [1891] A. C. 73; *Fairman v. Ires*, 5 B. & Ald. 642; *Woodward v. Lander*, 6 C. & P. 548; *Bannister v. Kelly*, 59 J. P. 793.

If the view of the Madras High Court in 36 M. 216 is correct, this Exception is confined in its operation to accusations made to persons in authority other than judicial authority, *e.g.*, *Kershaw v. Bailey*, 17 L.J. (Ex.) 129, where while the Justices were about to swear in the plaintiff as a paid constable, the defendant, a parishioner came forward and objected that he was an improper person, this was held to be privileged, even though other persons were present. See also *Padmore v. Lawrence*, 11 A. & E. 388; *Boxsius v. Goblet Freres*, [1894] 1 Q. B. 842. For other instances see *James v. Boston* 2 C. & K. 4; *Knight v. Hill*, 1873 J. P. 176. Bringing to the notice of the Deputy Commissioner that an officer in charge of an hospital was leading an immoral life and that he should be removed from the station was held to be covered by this Exception. 7 C. P. L. R. (Cr.) 20. Such an imputation will not be an offence unless express malice be made out. 7 C. W. N. 246.

221. Ninth Exception: Imputation for protection of Interest.—This Exception rests on the ground that honest transactions of business and of social intercourse should be duly protected, so long as the parties act in good faith. 12 M. 374 at 377. As remarked by Lindley, L.J., in *Stuart v. Bell*, [1891] 2 Q. B. 341 no definite line can be so drawn as to mark off with precision those occasions which are privileged and separate them from those which are not. Mutuality of interest in the communication no doubt would serve as the fundamental basis for privilege as held by Lopes, L.J., in *Hunt v. G. N. Ry. Co.*, [1891] 2 Q. B. 189 at 192; see *Knight v. Gibson*, 1 A. & E. 43; *Corhead v. Richards*, 2 C. B. 569; *Amen v. Damm*, 8 C. B. (N. S.) 597 at 602; *Davis v. Sneed*, L. R., 5 Q. B. D. 608 at 611; *Waller v. Loch*, 7 Q. B. D. 621; *Dunman v. Bigg*, 1 Camp 269n. In 9 B. 269 a statement made to a judge in the course of trial that the complainant was tamper-

ing with the witnesses and that he should be asked to sit in Court was held to fall within this Exception. See also 9 C. W. N. 195=2 Cr. L. J. 47. But a statement which a party or counsel may freely make would not be protected if made by a by-stander because the latter has no such interest. *Lynam v. Gowing*, 6 Ir. L. R., Ex. D. 259; *Botterill v. Whitehead*, 41 L. T. 588. Illustration (a) to this Exception is drawn from *Blackham v. Righ*, 2 C. B. 611. See to the same effect, *Baker v. Gamick*, [1894] 1 Q. B. 838. Illustration (b) is based on a string of English cases like *Sutton v. Johnston*, 1 T. R. 493; *Mansergh*, 1 B. & S. 400; *Warden v. Bayley*, 4 Taunt 67. Petitions presented by villagers to officers of Government would be protected if they are made in good faith even though every assertion therein may not be true to the letter, 15 Cr. L. J. 281=23 Ind. Ca. 489; and so also *bona fide* statements before a caste Panchayat 4 L. B. R. 84. The Exception is often requisitioned in connection with resolutions at caste-meetings and the doings of caste-heads and Gurus. *Weir I.* 613; 14 Bom. L.R. 585=1 Bom. Cr. Ca. 152=13 Cr. L. J. 687=16 Ind. Ca. 335. But in such cases parties should be careful that they do not indulge in excessive publication to members who are not of the caste or disciples of the Guru. Such excessive publication would negative good faith, 11 Bom. L. R. 638. To invoke the aid of this Exception the mere fact the complainant and the accused were of the same caste is not sufficient and no man would be justified in calling another an out-caste unless he does so *bona fide* and for the protection of his own interest, see 33 M. 67, where the previous rulings are considered; see *Weir I.* 614, 6 A. L. J. 472, as to privilege of caste assemblies and responsibility for communication of its resolutions.

Whatever may be the ultimate fate of the doctrine of absolute privilege in India, no one has hitherto claimed any such privilege for official reports submitted by an officer to his superior in the execution of his duty. If statements in such reports are recklessly or unjustifiably made, liability cannot be avoided on the ground

of any such absolute privilege. It was so held in the case of the Police-Inspector who being asked to report whether a certain person was the leader of a gang of dacoits added at the end of his report 'I learn from private inquiries that there is scarcely a woman in the houses of *Banias* who has not passed a night or two with the defendant,' 6 E. L. R. Appx. 42=14 W. R. (Cr.) 22. See 1880 P. R. No. 23; 1910, P. W. R. (Cr.) 4=11 Cr. L. J. 205=5 Ind. Ca. 714.

In cases of defamation where the accused is afraid that it might be found that he has gone beyond the limits of the Exception, it is open to him to prove that the character he had defamed is not of a very high order and that the general reputation of the complainant was bad enough to afford a reasonable ground for the imputation; under such circumstances, an English jury returns a verdict for plaintiff with a farthing damages as in *Monson v. Tussand*, [1894] 1 Q. B. 671, *King v. Watts*, 8 C. & P. 614, and would go a long way to reduce the sentence under the Penal Code, 2 C. P. L. R. 198. But care must be taken that the evidence thus let in affects the character of the complainant only so far as the particular transaction is concerned, 7 A. 906 and the defendant is not allowed a commission of a roving nature into the entire past history of the complainant; or, that he does not derive advantage by calling witnesses whose opinion of the complainant has been affected by the libel in question. *Thompson v. Nye*, 16 Q. B. 175 at 179; *Bell v. Parke*, 11 Ir. C. L. R. 418; *Scott v. Sampson*, 8 Q. B. D. 491; *Wood v. Denham*, 21 Q. B. D. 501; *Jones v. Stevens*, 11 Price. 235; *Mangena v. Wright*, [1909] 2 K. B. 258. The benefit of this Exception will be lost if the publication is found to be excessive beyond the reasonable limits of the requirements of the occasion. 4 Sind. L. R. 67=11 Cr. L. J. 588=8 Ind. Ca. 209. Similarly even a reply to a lawyer's notice of demand may make a person liable, if the reply is made the vehicle for making imputations on the character of the claimant and wholly irrelevant to the business. 1910 P. R. (Cr.)

10=1910 P. W. R. (Cr.) 6=11 Cr. L. J. 281=5 Ind. Ca. 892. Similarly, even an imputation made in a communication by a party to his own solicitor may make him liable, if the imputation is not made in good faith, and without the slightest ground and without honestly believing that it was true 5 Bom. L. R. 122.

Though under s 350, Cr. P. C., a magistrate succeeding another who had heard the case in part may with the consent of the accused proceed with the case from the point of the inquiry left unfinished by his predecessor yet it is highly desirous in cases of defamation that the magistrate who convicts, should have the complainant examined by himself rather than act merely on the record left by his predecessor, 13 C. W. N. 550.

222. Tenth Exception Caution conveyed for the good of the informant or for the public good.—This Exception covers cases of imputation in the discharge of a social duty such as giving a character to a servant seeking employment. The privilege will be lost if the publication is made to an unduly wide circle, 3 Bom. L. R. 188; or if it is sent by means of printed letters or circulars, *Gilpin v Fowler*, 23 L. J. (Ex.) 152; or by way of post-cards and telegrams, 6 M. 381, *Williamson v. Frere*, L.R. 9 C. 393; or if the caution given is accompanied by excessive expressions of opinion, *Fryer v. Kinnersley*, 33 L. J. (C. P.) 96. The question whether a publication is for the public good arises expressly in connection with Exceptions 1, 9 & 10 and incidentally in other Exceptions also. This is essentially a question of law, which even a Court exercising only powers of Revision under s 439, Cr. P. C., will feel bound to consider. See the remarks of Lindley, L. J., in *Stuart v Bell*, [1891] 2 Q. B. 341 at 345, 350. See *Clover v. Royden*, L. R., 17 Eq. 190 at 204 for the nature of the public interest which may be protected even by damaging the reputation, of a person in the way of his business. 'Interest' is an ever-widening circle and may sometimes be co-extensive with humanity at large, so that all difference between interest and public good

vanish Generally, when a man has nothing to gain for himself by damaging the character of the plaintiff but the imputation is made for common good it is protected not on the ground of interest but on the ground of public good, *Blake v. Pilford*, 1 Moo. & Rob. 198; *Woodward v. Lander*, 6 C. & P. 548. But there are many men whose interest in life is to promote public good. Where a matter is of public interest the Court ought not to weigh any comment on it in a fine scale; some allowance must be made for even intemperate language, provided however the writer keeps himself within the bounds of substantial proof and does not misrepresent or suppress any facts, 13 Bom. L. R. 1187=12 Cr. L. J. 595=12 Ind. Ca. 971; see also 15 Cr. L. J. 357=23 Ind. Ca. 725. But where a Brahmin was described as a man with whom not even Turks could associate, and the wedding of his daughter was described as a sinful carnival worthy of perdition—a moral end involving a disgrace, degradation and degeneration—it was held such language used to hold up the complainant to public execration could not be justified, 4 Bur. L. T. 48=12 Cr. L. J. 129=9 Ind. Ca. 775.

Apart from the question of public good, this Exception also covers communications made for the good of the person to whom the information is conveyed on a matter of supreme importance, such was held to be the case in *Re Coleridge*, Q. C., 15 C. B. (N. S.) 410=1 T. L. R. 84. where the lady whom the plaintiff was about to marry was informed of his antecedents by the defendant who was a friend of the plaintiff, the letter being written in consultation with the clergyman of the parish. Similarly when the defendant informed a man about to engage the plaintiff as *accoucheur* at his wife's approaching confinement that plaintiff was a man of immoral habits, *Dixon v. Smith*, 29 L. J. (Ex.) 125 at 129. *Todd v. Hawkins*, 8 C. & P. 88. As the law stands at present, it makes no difference whether the caution is conveyed uninvited. *Stuart v. Bell* [1891] 2 Q. B. 341 at 347, *Clark v. Molyneux*, 3 Q. B. D. 237, *Ramsay v. Webb*, Car. & M. 105; the earlier cases to the effect

information volunteered is not protected, being no longer regarded as sound law *King v. Watts*, 8 C. & P. 615; *Coxhead v. Richards*, 2 C. B. 569, *Bennet v. Deacon*, *ibid.* 628; *Masters v. Burgess*, 3 T. L. R. 96, *Amann v. Damm*, 8 C. B. (N. S.) 597, *Kine v. Sewell*, 3 M & W. 297; *Cleaver v. Senande*, 1 Camp 268.

As regards persons standing in certain fiduciary relationships as solicitor and client, guardian and ward, caution given is protected not merely by this section but on the ground such communications are necessary for the protection of mutual interests from the very nature of the relationship and there is an absence of undue publicity. The mere fact a defamatory matter is marked private and confidential will not afford any special protection *Picton v. Jackman*, 4 C. & P. 257, see *King v. Paterson*, 83 L. T. 498, as to legality of confidential trade circulars. See *Macintosh v. Dunn*, [1908] A. C. 390, followed in *Greelands v. Wilmhurst*, [1913] 3 K. B. 507.

IV PROVINCE OF JUDGE AND JURY.

223. Province of Judge and Jury—Every charge of defamation contains assertions of fact and assumptions of law. It is the business of the jury to find whether the assertions are true, and of the judge to direct them as to whether the assumptions are sound. The practice in India is substantially the same as that in England since *Fox's Libel Act*, 32 Geo. III, c. 60, that is to say, the judge directs the jury as to the law, leaving them to find the facts, and their verdict ought to be such as the judge directs to be appropriate to the facts arrived at by them. It is competent, however, to the jury to disregard the directions of the judge, and their verdict will still be good, till it is set aside in the manner provided by law. As to the English practice, see the summing up of Best, J., in *R. v. Burdett*, 4 B. & A., at 120, and *per Parke, B.*, *Parmiter v. Coupland*, 6 M. & W. 105. There are some cases, however, in which the law is so clear that it leaves no question for the jury, and then it is the duty of the judge absolutely to withdraw the case from their

consideration, and to direct them what verdict they should find. This generally happens where the verdict ought to be one of acquittal. It is very important to distinguish the two classes of questions, as the right to have a finding reopened in revision may depend largely upon whether the mistake complained of is one of law or of fact.

Where there is no question of privilege, the only points for decision are, whether the accused published the statement ascribed to him with the intent necessary under the Code, and whether the statement is defamatory. The first point is purely a question of fact for the jury; the second is a mixed question of law and fact. It is for the judge to say whether the statement can be a libel; it is for the jury to say whether it is a libel. In *Capital and Counties Bank v. Henty*, 7 A. C. 741, Lord Selborne, C., said, "In *Sturt v. Blagg*, 10 Q. B. 893, at 908. Wilde, C.J., said, 'It is the duty of the judge to say whether a publication is capable of the meaning ascribed to it by an *innuendo*; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.' If the judge, taking into account the manner and the occasion of the publication, and all other facts which are properly in evidence, is not satisfied that the words are capable of the meaning ascribed to them, then it is not his duty to leave the question raised by the *Innuendo* to the jury." In the same case Lord Blackburn quotes from a judgment of Lord Mansfield, in *R. v. Shipley*, 4 Doug. 164, as follows "Every circumstance which tends to prove the meaning, is every day given in evidence, and the jury are the only judges of the meaning," and then goes on to say: "If the words were reasonably capable of a meaning which, in the opinion of the Court, would be libellous on the plaintiffs personally, I think there can be no doubt that it ought to have been left to the jury to say whether the words bore that meaning." Cited and followed in *Nevill v. Fine Arts Insurance Co.* [1895] 2 Q. B., at 158; *affd.* [1897] A. C. 68; see also *Jenner v. A Beckett, L. R.*, 7 Q. B. 11; *Grant v. Yates*,

6 A. C. 158; see the dictum of Montagu Smith, J., in the course of argument in *Simmons v Mitchell*, **6 A. C. 156** at **158**; and **19 M. L. J. 714**; **Ratanlal 140**. It must be remembered that the dictionary sense of the words is not necessarily that which gives their meaning in the particular instance. That sense may be perfectly harmless and yet the words may be used so as to convey an offensive suggestion, or the sense may be in the highest degree defamatory, and yet the words as used may convey nothing beyond banter. It is for the jury to say what was meant, if that meaning can reasonably be affixed upon what was said.

Where the defence is that the occasion was privileged, this in general admits that, except for the privilege everything which would make out the charge has been established or is admitted. "The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury but when the jury have found the facts, it is for the judge to say whether the occasion is privileged."—*Per* Lord Esher, *Hebditch v McIlwaine* [1894], **2 Q. B.**, at **58**. "Where privilege exists the burthen of proof of actual malice is cast upon the person who complains." "The jury in civil cases, equally as in criminal cases, are the proper tribunal to determine the question of libel or no libel. This was affirmed by the *Declaratory Act of 1792*, and has been often recognized. But it is not competent for the jury to find that upon a privileged occasion relevant remarks, made *bona fide* and without malice, are libellous. It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this and every other question of law, if we were to

the Court first to decide whether there is any evidence upon which a rational verdict for the affirmant can be found." *Per* Willes, J., *Henwood v Harrison*, **L. R.**, **7 C.**, at **626**. Where there is neither internal nor

extrinsic evidence of malice or want of good faith which can reasonably be left to the jury, it is the duty of the judge to direct the jury, as a matter of law, that they should find for the defendant. *Nevill v. Fine Arts Insurance Co.* [1895], 2 Q. B. 156; see *per Lopes, L. J.*, at 171; *affid.* [1897], A. C. 63.

The same rule exists where the defence is that the case is not a libel at all, but a fair comment upon a matter of public interest. Before leaving the question of fair comment to the jury, the judge must be satisfied that the defamatory inference can reasonably be drawn from the stated facts. If it can, then it will be for the jury to say whether it ought to be drawn, *The Homing Pigeon Publishing Co., Ltd. v. The Racing Pigeon Publishing Co., Ltd.*, 29 T. L. R. 389. Whether the matter commented on is one of public interest, is for the Court to decide. Whether the comment is fair and *bona fide* is essentially a question for the jury, provided there is any evidence upon which they can so find. Whether there is any evidence upon which such a conclusion can be arrived at is again a question for the Court, but if there is any such evidence, the decision as to the effect of such evidence is wholly for the jury. *South Hetton Coal Co. v. North Eastern News Association*, [1894] 1 Q. B. at 141, 143, *per Lopes, L. J.*; *Kelly v. Tinning*, L. R. 1 Q. B. at 701, *per Cockburn, C. J.* The functions thus determined for the judge and jury are likely to be of any practical use in trials under the Criminal Procedure Code only in cases where a European British subject happens to be the accused person or where the High Court is called on in Revision to deal with a case of defamation tried by an inferior criminal court.

B.—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

224. **Criminal Intimidation.**—The injury threatened by s. 503, is substantially the same as that which is the essence of extortion s. 383; *ante*, Ch. X, § 179 at p. 635 *supra*. The objects aimed at are, however, wider under s. 503 than under s. 383, and the offence is complete by the attempt, although nothing is

effected by it. Thus while a constable was taking certain persons to his Inspector, threatening them with the head constable's vengeance if they accompanied the constable, was held to fall within the definition in s. 503, *Ratanlal* 850. But mere idle threats by a person in an angry mood without the power of putting the threats into immediate execution are not within the section, 1882 P. R. No. 45.

The word "injury" is defined by s. 44 as denoting any harm *illegally* caused to another. Therefore, it will not be an offence to threaten another with an action, or indictment, which might lawfully be preferred against him, 8 B. H. C. R. (Cr. Ca.) 101; (1897-1901) U. B. R. 359; 30 C. 418=7 C. W. N. 116, or with getting him dismissed from the public service. 20 B. 794; though if he obtained money by the threat, it would apparently be punishable under ss 388 and 213. A threat to bring a false charge against a person and support it by fabricating false evidence would clearly be an offence punishable under s. 506. *Weir* I. 623. But a threat in order to be indictable must be made with intent to cause alarm to the complainant. A communication by a person that he is going to take revenge by false complaints cannot amount to a threat or criminal intimidation, 2 Bom. L. R. 55. But a threat to get the complainants imprisoned if they kept the terms of an *Ikrarnama*, to keep the peace in *Mohurrum*, was held in 1886 A.W N. 41 to be within this section. And similarly a threat by the owner of stolen property that he would get the complainant turned out of his village if he did not prove his innocence (of theft) by dipping his hand in heated oil, which the complainant did and got his hand badly scalded, 9 C. P. L. R. 18.

A question which has arisen under this section, is as to the criminality of pronouncing a *bona fide* sentence of excommunication or exclusion from caste. There can be no criminality where such a sentence is legal; that is to say, where it is justified by the usages of the class or sect to which the complainant has voluntarily submitted, though it may not be one which the civil law would enforce.

In *Gibson v. Lawson* [1891] 2 Q B 545 Gibson and Lawson were both working under the same shipbuilding company. Gibson was a member of the National Society, Lawson of the Amalgamated Society. The members of the latter society resolved that they would strike unless Gibson left his society and joined theirs. He refused and his employers dismissed him, to avoid a strike. The magistrate refused to convict Lawson, who was the mouthpiece of the Amalgamated Society, and the medium

amounted to intimidation. The Court held upon a review of the Trades Union Legislation, that it did not. Strikes were legal by that legislation, and they held that the word "intimidate" must imply at least a threat of personal violence.

In another case, *Curran v. Tichborne* (reported on the same page as this case was decided along with the last) the pressure was applied directly to the employer. The defendants' union threatened him that unless he ceased to employ non union men they would call out the union men, which they accordingly did, and the latter all struck work. No violence was threatened, and no immoderate language was used, but the men quietly ceased work, causing of course great inconvenience and loss to their employer. In this case the magistrate convicted, and the High Court reversed his conviction, for the reasons already given. They considered that the harm which incidentally followed to the employer from the conduct of his workmen, which was itself legal, and which was intended to protect their own supposed interests, was not illegal, and that the combination of many to do that which was lawful in each, could not be considered criminal under the law of conspiracy. See further, *Allen v. Flood* [1898] A. C. 1. As to picketing and the remedy by action or injunction against, see *Lyons v. Wilkins*, [1896] 1 Ch. 811 [1899] 1 Ch. 253 (*Charnock's* case [1899] 2 Ch. 35 *Taff Vale Ry v. Amalgamated Railway Servants* [1901] A. C. 426 *Quinn v. Leatham* ib. 495).

Should similar cases arise in India, it seems to me that they would not be punishable under s. 503. The question would then turn upon the word "injury." Injury, as already observed, is defined by s. 44 of the Code as harm illegally caused. Where no criminal breach of contract was concerned, the threat to leave work in a body would be as lawful in India as in England, and the harm

harm resulting from it would be illegal harm, and there-

fore injury, a farther question would arise, whether the loss to trade and general inconvenience and expense resulting from a strike, would be injury to property within the meaning of s. 503. It might be argued, and probably with success, that property in that section means some specific, tangible property. If a man threatens illegally to dismiss his servant or agent, can he be said to threaten injury to his property?

It is essential to the commission of an offence under the second clause of this section that the person to whom the threat is addressed should be interested in the person to whom the injury is threatened. A petition was sent to a Revenue Commissioner containing a threat that a certain forest officer would be killed if he were not removed. It was found as a fact that the Commissioner had neither official nor personal interest in the forest officer. This being so, it was held that no conviction under ss. 503 or 507 could be maintained. *11 B. 376; 1882 P. R. No. 45.* The gist of the offence consists in the pressure put upon the mind of the person upon whom the threat is intended to operate. But if the person threatened is indifferent to him, he will obviously be indifferent to the threat. Thus a threat to commit suicide is not within s. 503 unless the person threatened is interested in the accused, *1866 P. R. No. 109.*

The threat need not be directly addressed to the party whom it is intended to influence. It is sufficient, although it is addressed to others, if it is intended to reach the ears of the party threatened, *Weir I. 622, 623*, and is used with any of the words stated in the section.

15 C. 671. In 5 C. P.
complainant's pleader,

aimed at by this section. In a case falling under the second part of s. 503 there should be a distinct finding as to the act which the accused endeavoured, to make the complainant abstain from doing. *R. V Mackenzie, L. R. [1892] 2 Q. B. 519=17 Cox. 442.*

A special form of intimidation is rendered punishable by s. 508, where a person induces or attempts to induce another to believe that he, or some person in whom he is

interested, will become, or will be rendered by some act of the offender, an object of Divine displeasure, if he does, or does not do, some act which he is legally entitled to do or to omit doing **Ratanlal 376**. The words "by some act of the offender" must be read with the verb "become" as well as with the verb "be rendered." The Illustrations to this section are clumsily worded. If a Brahmin starves at his debtor's door to obtain payment of a sum of money which the other had promised to pay on demand, it is not within the section, the debtor being legally bound to pay, but if the Brahmin does the same or behaves similarly to obtain a charitable contribution for the celebration of his daughter's marriage, he would be within the section. Thus when a Brahmin widow left her illegitimate child at the door of its reputed father in order to exact from him some payment for her own benefit and not for the support of the child, her act was adjudged to be covered by s. 508, 1886 A. W. N. 63. But the decision would have been different if she only wanted maintenance for the child. A man who persuades another that by his prayers or incantations he will be able to cause the deity to withhold rain or to send a destructive storm, would come within the section. He would not be punishable if he merely induced the other to believe that by refusing to comply with his wishes he was doing a sinful act, which would bring him within the ordinary course of Divine punishment.

The mere pronouncing of a sentence of excommunication, or exclusion from caste, does not come within this section. "A person who is excommunicated does not become an object of Divine displeasure by the act of the priest who pronounces the sentence. The proceeding purports to be a declaration that the person on whom it is passed has, by his own act, committed sin and rendered himself an object of Divine displeasure, and it also purports to be a sentence of interdiction from the means of grace administered by the clergy until on repentance and submission those privileges are restored." *Per Turner, C. J.*, 8 M. at 145.

"The accused did not threaten the complainant that he would do any act to render him an object of Divine displeasure. As the

spiritual superior of the complainant, he passed on him a temporal sentence, which is customarily pronounced on those who violate caste usages, but offered to restore him to caste privileges on submission. To constitute the offence punishable under this section, it must be shown that the respondent threatened to do a future act, or illegally to omit to do an act, and that by such threat he induced or attempted to induce the person threatened to believe that by that act or illegal omission the person threatened, or someone in whom the person threatened was interested, would become an object of Divine displeasure." *Per* Turner, C. J., 6. M. at 394.

225. Intentional insult to provoke a breach of the peace.—Section 504 renders punishable any person who intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence. The essence of this offence consists in the effect which it is likely to produce upon the person to whom the provocation is addressed, not upon any other person who may be present or who may come to know it. See 26 C. 653, at 663; 24 A. 155; *Weir* l. 620. Public peace can be broken by angry words as well as by deeds. *Holmes, Dears C. C.* 207; 4 *Bom. L. R.* 78. But a refusal on the part of one sect to associate with members of another sect coupled with the exclusion of the latter from the use of the public well was held not to be an offence under s. 501, 1883 *P. R. No. 3*. But where a Police Constable asked the complainant not to create a disturbance on the public road and when the latter paid no attention to the admonition, demanded his name and address and when this was refused the Constable called the complainant *sooar* and arrested and dragged him to the Police station the Constable was held guilty under s. 504, 5 *Bom L. R.* 597

It is no answer to a charge under this section that the person insulted was in such a state of terror as to feel no disposition to break the peace, provided the provocation was such as would naturally have that result. 10 M. 353; nor would the mere forbearance of the person insulted from being provoked to commit a breach of the peace, *Weir* l. 621; (1892—

1896) U. B. R. 290. be a valid defence What would be the effect if the insults were addressed to a clergyman, or to a lady, who would not be likely to break the peace? If it was probable that such person would get someone else to take an illegal revenge on their behalf, the requirements of the section would be satisfied. See **Weir I 622.** When a person's possession is sought to be disturbed, he is not entitled to have resort to insulting language **S 104, I. P. C.**, is no defence when such insulting language is made the basis of an indictment under **s 504, 11 C L J 113 11 Cr L. J. 213=5. Ind. Ca. 721** But in cases of vulgar abuse resorted to under provocation, the provisions of **s 95, I.P.C.**, may well be used. **15 Bom L R 1039=15 Cr. L J 14=22. Ind Ca 158.** It must also be remembered that mere abuse is not necessarily an offence under **s. 504, (1897—1901) I U. B. R. 67** Hence offences punishable under **s 10 of Madras Regulation XI of 1816** by a Village Headman are not cognizable by a Court constituted under the Criminal Procedure Code as falling under **s. 504**

226. Insult to Female Modesty—The intention to insult the modesty of a woman is the essential ingredient of the offence, **5 Bom L R 502, 1892, P R No. 6, 1898 P. R. No 12** If the act is committed in a public place it would be punishable under **s 294** as a public nuisance If the act had proceeded to the extent of using criminal force, it would then be punishable under **s 354**, or if the act of intrusion involves entry into the woman's property, it would be punishable as one of the aggravated forms of criminal trespass, **22 C 391 & 994.** **S 509** is a residuary provision enacted to punish an act which but for it would go unpunished

This section assumes the modesty of the woman and an intention to insult it; therefore no offence will have been committed where the woman is of a profession, or character, which negatives the existence of scrupulousness. **5 Bom. L R 502.** Nor, I conceive, would there be any offence, even though the woman were virtuous, if, under the circumstances of the case, the man *bona fide*

and reasonably believed that his advances would be well received and would lead to ulterior results. For in such a case his intention would not be to insult, but to solicit or excite. It is obvious, too, that each case must be judged of according to the degree of intimacy and the rank in life of the parties. That which would be an insult to the modesty of the lady might be none in the case of her ayah.

What is an "intrusion upon the privacy of a woman?" In the case of a Muhammedan, or a Hindu female of Rank, probably any chamber in which she is may be considered a place of privacy. With the European this would not be so, unless in rooms to which males have no implied right of admission. But where the only overt act consists in such an intrusion, how is the intention to insult her modesty to be evidenced, or may it be assumed? I fancy it may be assumed where the intrusion is so unlawful and takes place under such circumstances that no other intention is fairly conceivable; as, for instance, if a man were to gain admission to a lady's sleeping apartment under circumstances which negatived an intention to steal. In other cases the intention would have to be proved by independent evidence as, for instance, his conduct while there.

CHAPTER XIV.

ATTEMPTS TO COMMIT OFFENCES.

§ 227. Attempt.—Prior to the completion of a crime three stages may be passed through *First*, an intention to commit the crime may be conceived *Secondly*, preparation may be made for its commission *Thirdly*, an attempt may be made to commit it Of these three stages the mere forming of the intention is not punishable under the Penal Code. Nor is the preparation for an offence indictable The law will not take notice of an intent without an act, **24 B. 287=1 Bom. L. R. 678; Dugdale, 1 E & B 435** The intention can be inferred from the doing of the act alone when a man does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about the result, **4 Bom. L. R. 280** The mere presence of a man in the room of a married woman will not render the former liable for an attempt to commit adultery, **1879 P. R. No 13, 1902 P. R. No 25, 1912 P. W. R. (Cr.) 16=1912 P. L. R. 116=13 Cr. L. J. 469=15 Ind. Ca. 309.**

“Between the preparation for the attempt and the attempt itself there is a wide difference The preparation consists in devising or arranging the means or measures necessary for the commission of the offence, the attempt is the direct movement towards the commission after the preparations are made To illustrate a party may purchase and load a gun, with the declared intention to shoot his neighbour, but until some movement is made to use the weapon upon the person of his intended victim there is only preparation and not an attempt”

Accordingly, in the case which gave rise to the above remarks, it was held that declarations of an intent to contract an incestuous marriage, followed by elopement for the avowed purpose and sending for a magistrate to perform the ceremony, did not amount to an attempt to contract the marriage That there could be no attempt until the parties stood before the magistrate about to begin the ceremony *People v Murry*, cited 1 Bishop, § 686, n3. And so it was held, that the publish-

ing of banns was not an attempt to commit bigamy, 1 A. 316; 25 M. 726. Similarly when a person was found carrying a police jacket under his arm with intent that when he wore it he should be taken for a police constable, it was held, his conduct amounted to preparation to commit an offence under s. 171, but not to an attempt, [1904] 1 U. B. R. (P. C.) 3; so also when a milk-contractor was detected while proceeding in the directions of the cowshed with a quantity of stale milk in a can similar to the one in which cows were being milked, 1885 P. R. No. 40; and where a medicine man was asked to supply poison to be administered to the accused's son-in-law, 1882 P. R. No. 24, but in this case the solicitation might amount to an instigation of the medicine-man to abet the accused in the commission of murder and be punishable under s. 302 read with s. 116 having regard to Explanation 4, to s. 108, 3 M. 4; 1887 P. R. No. 49. See also 1903 P. L. R. 7, 1 L. B. R. 264; 8 B. H. C. R. (Cr. Ca.) 164; Ratanlal 470; 8 C. W. N. 278=1 Cr. L. J. 124; 1832 P. R. No. 45 1868 P. R. No. 18 for distinction between preparation and attempt. It would be a question of fact in each case whether the act of the accused amounted to an attempt or stopped short at the stage of preparation, 15 A. 173; Ou. S. C. 76; 15 Cr. L. J. 265=23 Ind. Ca. 473. Sometimes a preparation to commit an offence, *e.g.*, rape, not punishable as such, may amount to an independent offence as indecent assault, s. 354, 5 B. 403. We have already seen several other instances, where similar specific provision has been made, *e.g.*, preparation to wage war (s. 122) and preparation to commit dacoity (s. 399) and assembling dacoits (s. 402). It is illegal to convict a man both of attempting to commit and of abetting the same offence, 8 Bom. L. R. 855=4 Cr. L. J. 450. In 8 M. 5 it was held that a woman could not be convicted of attempting to commit suicide on proof that she ran towards a well saying she would fall into it, but was caught before she reached it. In 1907 P. R. No. 15=1908 P. L. R. 56=1907 P. W. R. (Cr.) 44=6 Cr. L. J. 444, mere presence on the roof of another person with implements for housebreaking was held not to constitute

an attempt to commit burglary though the accused might be liable for house trespass. To show that the line of separation between *attempt* and *preparation* is very thin, one has only to compare this case with the ruling in 37 B 553, where the commencement of scratching of the outer wall of a house to bore a hole with a view to get in was held to be an attempt. And in 24B, 287=1 Bom. L.R. 678 it was held that the removal of a girl out of the district in which she resided, as part of a journey to a town out of British India in which she was consigned to prostitution, did not constitute an attempt, to commit an offence under s. 372, I. P. C., within the district of domicile.

The real difficulty arises in determining where a given act, or set of acts, passes from preparation into an indictable attempt. In America the rule has been laid down, "that the attempt can only be manifested by acts which would end in the consummation of the offence, but for the intervention of circumstances independent of the will of the party." Sir James Stephen, in his *Digest of Criminal Law*, art. 50, defines an attempt to commit a crime, as "an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted. The point at which such a series of acts begins cannot be defined, but depends upon the circumstances of each particular case." And this definition was adopted in *R. v. Linnaker*, L. R. [1906] 2 K. B. 99=75 L. J. (K. B.) 385. S. 511, I. P. C., offers no definition of an attempt beyond the statement which renders punishable "whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed." It seems to me, however, that little assistance can be obtained from American or English definitions in deciding questions upon s. 511. English lawyers and the authors of the Code appear to look upon attempts to commit crime from a different point of view. The former treat an attempt as a definite act, and consider whether that fact is in its nature criminal. The latter treat an attempt as a continuous proceeding, and go on to determine when that proceeding

assumes a criminal character. "Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an attempt to be committed, *and in such attempt does any act towards the commission of the offence,*" shall be punished, etc. Apparently an attempt is not necessarily criminal. It becomes so when the attempt reaches a point at which an act is done towards the commission of the offence. This is evidently the point to which attention should be directed. A man is not punished for an attempt which, in the language of the Code, seems to mean nothing more than trying to commit a crime; but when he has done something definite in pursuance of his design he is punished, not for what he has done, but with regard to what he would have done if he had succeeded. The question then is in every instance, at what stage on the way to a completed offence does a person do an act towards the commission of it?

In many cases there is no difficulty. For instance, where a man does an act which would immediately result in the commission of a crime, but for the interposition of some external agency; as where the accused pointed and tried to pull the trigger of a revolver, which was wrested from his hand; *R. v. Duckworth* [1892] 2 Q. B. 83 = 17 Cox. 495, or where a man, with the intention of stealing in a shop, broke through the roof, but was disturbed before he could enter the shop; *R. v. Bain*, L. & C. 129 = 31 L. J. (M. C.) 88, or when a man attempted to obtain money from a pawn shop on the pretence the articles he offered were of silver, *Ball, Car. & Mar.* 249. *Holloway*, 18 L. J. (M. C.) 60; or when a man manufactured spurious trinkets and offered them to a goldsmith as stolen gold jewels, 15 Cr. L. J. 265 = 23 Ind. Ca. 473. Another equally clear case is, where the accused has done everything in his power to effect the criminal purpose, but has been frustrated by some unforeseen physical difficulty; as where a man puts his hand into the owner's pocket, and finds it empty; s. 511, *illus. (a & b)*. The contrary decisions in England have now been overruled, see *R. v. Brown*, 24 Q. B. D. 357. *R. v. King*. 17 Cox. 491 = 61 L. J. (M. C.) 116; *Jackson*, 17 Cox.

104; 14 A. 38, 9 C.W.N. 764=2 Cr. L J 422; *Waite*, [1892] 2 Q B. 600 It is equally clear when a man writes a letter inciting to consent to an act of sodomy which was received by the person to whom it was addressed, but handed over unread to another *R v. Ransford*, 13 Cox 9. But when a man is physically incapable of committing rape, he cannot be found guilty of an attempt. *Ratanlal* 865. In *R. v Williams* [1893] 1 Q B 320, a question was raised, whether a person could be convicted of attempting to do that which, by a presumption of law, the Court was bound to hold that he could not do, as, for instance, where a boy under fourteen was charged with rape. Those very experienced judges, Hawkins and Cave, JJ, declined to entertain the doubt. A very similar question arises and is equally settled against the accused, where the entire offence has been committed as far as the prisoner was concerned, but, from some collateral circumstance unknown to him, is incomplete as an offence at law, as where a person steals property, or obtains it by cheating, the owner consenting to the offence in order to detect the prisoner, or not being influenced by the false statement. *R v. Roebuck*, D & B 24=25 L J (M C), 101, *R v Hensler*, 11 Cox 570; see, also 15 B. 194; *ante*, § 174, at p 621 & § 186 at p 712. But where a woman with intent to poison her husband administered to him a substance which she believed to be a deadly poison but which in reality was quite harmless, she was held not guilty of an attempt to commit an offence under s 328 as the administration was not an act towards the administration of any poisonous substance. Her act was complete in itself and did not constitute any offence and hence could not constitute an attempt to commit an offence in spite of the intention which accompanied the act, 9 C P L R 14.

Where the commission of an offence requires the performance of a series of acts, and the person commences this series with the view to carry it out to its completion, it appears to me that he has, in the language of s. 511, done an act towards the commission of the offence, in the attempt to commit the offence. By a

series of acts, I mean, those acts which are the direct and immediate means of effecting the criminal design, as distinguished from remoter or preliminary proceedings, such as purchasing false jewels for sale as real, inquiring into the place where a *soncar* keeps his money, and the like. Where the servant of a contractor who was sent to deliver meat put a false weight into the scale, with the intention of appropriating the difference, but was detected in the act, it was held that he was rightly convicted of an attempt to steal.

Erle, C. J., said: it is said "however, that the evidence here does not show any such proximate overt act as is sufficient to support the conviction for an attempt to steal the meat. In my opinion there are several overt acts, which brought the attempt close to completion. These were the preparation of the false

Blackburn, J., said: "I am of the same opinion. There is no doubt, a difference between the preparation antecedent to an offence and the actual attempt. But if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime. Then, applying that principle to this case, it is clear that the transaction which would have ended in the crime of larceny, had commenced here." *R. v. Cherriman*, L. & C. 140, 145=31 L. J. (M. C.) 8=9 Cox 100; *R. v. Lagleton*, Dearl. 515=24 L. J. (M. C.) 158=6 Cox, 529.

The above remarks of Blackburn, J., were followed by the Bombay High Court in 37 B. 553=15 Bom. L. R. 569=24 Bom. Cr. Ca. 76=14 Cr. L. J. 451=20 Ind. Ca. 611, where with intent to break into a house the accused commenced boring operations on the outer wall but before the hole had extended right through the thickness of the wall, they were interrupted. The act of commencing the boring of the hole was held to constitute an attempt to commit an offence under s. 457; see also (1892—1896) 1 U. B. R. 293. So, where the accused was found in the act of digging behind the house of the prosecutor, and, when arrested, had in his possession a quantity of salt, and it was alleged

that he was intending to put the salt into the hole, in order to lay a charge against the prosecutor under the salt laws, the Court held that if the intent was made out, he would have been guilty of an attempt to fabricate false evidence **4 N.W.P H.C.R. 133** In another case, the defendant, a money-lender, who had been offended by one *Chattur Singh*, threatened he would make him pay Rs. 50 Subsequently the defendant sent one of his own debtors to buy a stamp, with instructions that he should represent himself to be *Chattur Singh*, and give the address of *Chattur Singh* and the other usual particulars, which were endorsed on the stamp The Court found that the defendant had purchased the stamp for the purpose of using it as evidence in a judicial proceeding against *Chattur Singh*. The theory was that some document binding the latter would have been written upon it The High Court held that, as soon as a stamp purporting to be sold to *Chattur Singh* had been purchased, an act had been done towards the commission of the offence of fabricating false evidence, which was properly charged as an attempt. **2 A 105, followed in 25 A 75.** In **16 C. 310** it appeared that the defendant wrote to the Currency Office in Calcutta, enclosing the halves of two Currency notes, stating that the other halves were lost, and inquiring what steps should be taken for the recovery of the value of the notes. The Currency officers were aware that the amount of the notes had already been paid to the holder of the other halves, and did not intend, under any circumstances, to pay the new applicant. They sent him, however, the usual form of claim to be filled up He filled it up, signed it, and sent it in. Upon these facts, the fraudulent character of the proceeding being made out, it was held that the first letter of application was merely a preparation, but that the filling in and forwarding the official form was an attempt to cheat, and that it was not the less so because the Currency Office was quite determined not to be cheated.

In **3 B. L. R (A. Cr.) 55**, it appeared that in had on several occasions occurred in a village,

by a ball of rags with a piece of burning charcoal in it. The prisoner was found in possession of a ball of that description containing burning charcoal, concealed in his dress. At the time he was seized he was engaged in a dispute with the other villagers, who charged the previous acts as having been done by his caste, and who were proceeding to drag him to the police. The ball dropped out while they were hustling him about. Glover, J., thought that it must be assumed "that a person going about at night, provided with an apparatus specially fitted for committing mischief by fire, intends to commit that mischief, and that he has already begun to move towards the execution of his purpose, and that is sufficient to constitute an attempt." Mitter, J., was of an opposite opinion. He said: "In order to support a conviction for attempting to commit an offence of the nature described in s. 511, it is not only necessary, that the prisoner should have done an overt act 'towards the commission of the offence,' but that the act itself (that is, the overt act) should have been done '*in the attempt*' to commit it (that is, the offence)." It certainly seems that Mr. Justice Mitter was right. The prisoner probably intended to commit arson, and had prepared to commit it, but one cannot see that he had attempted to commit it. It is quite possible that the discussion among the villagers, showing that their suspicions were aroused against himself and his caste, would have induced him to give up his design and never make any attempt. But when an accused under similar circumstances actually lighted a match he was held liable even though he dropped it finding that he was being watched, *Taylor*, 1 F. & F. 511. 8 A. 304 was decided in favour of the prisoner. There a practice existed in the town of *Muthura* that octroi duty imposed on goods passing out of the town should be refunded by the following process. The goods about to be exported were taken to the central office, where a representation of their contents, as being non-dutiable, was made. If the office accepted this representation, a refund certificate was granted, which was endorsed by the outpost clerk when passing the goods, and on taking the certificate so endorsed to the central office, the duty

paid to the outpost clerk would be returned. The defendant took three *luppas*, or skins, to the central office, and made a statement as to one which would have entitled him to a certificate. The clerk examined the contents, and found the statement was untrue, and thereupon handed over the offender to the police. He was convicted of an attempt to cheat. The conviction was reversed by Brodhurst, J., on the ground that the certificate alone would not have entitled him to money, or have caused damage or loss to anyone, and that before doing any of the further acts necessary for this purpose, he might have changed his mind and proceeded no further. The former ground for decision is opposed to the ruling of the same court in 15 A. 216 at 217 & 2 A. L. J. 718=2 Cr. L. J. 788, that a certificate is property within the meaning of s. 463, which is substantially the same as s. 417. On the second ground, the decision appears to be equally questionable. The defendant was certainly intending to cheat. The first of the series of steps necessary for that purpose was to obtain a certificate, which could only be obtained by means of a false statement, which he made. If he had got his certificate he might undoubtedly have done nothing further, in which case he would not have actually carried out his design. But was he attempting to cheat at the time he made his statement to the central office, and was this statement "an act done towards the commission of the offence"? If so, he had completed the offence under s. 511, and it was immaterial that he might never have completed one under s. 417.

This case was cited with apparent approval in 15 A. 173 at 178, 181, when the same court acted upon the principles just suggested.

The facts are not very clearly stated, but it would appear that one *Asad Ali* had obtained administration to the estate of his brother *Husain Ali Khan* and had by some process caused a Government promissory note, No. 9764, which was really the property of one *Muhammed Husain Ali Khan*, to be entered in the letters of administration as part of the estate of the deceased. The note seems to have been in the possession of the Comptroller-General, and *McCrca*, the defendant, joined *Asad Ali* in an attempt to induce that official to deliver it to him, or to *Asad Ali*, as

representing Husain Ali Khan. Many letters were written by McCrea to the Comptroller-General, which were not relied on; but the judge in charging the jury directed their attention "notably to the acts committed by the prisoner in making use of the letters of introduction, and in the preparation and production before the scheme failed, and

McCrea was convicted of an attempt to cheat, and the conviction was upheld on appeal. Both judges expressed their opinion that the offence, punishable under s. 511, extended to a much wider range of cases than would be deemed punishable as offences under English law. Following Sir C. Turner in 4 N.-W. P. H. C. R. 46 Blair, J., said: "It seems to me that section uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is conducive to the commission, is itself punishable, and though the Act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, (obviously using the word in the larger sense) does any act, etc., shall be punishable. The term 'any

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this decision was refused on general grounds. The Judicial Committee expressed no opinion as to the soundness of the decision. 20 I. A. 90=15 A. 310.

Jenkins, C. J., defined an attempt in 2 Bom. L. R. 286 as an intentional preparatory action which fails in object—which so fails through circumstances independent

2 B. L. R. 3

not matter that the progress is intercepted, 12 Bom. L. R. 21. Several cases have been decided in India as to the point of time at which an inchoate forgery becomes an attempt. In 3 M. 4 the accused, "intending to procure the preparation of a forged document, had a copy prepared, procured a stamp paper on which the document was to be written, and applied to a witness to furnish him with a Telugu date corresponding to an English

date; it may be presumed for insertion in the document he intended to get written." The Court cited with approval the ruling in *People v. Murray* (ante, § 227 at p. 933 and said, "Neither can the prisoner be convicted of an attempt to commit forgery, inasmuch as although he had an intention and made the preparation to commit, he had not proceeded so far as to do an act towards the commission of the offence." This case was clear enough, but a further element was added in 4 N.-W. P. H. C. R. 46 which is frequently cited. There the prisoner, intending to forge a document professing to be executed by one *Chotak*, had engaged a writer to accompany him to a place where the said *Chotak* would be found, and had also got one *Chetoo* to purchase a stamped paper for a bond, and to represent himself as *Chotak*, whereby the stamp-vendor endorsed the stamp with a statement that it had been sold to *Chotak*. The prisoner was convicted of an attempt to commit forgery. On appeal, Turner, J., said: "I do not see that in procuring the attendance of a writer, in purchasing the stamped paper, in causing *Chetoo* to represent himself to the stamp-vendor as *Chotak*, and in procuring the endorsement, the appellant had gone beyond the stage of preparation, and therefore I hold the conviction must be quashed. If a word of the instrument which he intended to forge had been written, I should have held the conviction right. In 2 A. 105, Turner, J., who decided both cases, distinguished the former. "The endorsement of the stamp-vendor forms no part of the document which it may be assumed it was the intention of the person who procured the endorsement to make on the face of the stamp paper. The offence of forgery (in 4 N.-W. P. H. C. R. 46) had, therefore, not proceeded beyond the stage of preparation, but in the case now before the Court there had been an actual fabrication; something had been done. . . . "I do not say that in the case cited the accused should have been discharged. Had the point been taken, the Court might have held the accused guilty of the offence of which the petitioner had been convicted." The argument which Turner, J., foreshadowed as one which might have been successful in procuring the conviction in 4 N.-W. P. H. C. R. 46, was obviously this: that as soon as the stamp

was handed over to *Chetno*, a fraudulent document had actually come into existence by the official endorsement which it bore that it had been sold to *Chotak*, and that this was not merely a preparation for a forgery, like buying a blank stamp, in the market, but was the first step in the series of acts by which the intended forgery would have been carried out.

In 7 C. 352, it appeared that the prisoner had given orders to the Burdwan Press to print one hundred receipt forms, similar to those formerly used by the Bengal Coal Company; that he corrected one proof of those forms, and was suggesting further corrections in a second proof in order to assimilate the form to that at present used by the Company, when he was arrested. The report does not state whether the form purported to be issued by the Bengal Coal Company, for coals supplied by it, but it is consistent with the judgment that it did. A conviction for attempting to commit forgery was set aside.

to the definition in s. 464, until the seal or signature of the Bengal Coal Company had been forged upon it, so as to make it appear that such seal or signature was that of the Bengal Coal Company. The prisoner, therefore, would not be guilty of the offence of forgery until the printed form had thus been converted into a false document: and for the same reason I think that he would not be guilty of an attempt to commit forgery until he had done some act towards making one of the forms a false document. If, for instance, he had been caught in the act of writing the name of the Company upon the printed form, and had only completed a single letter of the name, I think that he would have been guilty of the offence charged, because, to use the words of Lord Blackburn in *R. v. Chatterman*, "th
en
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the crime."

According to this decision, if the accused in 4 N.-W. P. H. C. R. 46 had written out the whole of the document, with genuine signatures of a writer and witnesses, he would have committed no offence till he had begun to forge the name of *Chotak*. Both these decisions

were disapproved by the Court in *McCrea's* case, (15 A. 173) cited above. In exactly such a case, where a stamp had been purchased in the name of one *Kehru*, whose name was endorsed upon it by the vendor, and where the commencement of a bond in his name had been written, the Allahabad High Court considered that everything necessary to make out an attempt had been done. 16 A. 409. Even after *Collins' case* 33 L. J. (M. C.) 177 had been overruled by *R. v. Broun*, 24 Q. B. D. 357, the Calcutta High Court re-affirmed 7 C. 352 in 22 C. 131 at 138. But the Calcutta view would seem to be unsupported even by English decisions anterior to *Collins' case*. Thus in *Roberts, Dears* 539=25 L. J. (M. C.) 17, the accused with intent to counterfeit half-dollars of Peru caused to be made and procured in England a part of the necessary dies, his ultimate intention being to procure the rest of the apparatus and when procured to make a few coins by way of testing the sufficiency of the apparatus and then transport the whole apparatus to Peru to be there used in making counterfeit coin. It was held since a complete offence would have been committed in England if the sample coins had been made there, the procuring of the dies was an act sufficiently proximate to the offence to constitute an attempt. A similar view as to what amounts to an attempt was taken in 2 A. 253. But an act too remote or quite foreign to the end proposed or too small for the law's notice, creates no apparent danger and perturbation in the peaceful order of things and therefore is not sufficient to constitute an attempt, 1 Bishop (8th Edn.), § 739. But as laid down in 25 B. 90=2 Bom. L. R. 653, s. 511 does not relate only to the penultimate act but to all preceding acts if they were done with intent to commit or to facilitate the commission of the act. The Chief Court of the Punjab held that from the moment when an intention is formed to commit an offence every act done which facilitates the commission of the offence and which is done with that object in view, is, in one sense, an act done towards the commission of the offence, but it is not the doing of any such act that would constitute an attempt. Whether a particular act done with the requisite intention towards the commission of an offence is sufficiently proximate to its

commission to constitute an attempt, or is so remote as to merely constitute preparation, is a question depending upon the circumstances of each case, 1879 P. R. No. 30. In the case of a person who buys poison to commit murder, the purchase would amount only to preparation. 1882 P. R. No. 24 But if he buys stamp-paper to have a forged document engrossed thereon in the name of another, this may amount to an attempt as in 16 A. 409

From the foregoing remarks it will appear, that to constitute an attempt, there must be an intention to commit a particular crime, a commencement of the commission, and an act done towards the commission. Sometimes the act done may be innocent, except for the intention; as, for instance, putting money into a man's pocket, in order to charge him with theft. 1 Bishop § 685. Sometimes it may be criminal; as, for instance, an attempt to rob, commenced by an assault. But in either case, if the act is to be aggravated by the particular intent assigned, that intent must be proved, as being the essence of the offence, and though it may be presumed from the surrounding circumstances, it cannot be assumed. For instance, if a man is found in a house at midnight, it might, under one set of circumstances, be the fair presumption that he came to steal; under another set, that he came to commit adultery; under a third set of circumstances, no presumption of any criminal intent might arise. Where a particular intent is charged, as constituting an attempt to commit a specific crime, it is not necessary that there should be any evidence of the intent besides the circumstances connected with the abortive act itself. But unless those circumstances, coupled with the other evidence (if any), establish, not only some criminal intent, but the particular criminal intent which has been charged, the prisoner must be acquitted.

Hence, also, the particular intention must last until so far as an act has been done, as would, by its union with the intention, constitute a criminal attempt. But as soon as this stage has been reached, the criminal attempt is com-

plete. Should the party then abandon the prosecution of the offence, from fear, fatigue, repentance, or any other cause, he will still be punishable for the attempt. For instance, if a man goes to a place armed, intending to commit murder, but when he is there does not find his enemy, or, having found him, shrinks from attacking him, this would not be an attempt *R v. M'Pherson, D & B. 197 at 201=7 Cox 281=26 L. J. (M. C.) 134*. So, if he went to a house with implements of housebreaking, intending to commit burglary, but on reaching the door, heard cries of distress, and broke in to rescue the sufferer, this would neither be housebreaking nor an attempt at it. But if a thief, having entered a house in order to steal, finds a dying man inside and then gives up his criminal object, and remains in the house merely to assist him, he would still be indictable for an attempt to steal in a dwelling-house 1 Bishop, §§ 366, 664, 692. And it has been so ruled in America, where, in cases of attempt to commit rape, the prisoner had voluntarily desisted before consummating his object *Ibid.* § 664, n 5.

An attempt to do an act which, if accomplished, would not be an offence under the Penal Code, cannot be an offence under s. 511. 11 B. 376. *Weir* l. 640; 1911 P. R. No. 2=12 Cr. L. J. 116=9 Ind. Ca. 682; 28 C. 314.

Where a prisoner has been indicted for committing any offence, the jury may find him not guilty of committing, but guilty of attempting to commit the offence under this section, Cr. P. C., s. 238.

An attempt to commit an offence punishable with whipping is not so punishable, as the section is limited in its operation to offences under the code punishable with transportation or imprisonment 3 B. H. C. R. (Cr. Ca.) 37. Nor can a person who is convicted of an attempt to commit an offence under Chapter XII, or XVII, be subjected to extra punishment under s. 75 in consequence of a previous conviction under those chapters. This only applies to cases where both convictions have been punishable under those chapters. *R. v.*

commission to constitute an attempt, or is so remote as to merely constitute preparation, is a question depending upon the circumstances of each case. 1879 P. R. No. 30. In the case of a person who buys poison to commit murder, the purchase would amount only to preparation. 1882 P. R. No. 24. But if he buys stamp-paper to have a forged document engrossed thereon in the name of another, this may amount to an attempt as in 16 A. 409.

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plete. Should the party then abandon the prosecution of the offence, from fear, fatigue, repentance, or any other cause, he will still be punishable for the attempt. For instance, if a man goes to a place armed, intending to commit murder, but when he is there does not find his enemy, or, having found him, shrinks from attacking him, this would not be an attempt *R. v M'Pherson, D. & B. 197 at 201=7 Cox 281=26 L. J. (M. C.) 134*. So, if he went to a house with implements of housebreaking, intending to commit burglary, but on reaching the door, heard cries of distress, and broke in to rescue the sufferer, this would neither be housebreaking nor an attempt at it. But if a thief, having entered a house in order to steal, finds a dying man inside and then gives up his criminal object, and remains in the house merely to assist him, he would still be indictable for an attempt to steal in a dwelling-house 1 Bishop, §§ 366, 664, 692. And it has been so ruled in America, where, in cases of attempt to commit rape, the prisoner had voluntarily desisted before consummating his object *Ibid.* § 664, n 5

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Moonesawmy, per Bittleston, J., 1st Mad. Sess., 1865; 5 B. 140; 3 A. 773; 17 A. 120 & 123; 1906 P. R. (Cr.) 14=1907 P. W. R. 15=1907 P. L. R. 12=5 Cr. L. J. 85; 21 W. R. (Cr.) 35.

Also an attempt to commit murder is probably not within this section as it is specially provided for by s. 307. See the discussion in Ch. IX, § 159, at pp. 530-534, *supra*, where a distinction is sought to be drawn between the scope of the words as used in s. 307 and in s. 302 read with s. 511. For attempt at cheating see the rulings discussed in § 186 at pp. 710—713: for rape, § 171 at p. 597. Also from the very nature of the definition in s. 391, s. 511 cannot apply to dacoity, 7 W. R. (Cr.) 48.

APPENDIX I.

THE INDIAN EXTRADITION ACT XV OF 1903.*

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING
TO THE EXTRADITION AND RENDITION OF CRIMINALS

WHEREAS it is expedient to provide for the more convenient
 33 & 34 Vict. c administration in British India of the Extradition
 52; 35 & 37 Vict. c Acts, 1870 and 1873, and of the Fugitive
 60; 44 & 45 Vict. c Offenders Act, 1881
 69

And whereas it is also expedient to amend the law relating to
 the extradition of criminals in cases to which the Extradition
 Acts, 1870 and 1873, do not apply,

It is hereby enacted as follows:—

CHAPTER I
PRELIMINARY.

Short title, extent and commencement 1 This Act may be called the Indian Extradition Act, 1903

(2) It extends to the whole of British India (including British Baluchistan, the Santhal Parganas and the Pargana of Spiti), and

(3) It shall come into force on such day as the Governor General in Council, by notification in the *Gazette of India*, may direct

Definitions 2 In this Act, unless there is anything repugnant in the subject or context—

(a) "European British subject" means a European British subject as defined by the Code of Criminal Procedure for the time being in force

(b) "extradition offence" means any such offence as is described in the first schedule

33 & 34 Vict. c (c) "Foreign State" means a State to which,
 52; 35 & 37 Vict. c for the time being, the Extradition Acts, 1870
 c 60 and 1873, apply

(d) "High Court" means the High Court as defined by the Code of Criminal Procedure for the time being in force

(e) "Offence" includes any act wheresoever committed which would, if committed in British India, constitute an offence and

(f) "rules" include prescribed forms

* For statement of objects and reasons, see *Gazette of India*, 1901, Part V, p. 21. For report of Sel. Committee, *ibid* 1903, Part V, p. 459. For proceedings in Council, *ibid*, part VI, pp. 151, 163 & 177

CHAPTER II.

SURRENDER OF FUGITIVE CRIMINALS IN CASE
OF FOREIGN STATES.

3. (1) Where a requisition is made to the Government of India or to any Local Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State, who is in or who is suspected of being in British India, the Government of India or the Local Government as the case may be, may, if it thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the crime if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case.

(2) The Magistrate so directed shall issue a summons or warrant for the arrest of the fugitive criminal according as the case appears to be one in which a summons or warrant would ordinarily issue.

(3) When such criminal appears or is brought before the Magistrate, the Magistrate shall inquire into the case in the same manner and have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by the Court of Session or High Court, and shall take such evidence as may be produced in support of the requisition and on behalf of the fugitive criminal, including any evidence to show that the crime of which such criminal is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime.

(4) If the Magistrate is of opinion that a *prima facie* case is made out in support of the requisition, he may commit the fugitive criminal to prison to await the orders of the Government of India or the Local Government, as the case may be.

(5) If the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition, or if the case is one which is bailable under the provisions of the Code of Criminal Procedure for the time being in force, the Magistrate may release the fugitive criminal on bail.

(6) The Magistrate shall report the result of his inquiry to the Government of India, or the Local Government, as the case may be, and shall forward, together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Government.

* This chapter has been declared to have effect in British India as if it were part of The Extradition Act of 1870, (33 & 34 Vict. c. 52) See Order in Council dated 7 3 01 in Gazette of India, 1901, Pt. I, p. 263

(7) If the Government of India or the Local Government, as the case may be, is of opinion that such report or written statement raises an important question of law, it may make an order referring such question of law to such High Court as may be named in the order, and the fugitive criminal shall not be surrendered until such question has been decided.

(8) If, upon receipt of such report and statement or upon the decision of any such question, the Government of India or the Local Government, as the case may be, is of opinion that the fugitive criminal ought to be surrendered, it may issue a warrant for the custody and removal of such criminal and for his delivery at a place and to a person to be named in the warrant.

(9) It shall be lawful for any person to whom a warrant is directed in pursuance of sub-section (8), to receive, hold in custody and convey the person mentioned in the warrant, to the place named in the warrant, and, if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of British India may be re-taken upon an escape.

(10) If such a warrant as is prescribed by sub-section (8) is not issued and executed in the case of any fugitive criminal, who has been committed to prison under sub-section (4), within two months after such committal, the High Court may, upon application made to it on behalf of such fugitive criminal, and upon proof that reasonable notice of the intention to make such application has been given to the Government of India or the Local Government, as the case may be, order such criminal to be discharged, unless sufficient cause is shown to the contrary.

Note—Ordinarily the High Court has no jurisdiction under section 15 of the Charter Act to revise proceedings of a Magistrate acting under this section. Thus in 38 C. 550n=15 C.W.N. 735=12 Cr. L.J. 346 10 Ind. Ca. 946, it was held the High Court has no power to transfer an inquiry from a Magistrate whom the Government acting under sub-section (1) has ordered to inquire into the case. The inquiry is dependant on the authorisation of the Executive Government. There is no provision of law empowering the High Court to request the Government to appoint another Magistrate or itself transfer the inquiry to another Magistrate. This ruling was followed in 38 C 547=15 C W N. 737=12 Cr L. J. 322=10 Ind Ca. 618, where the High Court was called on to quash proceedings on the ground, the inquiring Magistrate had no jurisdiction to act in the matter and there was no legal evidence before the District Magistrate to justify the applicant's detention. But as regards the quantum of bail demanded from a prisoner against whom proceedings are pending, the High Court has the fullest discretion in the matter under s 498, Cr P C., 15 C. W. N. 736 - 12 Cr. L. J 358=10 Ind. Ca. 958. Though ordinarily in the absence of a reference under sub-section 7) the High Court has no jurisdiction to interfere with the proceedings of

Magistrate, yet if the Magistrate acts contrary to natural justice, and reports to the Executive Government under sub-section (6) to the effect a *prima facie* case has been made out against the accused without giving the latter a reasonable opportunity to adduce evidence in his defence the High Court has ample power under s. 491, Cr. P. C., to interfere. There is nothing in this Act to indicate that a supreme right such as

have been complied with, the High Court will not go into the question of the sufficiency of the report. When therefore a Magistrate giving the accused a

without even express accused that the latter has no proper defence at all, the proceedings taken by the Executive Government on such a report are invalid and the High Court cannot remand the proceedings to the Magistrate for the defence evidence being recorded, because the Magistrate becomes *functus officio* the moment he sends in his report under sub-section (6). 39 C. 164=15 C. W. N. 1033=12 Cr. L. J. 505=12 Ind. Ca. 273. In this same case it was further held that since the power of the Government to issue a warrant under sub-section (9) is a statutory power exercisable on the receipt of a valid report from the Magistrate, the Government can only act in strict compliance with the provisions of the statute and the High Court may direct the release of the prisoner if there is any illegality in the report on which the Government acted. A similar view as to power of the High Court to discharge a person illegally detained in custody and illegally ordered to be delivered as a fugitive offender was taken in 41 C. 400=18 C. W. N. 869=14 Cr. 673=21 Ind. Ca. 933. where 7 Bom. L. R. 463 at 467 & 1886 P. R. 45 at 52 are followed. A similar view as to the power of the judiciary to interfere with arbitrary acts of the Executive where liberty of subject is concerned, was taken by Chief Justice Sadasivier in 21 Tr. L. R. 89, where the law on the subject is discussed in a very clear and elaborate judgment.

4. (1) Where it appears to any Magistrate of the first class or

Magistrate to
issue warrant of
arrest in certain
cases.

any Magistrate specially empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is a fugitive criminal of a Foreign State, he may, if he thinks fit, issue a warrant for the arrest of such person, or such information or complaint and on such evidence as would, in his opinion, justify the issue of a warrant if the crime of which he is accused or has been convicted had been committed within the local limits of his jurisdiction.

Issue of warrant
to be reported
forthwith

(2) The Magistrate shall forthwith report the issue of a warrant under this section to the Local Government.

(3) A person arrested on a warrant issued under this section

Person arrested
not to be detained
unless order re-
ceived

shall not be detained more than two months, unless within that period the Magistrate receives an order made with reference to such person under section 3, sub-section (1).

(4) In the case of a person arrested or retained under this Bail section the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the crime of which he is accused or has been convicted

Note.—The object of this section is to provide for an *ad interim* arrest of the alleged fugitive offender before the Local Government is called upon to act under s 3 by the foreign state, 39 C 164—15 C.W.N. 1053—14 C L. J. 375—12 Cr. L. J. 503—12 Ind. Ca. 273 and the High Court has the fullest discretion to act under s 498, Cr P C, 15 C. W. N. 736—12 Cr. L. J. 358—10 Ind. Ca. 938.

5. (1) If the Government of India or any Local Government is of opinion that the crime of which any fugitive criminal of a Foreign State is accused or alleged to have been convicted is of a political character, it may, if it think fit, refuse to issue any order under section 3, sub-section (1)

Power of Govern-
ment to refuse to
issue order under
section 3 when
crime of Political
character

(2) The Government of India or the Local Government may also at any time stay any proceedings taken under this chapter and direct any warrant issued under this chapter to be cancelled and the person for whose arrest such warrant has been issued to be discharged

Power of Govern-
ment to discharg-
any person in
custody at any
time

6. The expressions "the Police Magistrate" and "the Secretary of State" in section 3 of the Extradition Act, 1870, shall be read as referring respectively to the Magistrate directed to inquire into a case under section 3 of this Act, and to the Government of India or the Local Government, as the case may be

References to
"Police Magis-
trate" and "Secre-
tary of State" in
section 3 of Extra-
dition Act, 1870 33
& 34 Act. c 54

CHAPTER III.

SURRENDER OF FUGITIVE CRIMINALS IN CASE OF STATES OTHER THAN FOREIGN STATES.

7 (1) Where an extradition offence has been committed or is supposed to have been committed by a person not being a European British subject, in the territories of any State not being a Foreign State, and such person escapes into or is in British India, and the Political Agent in or for such State issues a warrant, addressed to the District Magistrate of any district in which such person is believed to be, or if such person is believed to be in Presidency town, to the Chief Presidency Magistrate of such town, for his

Issue of warrant
by Political Agents
in certain cases

* The Political Agent may issue a warrant for the arrest and surrender of any person accused of having done in any State against the law of that State an act which would if done in any part of British India where the Criminal Tribes Act III of 1911 is in force have constituted an offence against any of the provisions of the latter Act (*see title of India 1878 Pt I p 1196*). Vol III, General Rules and Orders p 1829

arrest and delivery at a place and to a person or authority indicated in the warrant, such Magistrate shall act in pursuance of such warrant and may give directions accordingly.

(2) A warrant issued as mentioned in sub-section (1) shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants, and the accused person, when arrested, shall be produced before the District Magistrate or Chief Presidency Magistrate, as the case may be, who shall record any statement made by him; such accused person shall then, unless released in accordance with the provisions of this Act, be forwarded to the place and delivered to the person or authority indicated in the warrant.

(3) The provisions of the Code of Criminal Procedure for the time being in force in relation to proclamation and attachment in the case of persons absconding shall, with any necessary modifications, apply where any warrant has been received by a District Magistrate or Chief Presidency Magistrate under this section as if the warrant had been issued by himself.

Notes.—1. A District Magistrate to whom a requisition under this section is made by a Political Agent under this section, must act on the warrant and has no authority to ascertain whether a *prima facie* case exists or not, 1909 P. R. (Cr.) 3=1908 P. W. R. (Cr.) 36=9 Cr. L. J. 3=1 Ind. Ca. 198

2. Rules framed by the Governor-General in Council, in virtue of the powers conferred by s. 22 *infra*.

(1) The Political Agent shall not issue a warrant under this section in any case which is provided for by treaty, if the State concerned has expressly stated that it desires to abide by the Procedure of the Treaty, nor in any case in which a requisition for surrender has been made by or on behalf of the State under s. 9 *infra*.

(2) The Political Agent shall not issue a warrant under this section, except on a request preferred to him in writing, either by or by the authority of the person for the time being administering the executive Government of the State for which he is a Political Agent, or by any Court within such State which has been specified in this behalf by the Governor-General in Council or by the Governor of Madras or Bombay in Council, as the case may be, by notification in the *Official Gazette*.

(3) If the accused person is a British subject, the Political Agent shall before issuing a warrant under this section, consider whether he ought not to certify the case as one suitable for trial in British India and he shall, instead of issuing such a warrant, so certify the case, if he is satisfied that the interests of justice and the convenience of the witnesses can better be served by the trial being held in British India.

See 6 B. 622. This rule cannot control s. 189, Cr. P. C., so that when a certificate under that section has once been issued, it is not competent for the political agent to cancel it and direct the trial of the accused in the native state. On the other hand, the power to issue a certificate under s. 189 remains unaffected even after he had issued a warrant under s. 7 of this act, 14 Bom. L. R. 377=13 Cr. L. J. 337=1 Bom. Cr. Ca. 140=15 Ind. Ca. 802; Ratanlal 253; 1886 P. R. (Cr.) 21.

(4) The Political Agent shall, in all cases before issuing a warrant under this section, satisfy himself by preliminary inquiry or otherwise that there is a *prima facie* case against the accused person

(5) (a) The Political Agent shall, before issuing a warrant under this section, decide whether the warrant shall provide for the delivery of the accused person—

(i) to the Political Agent or to a British officer subordinate to the Political Agent, with a view to his trial by the Political Agent, or

(ii) to an authority of the State with a view to his trial by the State Courts.

(b) Before coming to a decision, the Political Agent shall take the following matters into consideration —

(i) the nature of the offence charged,

(ii) the delay and trouble involved in bringing the accused person before himself,

(iii) the judicial qualification of the Courts of the State

(iv) whether the accused person is a British subject or not, and if he is a British (other than a European British) subject, whether the Courts of the State by custom or by recognition, try such British subjects surrendered to them

(v) whether the Courts of the State have by custom or by recognition, powers to inflict the punishment which may be inflicted under the Indian Penal Code, for an offence similar to that with which the accused person is charged

(6) Notwithstanding anything in Rule 5, the Political Agent shall make the warrant provide for the delivery of the accused person to himself (or to an officer subordinate to himself) or to an authority of the State concerned, as the case may be, if he is generally or specially instructed by the Governor-General in Council to try an accused person himself or to make him over for trial to the proper Courts of such State

(7) In the case of an accused person made over for trial to the Court of the State, the Political Agent shall satisfy himself that the accused receives a fair trial, and that the punishment inflicted on conviction is not excessive or barbarous, and if he is not so satisfied, he shall demand the restoration of the prisoner to his custody pending the orders of the Governor-General in Council [As to trial for an offence other than that for which extradited, see 17 B 359 at 374 & 375]

(8) * * * *

(9) Accused persons arrested in British India on warrant issued under this section or *infra*, shall be treated as far as possible in the same way as persons under trial in British India

(10) A person sentenced to imprisonment by a Political Agent, shall, if a British subject, be conveyed to the most convenient prison under British Administration and shall there be dealt with as though he had been sentenced under the Local Law

Provided always that this Rule shall not be construed so as to give such person any right of appeal other than that allowed by the Rule for the time being in force, regulating Appeals from the Political Agent. [Gazette of India 1901, Pt 1, p. 361] Vol III, General Rules and Orders, p 1871

3. There is no provision in this Act making an inquiry by a competent British Court in British India, into the truth of the accusation, whether in the presence of the accused or otherwise, a condition

8. (1) Where a Political Agent has directed by endorsement on any such warrant that the person for whose security. arrest it is issued may be released on executing a bond with sufficient sureties for his attendance before a person or authority indicated in this behalf in the warrant at a specified time and place, the Magistrate to whom the warrant is addressed shall on such security being given, release such person from custody.

(2) When security is taken under this section, the Magistrate shall certify the fact to the Political Agent who issued the warrant, and shall retain the bond.

(3) If the person bound by any such bond does not appear at the time and place specified, the Magistrate may, on being satisfied as to his default, issue a warrant directing that he be re-arrested and handed over to any person authorized by the Political Agent to take him into custody.

(4) In the case of any bond executed under this section, the Magistrate may exercise the powers conferred by the Code of Criminal Procedure for the time being in force in relation to taking a deposit in lieu of the execution of a bond and with respect to the forfeiture of bonds and the discharge of sureties.

Note.—In the absence of an endorsement on the warrant by the

8A. Notwithstanding anything contained in s. 7, sub-s. (2) or s. 8, when an accused person arrested in accordance with the provisions of sec. 7 is produced before the District Magistrate or the Presidency Magistrate, as the case may be, and the statement (if any) of such accused person has been recorded such Magistrate may, if he thinks fit, before proceeding further report the case to the Local Government and, pending the receipt of orders on such report, may retain such accused person in custody or release him on his executing a bond with sufficient sureties for his attendance when required.

9. Where a requisition is made to the Government of India or to any Local Government by or on behalf of any State not being a Foreign State, for the surrender of any person accused of having committed an offence in the territories of such State, such

Requisitions by
States not being
Foreign States

requisition shall (except in so far as relates to the taking of evidence to show that the offence is of a political character or is not an extradition crime) be dealt with in accordance with the procedure prescribed by s. 3 for requisitions made by the Government of any Foreign State as if it were a requisition made by any such Government under that section.

Provided that if there is a Political Agent in or for any such State, the requisition shall be made through such Political Agent.

10. (1) If it appears to any Magistrate of the first class or any Magistrate empowered by the Local Government in this behalf that a person within the local limits of his jurisdiction is accused or suspected of having committed an offence in any State not being a Foreign State and that such person may lawfully be surrendered to such State, or that a warrant may be issued for his arrest under s. 7, the Magistrate may, if he thinks fit, issue a warrant for the arrest of such person on such information or complaint and on such evidence as would, in his opinion, justify the issue of warrant if the offence had been committed within the local limits of his jurisdiction

Power to Magistrates to issue warrants of arrest in certain cases

(2) The Magistrate shall forthwith report the issue of a warrant under this section, if the offence appears or is alleged to have been committed in the territories of a State for which there is a Political Agent, to such Political Agent and in other cases to the Local Government

Issue of warrant to be reported forthwith

(3) A person arrested on a warrant issued under this section shall not, without the special sanction of the Local Government, be detained more than two months, unless within such period the Magistrate receives an order made with reference to such person in accordance with the procedure prescribed by s. 9, or a warrant for the arrest of such person under s. 7.

Limit of time of detention of person arrested

(4) In the case of a person arrested or detained under this section, the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the offence with which he is charged.

Bail

Note — This section is in pari materia with s. 189, Cr P C. Where a

to the court of session and trial by that court were held not to be vitiated by that circumstance, 8 Bom. L R 507 = 4 Cr L J. 49. See Ratanlal 97, 5 Ou. Ca. 55

11. (1) A person accused of an offence committed in British India, not being the offence for which his surrender is asked, or undergoing sentence under any conviction in British India, shall not be surrendered in compliance with a warrant issued by a Political Agent under s. 7 or a requisition made by or on behalf of any State not being a Foreign State under s. 9, except on the condition that such person be re-surrendered to the Government of India or the Local Government, as the case may be, on the termination of his trial for the offence for which his surrender has been asked :

Provided that no such condition shall be deemed to prevent or postpone the execution of a sentence of death lawfully passed.

(2) On the surrender of a person undergoing sentence under a conviction in British India, his sentence shall be suspended until the date of his trial for the offence for which he was surrendered.

12. The provisions of this chapter with reference to accused persons shall, with any necessary modifications, apply to the case of a person who, having been convicted of an offence in the territories of any State not being a Foreign State, has escaped into or is in British India before his sentence has expired.

13. Every person who is accused or convicted of abetting or attempting to commit any offence shall be deemed to be an offender within the meaning of this chapter, to be dealt with accordingly.

14. It shall be lawful for any person to whom a warrant is directed in pursuance of the provisions of this chapter to receive, hold in custody and convey the person mentioned in the warrant, to the place named in the warrant, and, if such person escapes out of any custody to which he may be delivered in pursuance of such warrant, he may be re-taken as a person accused of an offence against the law of British India may be re-taken upon an escape.

15. The Government of India or the Local Government may, by order, stay any proceedings taken under this chapter, and may direct any warrant issued under this chapter to be cancelled, and the person for whose arrest such warrant has been issued to be discharged.

Note.—*Ouster of the jurisdiction of the High Court.*—This section ousts the jurisdiction of the High Court to inquire into the propriety of the warrant, but leaves open the question of the High Court's power to

interfere with a Magistrate's action, if it was proved that such action was consequent upon a warrant issued by a Political Agent which was plainly illegal 7 Bom L R. 463=2 Cr. L J 439; 1886 P. R. 45, followed in 41 C. 400=18 C. W. N. 869=14 Cr L J 673=21 Ind Ca 993

16 The provisions of this chapter shall apply to an offence or to an extradition offence, as the case may be, committed before the passing of this Act, and to an offence in respect of which a Court of British India has concurrent jurisdiction

Application of Chapter to offences committed before its commencement

17. (1) In any proceedings under this chapter, exhibits and depositions (whether received or taken in the presence of the person against whom they are used or not) and copies thereof, and official certificates of facts and judicial documents stating facts, may, if duly authenticated, be received as evidence

Receipt in evidence of exhibits, depositions and other documents

(2) Warrants, depositions or statements on oath which purport to have been issued, received or taken by any Court of Justice outside British India, or copies thereof, and certificates of, or judicial documents stating the fact of, conviction before any such Court, shall be deemed duly authenticated,—

Authentication of the same

(a) If the warrant purports to be signed by a Judge, Magistrate or officer of the State where the same was issued or acting in or for such State.

(b) if the depositions or statements or copies thereof purport to be certified, under the hand of a Judge, Magistrate or officer of the State where the same were taken, or acting in or for such State, to be the original depositions or statements or to be true copies thereof, as the case may require

(c) if the certificate of, or judicial document stating the fact of, a conviction purports to be certified by a Judge, Magistrate or officer of the State where the conviction took place or acting in or for such State

(d) if the warrants, depositions, statements, copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a minister of the State where the same were respectively issued, taken or given.

(3) For the purposes of this section, "warrant" includes any judicial document authorizing the arrest of any person accused or convicted of an offence

Definition of warrant

18 Nothing in this chapter shall derogate from the provisions of any treaty for the extradition of offenders,

Chapter not to derogate from Treaties

CHAPTER IV.

RENDITION OF FUGITIVE OFFENDERS IN HIS
MAJESTY'S DOMINIONS

Application of
Fugitive Offenders'
Act, 1881, 44 & 45
Vict., c. 69

19. For the purpose of applying and carrying into effect in British India the provisions of the Fugitive Offenders Act, 1881, the following provisions are hereby made:—

(a) the powers conferred on "Governors" of British possessions may be exercised by any Local Government;

(b) the powers conferred on a "Superior Court" may be exercised by any Judge of a High Court;

(c) the powers conferred on a "Magistrate" may be exercised by any Magistrate of the first class or by any Magistrate empowered by the Local Government in that behalf; and

(d) the offences committed in British India to which the Act applies, are piracy, treason and any offence punishable under the Indian Penal Code with rigorous imprisonment for a term of twelve months, or more, or with any greater punishment.

Note.—Under Madras notification No. 281 JdI. (of 23 G-1905 Ga. III, Pt. I., p. 472) Presidency Magistrates in the City of Madras are invested with powers conferred on a Magistrate by the *Fugitive Offenders Act* 1881, 44 & 45 Vict., c. 69.

CHAPTER V.

OFFENCES COMMITTED AT SEA

20 Where the Government of any State outside India makes

Requisition for
surrender in case
of offence com-
mitted at sea

a requisition for the surrender of a person accused of an offence committed on board any vessel on the high seas which comes into any port of British India, the Local Government and any Magistrate having jurisdiction in such port and authorized by the Local Government in this behalf may exercise the powers conferred by this Act.

CHAPTER VI.

EXECUTION OF COMMISSIONS ISSUED BY CRIMINAL
COURTS OUTSIDE BRITISH INDIA.

21. The testimony of any witness may be obtained in relation to any criminal matter pending in any

Execution of com-
missions issued by
Criminal Courts
outside British
India

Court or tribunal in any country or place outside British India in like manner as it may be obtained in any civil matter under the provisions of the Code of Civil Procedure for the time being in force with respect to commissions, and the provisions of that

Act 44 and 45 Vict. c. 69

Code relating thereto shall be construed as if the term "suit" included a criminal proceeding.

Provided that this section shall not apply when the evidence is required for a Court or tribunal in any State outside India other than a British Court and the offence is of a political character.

CHAPTER VII SUPPLEMENTAL.

Power to make rules 22 (1) The Governor-General in Council may make rules to carry out the purposes of this Act -

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

- (a) the removal of prisoners accused or in custody under this Act, and their control and maintenance until such time as they are handed over to the persons named in the warrant as entitled to receive them,
- (b) the seizure and disposition of any property which is the subject of, or required for proof of, any alleged offence to which this Act applies.
- (c) the pursuit and arrest in British India, by officers of the Government or other persons authorised in this behalf, of persons accused of offences committed elsewhere, and
- (d) the procedure and practice to be observed in extradition proceedings.

(3) Rules made under this section shall be published in the *Gazette of India* and shall thereupon have effect as if enacted by this Act.

Note—The Rules framed under this section do not apply to territory under British Administration in which the Code of Criminal Procedure (Act V of 1898) is in force—*Gazette of India*, 1875, Pt I, p 524 Vol III, Rules and Orders, p 1835 See also 12 M. 39; 9 B 333 at 339; and 26 M. 607.

23. Notwithstanding anything in the Code of Criminal Procedure, 1898, any person arrested without an order from a Magistrate and without a warrant, in pursuance of the provisions of s 54, clause *seventhly*, of the said Code, may, under the orders of a Magistrate within the local limits of whose jurisdiction such arrest was made, be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such Magistrate under s 10

Detention of persons arrested under
s 54, clause *seventhly*,
Act V of 1898

* For the Procedure to be followed for the confinement of a prisoner under sentence of death and for his execution, see *Gazette of India*, 1904 Part I, p 264 or Vol III, Rules and Orders, p 1829

THE FIRST SCHEDULE.

EXTRADITION OFFENCES

[See s. 2, clause (l), and Chapter III (*Surrender of Fugitive Criminals in Case of States other than Foreign States*)].

[The sections referred to are the sections of the Indian Penal Code]

Frauds upon creditors (s. 206).

230 to 263 A).

Attempt to murder (s. 307).

Thagi (ss. 310, 311).

Causing miscarriage, and abandonment of child (ss. 312 to 317).

Causing hurt (ss. 323 to 333).

Wrongful confinement (ss. 347, 348).

Fraudulent deeds, &c. (ss. 421 to 424)

Mischief (ss. 425 to 440).

Lurking house-trespass (ss. 443, 444)

Forgery, using forged documents, &c. (ss. 463 to 477A).

Desertion from any body of Imperial Service Troops.

Piracy by law of nations.

Sinking or destroying a vessel at sea or attempting or conspiring to do so.

Assault on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.

Any offence against any section of the Indian Penal Code or against any other law which may, from time to time, be specified by the Governor General in Council by notification in the *Gazette of India* either generally for all States or specially for any one or more States.

EXTRADITION RULES BETWEEN THE BRITISH AND FOREIGN POSSESSIONS IN INDIA.

I.—British and French Indian Governments

1. By the tacit consent of both the contracting powers—the French and English Governments—the clause in the Convention of March 1815 relating to the extradition of *Debtors* has been treated as set aside, and has not been acted on, consequently it must be considered null and void. Further, although the 9th Article of the Treaty speaks of offences generally, the subsequent and uniform exposition of the Article, by the Acts and Declarations of the two Governments, has virtually put an interpretation to some extent upon the word “offences,” as to which

its meaning to offences of a grave character, and to exclude from the operation of the treaty (a) mere petty local offences, which would not necessarily be treated as criminal acts by the laws of both countries, and (b) political offences. The Governor in Council resolves to give a

surrender is made, while a report of his proceedings in every case of

2 With reference to the above Proceedings, the several District Magistrates will, in future, submit the reports referred to at the close of para 1 of G O, 14th March, 1872, No 359 in a form containing the following particulars —

(1) Names of offenders, (2) nature of offence (3) to what authority surrendered, (4) date of surrender, (5) remarks — (G O, 24th October, 1889, No 2194, Judicial)

3 It was pointed out in G O, 14th March, 1872, No 859 that although the 9th Article of the Treaty with France speaks of offences generally, practice has long since limited the meaning to offences of a "grave" character. Looking at the Schedule attached to Act XXI of 1879 (now Schedule I to Act XV of 1903), the Government consider

by a mere debtor, it is competent to him to ask for particulars after a reference to the articles of the "Code Penal" cited in the warrant, the extradition of debtors, as well of course as of Political offenders, not being within the Treaty, as interpreted by practice. As regards the question whether a resident of British Territory sojourning in the French Territory for a few weeks or months on business or affairs (with the *animus revertendi*) and returning to his own village thereafter, should be deemed to take refuge within our territory or to become a fugitive from justice with the meaning of the

authorities should be invited to the necessity of making their requisitions to such officers only, in future cases (G O 19th May 1882, No 135, Judicial).

4 In cases where surrender is applied for of persons escaping into British Territory on conviction by French Courts, regard should be

had to the nature of the offence with which the person was originally charged. By G. O., 14th March, 1872, No. 359, and connected papers, the word "offences" is limited to mean only offences of a grave character, and this distinction should be borne in mind whether the person has been only charged or both charged and convicted of an offence in French Territory. G. O., 31st January, 1889, No. 178, Judicial)

5 Where it is doubtful whether the offence committed is a "grave crime" as contemplated by the received interpretation of the Treaty of 1815, the Magistrate should ask for a copy of the complaint and submit it to Government for orders before taking any step for the apprehension of the accused. G. O., 26th March, 1888, No 747, Judicial).

Police Convention.

The following Police Convention of 1872 regarding the suppression of offences and crimes committed in French and British territories will be followed in all parts of the Presidency which adjoin French Territory:

1 The Police of both territories will respectively communicate any useful information regarding what they do.

2. They will exchange lists of vagrants and people without fixed residences who wander from one territory to another.

3. The officers of the Judicial Police belonging to French Territory will arrest provisionally on either written or verbal requisitions of officers of the British Police

(a) All French subjects suspected of theft with dacoity, of gang robbery, or of murder. Information as to

(b) British subjects suspected of grave crimes and offences other than those relating to the Revenue and Customs Laws

4. They will proceed on similar requisitions to search for articles stolen and prepare reports regarding their seizure.

5. They will forthwith send the arrested prisoners and the articles seized to Pondicherry for the orders of the Solicitor-General

6. In no case and under no pretext will they themselves make over the prisoners arrested or the articles seized to foreign agents (unknown parties)

7. They are prohibited from performing any of their duties in foreign territory.

8 The above provisions are reciprocal, and will be observed by the officers of the British Police on requisitions made by officers of the French Judicial Police

Such arrest, if not supported by a warrant issued by a Magistrate of the Indian Extradition, Act 1913, instruction to the Police, on to apply to the Magistrate of Act XV of 1903, and as it is intended to

Letter to Commissioners of Divisions.

The following letter, dated 23th June, 1881, from the Secretary to the Government of Bengal, to all Commissioners of Divisions and District Magistrates, is important with reference to extradition between the French and British possessions in India—I am directed to state, for your information, that the question of extradition between the French and British possessions in India has recently been under the consideration of the Government of India and her Majesty's Secretary of State for India. The practical question at issue was whether the procedure in cases of extradition should be regulated by the stipulations of Article IX of the Treaty of 7th March, 1815, between Great Britain and France which relates exclusively to the Indian possessions of the two countries, and under which persons accused of non-political offences of a grave character have hitherto been surrendered upon application, supported by a warrant and summary of the charges, no depositions of witnesses being required, or whether it was necessary to observe the more stringent provisions of [s 3 of the Indian Extradition Act XV of 1903] and ss 3 and 10 of Statute 33 and 34 Vic. C. 52, relating to Extradition. The decision at which her Majesty's Government has arrived is that existing practice is to be maintained, and that the Indian Act of 1903 and the English Statute of 1870 do not apply—See *Punjab Record*, 1893, p. 47.

II.—Hyderabad.

1. AGREEMENT made between the British Government and that of His Highness of the Nizam by which the treaty concluded between both those Governments in 1867 has been modified so far as the procedure to be observed in cases of extradition of offenders from British India to the Hyderabad State is concerned—

Article 1st—The two Governments hereby agree to act upon a system of strict reciprocity as hereinafter mentioned.

Article 2nd.—Neither Government shall be bound in any case to surrender any person not being a subject of the Government making the requisition. If the person claimed should be of doubtful nationality, he shall, with a view to promote the ends of justice, be surrendered to the Government making the requisition.

Article 3rd—Neither Government shall be bound to deliver up debtors, or civil offenders, or any person charged with any offence not specified in Article 4th.

Article 4th.—Subject to the above limitations, any person who shall

murder, attempting
dacoity, kidnapping
receiving property

maiming,
knowingly
thefts of
gold, silver, &c.

Article 5th—In no case shall either Government be bound to surrender any person accused of any offence except upon requisition duly made by or by the authority of the Government within whose territories the offence shall be charged to have been committed, and also upon such evidence of criminality as, according to the laws of the country in

which the person accused shall be found, would justify his apprehension and sustain the charge, if the offence had been there committed.

Article 6th—The above treaty shall continue in force until either one or the other of the high contracting parties shall give notice to the other of its wish to terminate it, and no longer.

Article 7th—All existing engagements and agreement shall continue in full force.

2. Whereas a Treaty relating to the extradition of offenders was concluded on the 25th May, 1867, between the British Government and the Hyderabad State; and whereas the procedure prescribed by the Treaty for the extradition of offenders from British India to the Hyderabad State has been found by experience to be less simple and effective than the procedure prescribed by the law as to the extradition of offenders in force in British India; It is hereby agreed between the British Government and the Hyderabad State that the provisions of the Treaty prescribing a procedure for the extradition of offenders from British India to the

shall be followed in every such case (No. 2597, *Judicial*)

3. When offenders from the Hyderabad State are apprehended in British territory by the Nizam's Police and made over to the British authorities in view to their formal surrender to the Nizam's Government, the receipt of the Magistrate having jurisdiction in the place in which the offenders are arrested, shall, in all cases, be required as a voucher.—(*G. O.*, 16th June, 1870, No. 814, *Judicial*).

The following direction by the Governor-General in Council, dated 22nd May, 1835, has been published:—

I. No 1637 I.—In exercise of the powers conferred by [s 2] of Act XV of 1903, The Indian Extradition Act] and all other powers enabling him in this behalf, the Governor General in Council is pleased to direct as follows:—

Bazaars for the Hyderabad Residency in the Code of

Criminal Procedure.

(2) The First Assistant to the Resident at Hyderabad for the time being shall exercise within the limits of the Hyderabad Residency Bazaars, the powers of a Court of Sessions as described in the Code of Criminal Procedure.

(3) The Resident at Hyderabad for the time being shall exercise within the limits of the Hyderabad Residency Bazaars, the powers of a High Court as described in the Code of Criminal Procedure.

(4) This notification applies to all proceedings except proceedings against European British subjects or persons jointly charged with European British subjects.

(5) All criminal powers which may, before the date of this notification, have been exercised by the officers referred to herein within the limits specified shall be deemed to have been exercised in accordance with law.

The Government of India in the
dated the 18th January, 1902, as
is hereby cancelled

II. No 1639 I—In exercise of the powers conferred by s. 23 of Act XV of 1903, The Indian Extrajudicial Act and of all other powers enabling him in this behalf, the Governor-General in Council is pleased to direct as follows:—

of a District Magistrate as described in the Code of Criminal Procedure

(2) The First Assistant to the Resident at Hyderabad for the time being shall exercise, within the limits of His Highness the Nizam's Territories (in all cases in which such powers may lawfully be exercised by the Governor-General in Council within such territories), the powers of a Court of Session as described in the Code of Criminal Procedure

(3) The Resident at Hyderabad for the time being shall exercise the powers of a High Court as described in the said Code in respect of all offences over which magisterial jurisdiction is exercised by the Superintendent of the Hyderabad Residency Bazaars within the said territories, and in respect of all offences over which the jurisdiction of a Court of Sessions is exercised by the First Assistant to the Resident within the said territories

(4) In the exercise of the jurisdiction of a Court of Sessions conferred on him by this notification, the First Assistant to the Resident

warrant-cases by Magistrates

(5) This notification applies to all proceedings except proceedings which may be instituted and herein contained

(6) Nothing in this notification shall be deemed to extend to any cantonment, or to the Hyderabad Residency Bazaars, or to any railway lands situate within the said territories:—(*Gazette of India, 23rd May, 1885, Part I p 304*)

III—Mysore

1. Any person, liable to be tried for an offence committed within the limits of the territories described in Chapter I, section 1, of the Indian Penal Code, may be arrested within the territories of Mysore by an officer of Police Subordinate to the Chief Commissioner of Mysore, or other person duly authorised for the purpose, in the same way and under the same conditions, with or without warrant, as if the offence had been committed in the territories of Mysore

2 If the person, so arrested, be a British subject, or other than a subject of Mysore, he shall be surrendered for trial to the British authorities

3 If the person, so arrested, be a subject of the Government of Mysore, he shall either be tried in the Courts in Mysore or surrendered for trial in British Courts, as may be found most convenient

4 Any subject of the Mysore Government liable to be tried for an offence committed beyond the limits of the Mysore territories may be dealt with by the Mysore Courts, in the same manner as if such offence

had been committed within the said territories.—(*G. I. Notification, 5th January, 1871, No. 5, Judicial, Foreign Dept.*)

5. Officers exercising the powers of a Magistrate, when requiring the surrender of a person, must apply to the Commissioner of the Division having jurisdiction over the locality to issue his warrant for the purpose, the application being supported by the required evidence.—(*G. O., 1st May, 1877, No. 1109, Judicial.*)

6. For the purpose of having the house of a person searched in the Mysore territory, the Magistrate in the British territory is not to issue any warrant himself, which he has no power to do, but to apply to the Commissioner of the Division having jurisdiction over the locality to issue his warrant for the purpose, the application being supported by the required evidence.—(*G. O., 1st May, 1877, No. 1109, Judicial.*)

IV.—Ceylon

The Law of Extradition which governs Ceylon is contained in the Statute G and 7 Vic, C 34; and it is under that law alone that extradition is obtained.

will be gathered from the papers therein referred to, are—

I.—That the Magistrate must have some satisfactory evidence before him to justify the issue of a warrant for the apprehension of the offender;

II.—That true copies of the depositions, etc., on which the warrant was issued must be furnished to the constable who is to proceed with the warrant to Ceylon;

III.—That the constable should be in a position to swear that the depositions, etc., are true copies, and to the seal and signature of the Magistrate granting the warrant;

IV.—That on arrival in Ceylon, the constable is to place himself in communication with the Colonial Police, in view to obtaining the endorsement of Her Majesty's Judge and to the taking of the other steps necessary to the warrant being executed.—(*G. O., 18th April, 1877, No. 970, Judicial.*)

V.—Penang.

Where the Lieutenant Governor of Penang telegraphed to the Chief Police Officer of Negapatnam requesting him to arrest an accused person who had escaped from Penang, the arrest made by the Police officer, without a warrant from a duly authorized Magistrate was held improper and the delivery of the accused without the warrant of the Local Government still more irregular.

What a Magistrate, subordinate to the District Magistrate, should do, after issuing the warrant of arrest in any such case is to report his action to Government, through the usual channel or channels, and the District Magistrate in submitting the report to the Chief Secretary should state that he has telegraphed to the Executive Government or Foreign Power concerned, requesting that a requisition to give up the accused person may be made to the Governor in Council in accordance with [the Indian Extradition Act, 1903.]—(*G. O.*, 29th April, 1892, No 314, *Judicial*)

VI Other States.

With reference to the provisions of s 13 of Act XXI of 1879, the Governor-General in Council was pleased to direct that, for offences committed in any of the following States, viz., Patiala, Jind, Nabha, Maler Kotla, Kalsia, Dujana, Pataudi and Loharu, Bahawalpur, Chamba, Faridkot, Mandi, Suket, Sirmur (Naha), Kahlur (Bailaspur), Bashahr, Nalagarh, Keonthal, Baghal, Baghat, Jubbal, Kumharsain, Bhajji, Malog, Balson, Dhami, Kuthar, Kunihar, Mangal, Bija, Darkuti, Taroch, Sangri, the persons accused shall be handed over by the Political Agent concerned to the Courts of the State for trial. But this direction was subject to the instructions contained in the notifications published in the *Gazette of India*, No 87 J, dated the 16th August, 1876, and to the further condition that should there be, in any particular instance, special reasons for his so doing, the Political Agent might dispose of the case himself.—*Letter dated Simla, 13th August, 1885, Foreign Secretary to Government of Punjab (Punjab Rec., Circular Or., p. 28).*

VII.—Miscellaneous.

1. *Bail*—When a prisoner has been arrested under the provisions of the Extradition Act, under a Political Agent's warrant (s 7) or under a warrant issued by the Governor-General in Council or any Local Government, bail cannot be taken under s 10 (4) and the person arrested must be removed in custody and delivered up at the place and to the person named in the warrant (*Letter from the Government of India, 6th May, 1875, No 53 J, read in G. O., 17th June, 1875, No 367, Political*)

2. *Act XV of 1903*—Act XV of 1903 does not profess to deal with the matter of requisitions for the surrender of criminals who have fled from justice out of British India into a Native State, but with the converse. The standing order on the subject by the Government of India is that "where such a demand is made it should be made by our Magistrates, not to the State direct, but through the Political Officer, and the demand should invariably be accompanied by a copy of any depositions made, or, where no evidence has yet been taken, by a statement of the information

compliance with any reasonable demand made to the Durbar to which he is accredited, for the surrender of an absconded criminal." As to what is a "reasonable demand," the Government of India state that it certainly includes the case of all offences (*vide* Schedule I of Act XV of 1903) for which the arrest and removal of criminals escaping into British India is allowed; and that some cases outside of that catalogue may probably be added with propriety. Such instances, however, would be exceptional, and the requisitions for surrender should not be made without the sanction of the Governor in Council, where the offence is not one of those mentioned in the Schedule above cited, or where the Political Agent doubts the reasonableness of the grounds of the requisition, and the Magistrate of the District continues to press it. (*G.O., 12th April, 1875, No. 219, Political.*)

3. *Procedure in arrest.*—Officers of the Magistracy, in applying for the arrest and surrender of criminals who have escaped from British India into a Native State, should do so by means of a letter addressed to the Political Agent concerned. The issue of a warrant in such cases is clearly irregular and unauthorized. (*G.O., 3rd May, 1875, No. 258, Political.*)

4. The surrender of accused persons escaping into British India is governed by the provisions of s. 3, s. 7 or s. 9 as the case may be of the Indian Extradition Act XV of 1903, the necessary formalities prescribed being the following:—

(a) There must first be a requisition made to the Governor in Council by the authority administering the executive Government of any part of the dominions of Her Majesty, or the territory of any foreign Prince or State, that any person accused of having committed an offence in such dominions or territory should be given up.

(b) The Governor in Council has then to issue an order to the Magistrate, who would have had jurisdiction to inquire into the offence if it had been committed within his local jurisdiction, directing him to inquire into the truth of the accusation.

(c) Such Magistrate has thereupon to issue his summons or warrant for the arrest of the person named, as the case may be, according to the nature of the offence, and enquire into the truth of the accusation.

(d) On closing his inquiry, the Magistrate has to report the result to the Government.

(e) If satisfied, on such report, that the accused ought to be
 Council may issue his warrant for
 e accused person and for his
 to be named in the warrant.

It is not until these several formalities have been observed and complied with that the accused can be surrendered to the authority making the requisition. (*G.O., 24th February, 1874, No. 283, Judicial.*)

5 *Charges*.—In the matter of defraying charges connected with the sending of European British subjects to the High Court at Madras for trial for offences committed in Native States, the Governor in Council resolves to direct that the practice heretofore observed be uniformly followed, viz., for the Madras Government to defray the expenses of prosecutors and witnesses, and for the Native Government to defray the expenses on account of the accused.—(*G. O.*, 6th April, 1872, No 478, *Indial*)

APPENDIX II.

THE WHIPPING ACT No. IV OF 1909.*

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO THE PUNISHMENT OF WHIPPING

WHEREAS it is expedient to consolidate and amend the law relating to the punishment of whipping It is hereby enacted as follows:—

Short title and extent 1 (1) This Act may be called the Whipping Act, 1909 and

(2) It extends to the whole of British India, inclusive of British Baluchistan and the Sonthal Parganas

Whipping added to punishments described in Act XLV 1900 2 In addition to the punishments described in s. 53 of the Indian Penal Code, offenders are also liable to the punishment of whipping:—

Note.—“I think the Indian Penal Code and the Code of Criminal Procedure must be read as if the Whipping Act (VI of 1864) formed a part of the Penal Code from the date of its enactment”—*PER NORMAN*, off. C. J., 7 B. L. R. 165 at 169=15 W. R. (Cr.) 89 See also 5 M. H. C. R. Appx. XVIII.

Offences punishable with whipping in lieu of other punishment 3 Whoever commits any of the following offences, namely:—

(a) theft, as defined in s. 378 of the Indian Penal Code other than theft by a clerk or servant of property in possession of his master,

(b) theft in a building, tent or vessel, as defined in s. 380 of the said Code,

(c) theft after preparation for causing death or hurt, as defined in s. 382 of the said Code

(d) lurking house trespass, or house-breaking, as defined in ss. 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section,

For statement of object and reasons see *Gazette of India* 1908 Pt. V, p. 222, for Report of Select Committee, *ibid.*, 1901 Pt. V p. 47, and for proceedings in Council *ibid.* 1908 Pt. VI, p. 19 1909, Pt. VI pp. 14 & 18 etc

(c) lurking house-trespass by night, or house breaking by night, as defined in ss. 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section, may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the said Code.

Notes.—1. Exact scope of the section.—In cases of adults as well as of juveniles, whipping can only be in lieu of any other punishments, 1864 W. R. (Cr.) 38; 1 W. R. Cr. 24; 2 W. R. (Cr.) 63; 4 W. R. (Cr.) 20. When a sentence of whipping is imposed, the punishment should be stated as whipping. But, where as in this section, the punishment of imprisonment or both cannot be legally inflicted under the I. P. C., in addition to the whipping. The word punishment in this section and in s. 5 *infra* means the total of punishments awardable under the Indian Penal Code, 16 B 357, followed in 5 L. B. R. 22-10 Cr L. J. 120-2 Ind. Ca. 620. A sentence of whipping in addition to another punishment for one of two offences of the same character of which the prisoner is simultaneously convicted is not warranted by law, 1885 P. R. (Cr.) 8. A double sentence of whipping is illegal, 4 B. & L. R. 929 at 930; Rafanial 564. Only a single sentence of whipping can be awarded, 9 W. R. (Cr.) 41; the law does not contemplate concurrent sentences of whipping 3 Bur L. T. 174-12 Cr. L. J. 455-11 Ind. Ca. 1001. The strict meaning of the expression would be that the accused is to be flogged by two operators simultaneously which would be monstrous, see 5 M. H. C. R. App. XVIII. When an illegal sentence of whipping and imprisonment has been passed, and the whipping has been carried into execution, and where the sentence as a whole is unlawful, the High Court will not necessarily set aside the sentence of imprisonment, Weir I, 935. See Weir I, 934, where an accused was sentenced to imprisonment and whipping, and the High Court amended the sentence by allocating the sentence of imprisonment to one of the offences and whipping to the other, and M. H. C. Cr. R. C. 316 of 1911 where the High Court in consideration of the fact that an illegal sentence of whipping was not set aside.

2. Whipping may be awarded even if conviction is for several offences of which alone are punishable with whipping. If a prisoner is sentenced to imprisonment for the whole term, the whipping is not considered objectionable though not illegal.

3. The abetment of any of the offences specified in this section is not punishable with whipping. No doubt a 1901 P. C. provision is

abetment the punishment provided for the offence, i. e. a thing punishable under the I P C or any special law (s. 40). Now under the Penal Code theft is punishable with imprisonment or fine or both (s. 379) or with whipping under this Act, but this Act is not a special law (s. 41) because a special law means a law making punishable certain things not already punishable under the Penal Code. This act is not a special law in this sense, it creates no fresh offences but merely provides a supple-

juvenile offenders. Hence it is not intended in this section that abetment of the offences herein specified should be punishable with whipping.—*per Twomey, J*, 7 L. B. R. 63 = 15 Cr. L. J. 3 = 22 Ind. Ca. 147.

Offences punishable with whipping in lieu of or in addition to other punishment

4 Whoever—

(a) abets, commits or attempts to commit rape, as defined in s. 375 of the Indian Penal Code

(b) compels, or induces any person by fear of bodily injury, to submit to an unnatural offence as defined in s. 377 of the said Code,

(c) voluntarily causes hurt in committing or attempting to commit robbery, as defined in s. 390 of the said Code;

(d) commits dacoity as defined in s. 391 of the said Code,

may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence, abetment or attempt be liable under the said Code

Note.—This section is to be read subject to the provisions of s. 391 (3) of the Cr. P. C. so that a sentence of whipping when the imprisonment awarded is for a term less than three months, is illegal, 4 Bom. L. R. 436. This section applies to juvenile as well as to adult offenders 7 B. H. C. R. (Cr. Ca.) 70.

Juvenile offenders when punishable with whipping

5 Any juvenile offender who abets, commits or attempts to commit—

(a) any offence punishable under the Indian Penal Code, except offences specified in Chapter VI and in sections 153A and 550 of that Code and offences punishable with death, or

(b) any offence punishable under any other law with imprisonment, which the Governor-General in Council may, by notification in the *Gazette of India*, specify in this behalf,

may be punished with whipping in lieu of any other punishment to which he may for such offence, abetment or attempt be liable

Explanation—In this section the expression “juvenile offender” means an offender whom the Court, after making such enquiry (if any) as may be deemed necessary, shall find to be under sixteen years* of age, the finding of the Court in all cases being final and conclusive

* Cf. s. 4 of the Reformatory Schools Act, at p. 977 *infra*

Notes.—1. The scope of the section. This section is not meant to supersede ss. 3 and 4, but to be applied to proper cases alternately with those sections. Ss. 3 and 4 apply equally to juvenile offenders, *Ratanlal* 79. The explanation defining "juvenile offender" is in accordance with 8 B. H. C. R. (Cr. Ca.) 9 & 6 A. 492. This act does not empower a court after passing a sentence of imprisonment to commute it into a sentence of whipping should be passed to s 59 I. P. C. 5 L. B. R. 21.

2. Offences under special laws for which juvenile offenders may be punished with whipping—The Governor General has notified (*Gazette of India*, 1910, Pt. I, p. 234. and 1911 Pt. I, p. 24) that under s 11 of the

with imprisonment for three years or upwards, may be punished with whipping in lieu of any other punishment to which he may be liable under the said Code.

7. To s. 392 sub-sec (2), of the Code of Criminal Procedure, 1898, the words "and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes" shall be added

Amendment of s
392, Act V, 1909

Repeals 8 The enactments mentioned in the schedule are hereby repealed to the extent specified in the fourth column thereof

THE SCHEDULE

ENACTMENTS REPEALED

See Section (8)

Year.	No	Subject or short title	Extent of repeal
1	2	3	4
<i>Acts of the Governor-General in Council.</i>			
1864	VI	The Whipping Act, 1864	So much as is unrepealed
1895	III	The Indian Criminal Law Amendment Act, 1895	Section 5
1898	V	The Code of Criminal Procedure, 1898	The words "whipping (if specially empowered)" in sub sec (1) and sub sec (3) of s 32 The words and figures "(1) Power to pass sentences of whipping, s 32," under the heading "Powers with which a Magistrate of the second class may be invested" in Schedule IV
1898	XIII	The Burma Laws Act, 1898	Section 4, sub-sec (3), cl (b), and the Second Sch
1900	V	The Whipping Act, 1900.	The whole Act

APPENDIX III.

THE REFORMATORY SCHOOLS ACT
No. VIII of 1897.*AN ACT TO AMEND THE LAW RELATING TO REFORMATORY
SCHOOLS AND TO MAKE FURTHER PROVISION FOR
DEALING WITH YOUTHFUL OFFENDERS.

WHEREAS it is expedient to amend the law relating to Reformatory Schools and to make further provision for dealing with youthful offenders ;

Preamble

It is hereby enacted as follows :—

I.—Preliminary

Title, commencement and extent.

1. (1) This Act may be called the Reformatory Schools Act, 1897 ; and

(2) It shall come into force at once.

(3) This section and s. 2 shall extend to the whole of British India. The other sections shall extend in the first instance to the whole of British India, except the territories for the time being administered by the Lieutenant-Governor of the Punjab and Chief Commissioner of Coorg, but either of the said Local Governments may, any time, by notification in the local Official Gazette, extend these sections to their territories from such day as may be fixed in any such notification.

Note.—This Act has been declared in force in Upper Burma (except in the Sontha Pargunnahs) See The Act was in 1903 extended II, p. 20, and to Coorg from 1st I, p. 26.

Repeal of Act V of 1876.

2. (1) The Reformatory Schools Act, 1876 is hereby repealed

(2) But all proceedings taken, orders passed, officers appointed or authorized, and rules made under the said Act shall, so far as may be, be deemed to have been respectively passed, appointed or authorized and made, under this Act.

(3) Any enactment or document referring to the said Act shall, as far as may be, be construed to refer to this Act or to the corresponding portion thereof.

* For statement of objects and reasons, see *Gazette of India* 1897, Pt. V, p. 133 ; for Report of the Select Committee, see *ibid.* 1897, Pt. V, p. 133 ; and for Proceedings in Council, see *ibid.* 1896, Pt. V, pp. 222 and 253 ; and *ibid.* 1897, Pt. VI, pp. 44 and 68.

Note.—Having regard to the provisions of this section, it was held in 21 M. 430, that a Magistrate was bound to follow the rules framed under the old Act (V of 1876) and direct the detention of a juvenile offender until he attains the age of 18. The rules under this old Act have to be followed, in so far as they are not inconsistent with the provisions of this Act.

Section 39 of Act X of 1881 repealed on date fixed by a notification under s 1, sub-sec 3

3 From the day fixed by any notification issued under s 1, sub-sec (3), s 399 of the Code of Criminal Procedure, 1882, shall be repealed in the province to which the notification relates

Note.—See 25 C 333 & 12 M. 94.

Definitions

4 In this Act, unless there is anything repugnant in the subject or context,—

(a) "Youthful offender" means any boy who has been convicted of any offence punishable with transportation or imprisonment, and who, at the time of such conviction, was under the age of fifteen years.

Note.—Cf s 5, *explanation of the Whipping Act*, IV of 1909, at p 973 *supra* and see Ratanlal 905.

(b) "Inspector General" includes any officer appointed by the Local Government to perform all or any of the duties imposed by this Act on the Inspector-General; and

(c) "District Magistrate" shall include a Chief Presidency Magistrate.

II — Reformatory Schools

Power to establish and discontinue Reformatory schools

5 With the previous sanction of the Governor General in Council, the Local Government may—

(a) establish and maintain Reformatory Schools, at such places as it may think fit,

(b) use as Reformatory Schools, schools lent by persons willing to act in conformity with such rules, consistent with this Act, as the Local Government may prescribe in this behalf,

(c) direct that any schools so established or used shall cease to exist as a Reformatory School or to be used as such

Note.—The following have been declared to be Reformatories under this Act.—In BURMAH—the Reformatory at *Poungdeh* in MADRAS the

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School at *Dethi*.

6. Requisites of Schools

7. Inspection of Reformatory School

imprisonment within the meaning of this section so as to empower a Magistrate to make an order under this Act. Detention in a Reformatory School cannot be terminated when the fine is paid, *L B R (1893-1900) 491.*

2 To give jurisdiction to the Court to act under this section, it must find that the offender is a fit subject by his age.—A Sessions Judge cannot pass an order for detention of the prisoner in a Reformatory in supersession of the order for imprisonment, without taking evidence as to his age as required by s. 11, *4 C W N LXI & 225*. In order that a Magistrate may have jurisdiction under the Act, it is necessary that the offender should be under 15 years of age at the time of conviction and the Magistrate must on enquiry be satisfied on this point, *Weir I, 879*. Where there is no clear finding as to the age of the offender, the High Court might interfere with such an order as one made without jurisdiction, either in appeal or in revision, *21 A 391 (F. B)*. The warrant of commitment should state the age of the convict and the period of his detention in the school, *M H C Cr Rev. Case 99 of 1907.*

3 Minimum period of detention must be three years.—Where a juvenile offender (14 years old) was convicted of the offences of house-breaking and theft in a building (ss. 454 and 380, I. P. C.) and sentenced to 1 year's rigorous imprisonment, for such offence and in lieu of under-going the imprisonment, directed to be detained in the Reformatory for a period of 2 years, *held* that the order was illegal, being contrary to the provisions of sub-sec. 1) of this section, *Ratanlal 947.*

4 The Court has a discretion as to whether a particular juvenile is a fit subject for a school.—It is not every boy that is convicted that can be sent to a Reformatory School, but only such as are found to be

6 Rules defining what youthful offenders should be sent to the Reformatory School, &c.—Under s. 22 of the old Act, the power to make rules was vested in the Governor-General in Council, while sub-sec. (3) of this section confers such power on the Local Governments. The Madras Government in an order (G. O., No. 934, Judicial, dated 23rd July, 1897), has observed that the operation of the rules framed by the Government of India has been saved by sub-sec. (2) to s. 2 *supra.*, and has decided that it is not necessary to frame new rules, *21 M. 430 at 431.* The rules regulating the period for which youthful offenders may be sent to Reformatories, are abstracted below:—

(A) *Bengal Rules.*—(1) Youthful offenders whom the Court or the District Magistrate, as the case may be, does not think fit to discharge

for five years is perfectly legal. Weir I 883. But see 3 L. B. R. 46 = 2 Cr L J 738. In M H C CrI, Appeal 558 of 1905 a direction that an accused should be sent to the Reformatory School for five years was held to be illegal, when he would attain the age of 18 before the expiry of the five years. The attention of the lower Court was drawn to G O No 1317 dated 18th August 1905, in which the form of legal sentences as laid down by the High Court is sanctioned by Government. For Madras Rules, see Local R & O I 101-111; For Bombay Rules List of Local Rules, 1896, I 160; Central Provinces, List of Local R & O 1896, p 23.

For similar rules in the UNITED PROVINCES, see N-W Gazette, 30th July, 1897, Pt VI pp 167-168; BURMA, Burma Gazette 1897, Pt I, p 3037; ASSAM, Assam Gazette, 1899, Pt I p 180.

(C) Punjab Rules—I It should be noted that the only Courts empowered to direct youthful offenders to be sent to the Reformatory School are —(a) the Chief Court, (b) the Court Sessions of (c) a District Magistrate, and (d) any Magistrate specially empowered by the Local Government in this behalf. The Local Government do not at present propose to specially empower any other Magistrates, but any Magistrate who has not been so empowered may under s 9 of the Act refer the case of any youthful offender to the District Magistrate to whom he is subordinate, and all Magistrates should do so in suitable cases.

II A youthful offender is defined as meaning any boy who has been convicted of any offence punishable with transportation or imprisonment, and who at the time of such conviction, was under the age of 15 years, and it is incumbent on all Courts and Magistrates dealing with cases of youthful offenders, whether specially empowered or not, to make a preliminary inquiry and to record a finding as to the age of the offender. In taking the medical evidence mentioned in paragraph IV (a) of this Circular, the opinion of the medical officer as to the age of the boy should invariably be recorded.

III Under Punjab Government Notification No 427-A, dated the 2nd October, 1903, a Court or Magistrate convicting any youthful offender of any of the offences specified below shall send the offender to the Reformatory School.

1. Any offence specified in Chapter XII of the Indian Penal Code; or

2. Any offence specified in Chapter XVI of the Indian Penal Code; or

3. Any offence specified in Chapter XVII of the Indian Penal Code; or

4. Any offence specified in Chapter XXII of the Indian Penal Code; or

5. Any offence specified in Chapter XXIII of the Indian Penal Code; or

6. Any offence specified in Chapter XXIV of the Indian Penal Code; or

IV. It should be borne in mind that before recording an order directing the detention of a boy in the Reformatory School, Courts and Magistrates should satisfy themselves—

- (a) after taking medical evidence that he is not blind, insane, idiot, leprous, tuberculous, epileptic or suffering from any permanent physical incapacity for industrial employment, or
- (b) that he has not been twice previously convicted and sentenced for any offence under Chapter XII or Chapter XVII of the Indian Penal Code. Two or even more previous convictions under other chapters of the Indian Penal Code do not in themselves render a boy inadmissible to the Reformatory School provided that the aggregate amount of imprisonment undergone does not exceed three months, or
- (c) that he has not been previously convicted under s. 377, I P C., or
- (d) that he has not undergone detention in jail for a period or periods amounting in all to three months.

A youthful offender with any of these disqualifications will not be admitted into the Reformatory School and Courts or Magistrates must deal with such an offender in the ordinary course under the Indian Penal Code, or under s. 562 of the Cr. P. C.

These rules will, it is hoped, secure as inmates of the Reformatory School casual criminals and first offenders capable of reformation, and will exclude the corrupting influence of incorrigible offenders, and of boys who have already learnt the evil that can be learnt in jail.

V. Section 8, sub-sec (1) of the Reformatory Schools Act prescribes the period for which Magistrates must order detention in the Reformatory School. This period cannot be less than three or more than seven years. This section should be read in connection with Punjab Government Notification No. 427-B, dated the 2nd October, 1903,

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VI. Besides the case of youthful offenders convicted by a Court or Magistrate of one of the offences specified (vide list subjoined to paragraph III of this Circular), s. 10 of the Reformatory Schools Act contemplated another case in which detention in the Reformatory School may be ordered. It is when the Superintendent of a Jail power
ho is under the age
offender brought to
Reformatory School,
the District Magistrate will, of course, be guided by the rules made by the Local Government under s. 8, sub-sec (3), clause (a) of the Reformatory Schools Act, published as Punjab Government Notification No. 427-A, dated the 2nd October, 1903. Should the District Magistrate consider that the youthful offender, though not admissible to the

Reformatory under those rules, is a proper person to be an inmate of the school, he must refer the case to the Local Government

VII. Magistrates should make free use of the provisions of the Whipping Act, of s. 562 of the Code of Criminal Procedure, and of s. 31 of the Reformatory Schools Act, in dealing with boys,—and should refrain from sending boys to the Reformatory School in cases where they can be suitably dealt with under the foregoing provisions of the law. Boys sentenced to whipping and found unfit for it should be sent to the Reformatory School and not to jail

VIII Under the rules made by the Local Government for the classification, separation and daily employment of youthful offenders, boys detained in a Reformatory School will be classed in two divisions, a senior and a junior, and each division will be sub-divided into two sub-divisions, A and B. The senior division will consist of boys above fourteen and the junior division of boys under fourteen years of age. Sub-division A will contain boys not in sub-division B, and sub-division B will contain (1) boys who by reason of previous offences, whether the subject of criminal prosecution or not, or of the character of their offence, or the circumstances under which it was committed (offences against morals and serious organized offences, whether against property or against the person) appear to have marked criminal propensities, (2) boys who have been in jail, except those sent to jail under the proviso to s. 12 of the Reformatory Schools Act temporarily, i.e., detained in jail for want of accommodation in the Reformatory School, (3) boys whose parents are habitual criminals, and boys who have been subjected to family influences and surroundings which are likely to prejudice to a life of crime. In directing the detention of a boy in the Reformatory School, Magistrates should, with reference to this rule, record their opinion as to the sub-division in which the boy should be placed while under detention.

IX When a Magistrate orders a boy to be detained in the Reformatory School he should by telegram ascertain from the Superintendent thereof whether accommodation is available. If there is accommodation, the boy should be sent at once to the school, otherwise, he should be sent to the jail prescribed by the Local Government in Notification No 426 dated 3rd October, 1903, and the Superintendent of the Reformatory School should be informed of the jail to which he is sent, or to which he may thereafter be transferred.

X The Honourable the Judges trust that the foregoing instructions will be observed strictly, Appellate, Revisional and Controlling Courts are specially enjoined to keep a watchful eye on Subordinate Courts, and should report to this Court any Magistrate who disregards these instructions, 1903 P. R., Pt II, p 20

For forms of warrants of commitment to a Reformatory prescribed in the Punjab, see 1903 P. R. Executive No 2, pp 4-6

9. (1) When any Magistrate not empowered to pass an order under the last foregoing section is of opinion

Procedure where Magistrate is not empowered to pass an order under s 8

that a youthful offender convicted by him is a proper person to be an inmate of a Reformatory

forward the youth he is subordinate.

(2) The Magistrate to whom the proceedings are so submitted may make such further inquiry (if any) as he may think fit and pass such sentence and order for the detention in a Reformatory School of the youthful offender, or otherwise, as he might have passed if such youthful offender had been originally tried by him.

Notes.—The District Magistrate alone is empowered to act under this section. He is not entitled to transfer a case received by him from a Subordinate Magistrate to a Sub-divisional Magistrate for disposal. If the Sub-divisional Magistrate makes an order without jurisdiction, it *infra* would not disentitle the High Court to set aside the order. 13 Revision, 2 L. B. R. 121.

2. A substantive sentence must be first passed by the superior Magistrate and not by the trying Magistrate.—On a conviction for theft, a youthful offender was forwarded by a third-class Magistrate to the District Magistrate as a proper person to be an inmate of a Reformatory School. The District Magistrate without passing any sentence, ordered the accused to be detained in a Reformatory School. *Held*, that in all cases instead of to a Reformatory School, a sentence to which *Rev. Case 506 of 1900*

10 The officer in charge of a prison in which a youthful offender is confined, in execution of a sentence of imprisonment, may bring him, if he has not then attained the age of fifteen years, before the District Magistrate within whose jurisdiction such prison is situate; and such Magistrate may, if such youthful offender appears to be a proper person to be an inmate of a Reformatory School, direct that, instead of undergoing the residue of his sentence, he shall be sent to a Reformatory School, and there detained for a period which shall be subject to the same limitations as are prescribed by or under s 8, with reference to the period of detention thereby authorized

Power of Magistrates to direct boys under fifteen sentenced to imprisonment to be sent to Reformatory Schools

Notes.—1 The Court ought to determine the exact age of the offender.—A Magistrate acting under this section is bound to ascertain the age of the juvenile offender, and in accordance with that finding direct his confinement in a Reformatory School. It is not sufficient for the Magistrate merely to find that the prisoner is under a particular age. 14 B 381. See also 25 C 333 at 340 and 15 C P L R (Cr) 151.

2. An order under this section is a judicial proceeding, subject to revision by the High Court.—The order of a Magistrate under this section is not an executive act, but a judicial proceeding and the High Court has jurisdiction to revise it. Under s 11 *infra*, the Magistrate has to take evidence as to the age of the prisoner and as his proceedings involve the alteration of a sentence after the due exercise of a judicial discretion, such proceeding is clearly a judicial proceeding within the scope of ss. 4 and 435, Cr. P. Code 14 B 381; Ratanlal 494. But in M. H. C. Cr. Revn Case 52 of 1905, the

Madras High Court was inclined to take the view that the order passed by a District Magistrate under this section was an executive act and he could himself rectify any error in his order. It is doubtful whether it is a case within the meaning of s 28 of the *Letters Patent, 14 B. 381* at 383.

11 (1) Before directing any youthful offender to be sent to a Reformatory School under s 8, s 9 or s 10, the Court or Magistrate shall inquire into the question of his age, and, after taking such evidence (if any) as may be deemed necessary, shall record a finding thereon, stating his age as nearly as may be

Preliminary enquiry and finding as to age of youthful offender

(2) A similar inquiry shall be made and finding recorded by every Magistrate not empowered to pass an order under s 8 before submitting his proceedings and forwarding the youthful offender to the District Magistrate as required by s 9, sub sec (1)

Note—The exact age of the offender must be found—Before an order for detention in a Reformatory School can be passed in lieu of a sentence of imprisonment, there should be a definite finding as to the age of the accused and as to his being a fit subject for a Reformatory School, 3 C W N 576 See also *Weir I 879, 14 B. 381; Ratanlal 726* It is generally desirable that when it is procurable there should be some reliable evidence as to the age of the accused, especially when it may be necessary to determine the period of the detention which is limited to his attaining eighteen years of age, 27 C 133 See also 11 C. W. N XI "In some cases, it is not necessary to ascertain the exact age of the prisoner boy. So long as he is not over fifteen, the Magistrate may rightly fix a period of three years, or if the boy is not over eleven,—he may safely fix a period of seven years, without further inquiry. But if inquiry is necessary in order to fix the period as it would be when the wishes to make the period as long as find as well as he can, the exact duty to leave the decision of the Per SHPPHARD, J, 24 M. 13 at five delay in the disposal of a case, the Madras High Court in its proceedings, J No 12140 of 1910, dated 14th November 1910, observed that this section did not render it obligatory on Magistrates to record evidence as to age though it was advisable to take in expert's evidence. But merely asking the accused what his age is and recording his answer would be insufficient unless there is no chance at all of procuring better evidence, 1 L B R 126,

12 Every youthful offender directed by a Court or Magistrate to be sent to a Reformatory School shall be sent to such Reformatory School as the Local Government may, by general or special order appoint for the reception of youthful offenders, so dealt with by such Court or Magistrate

Government to determine Reformatory School to which such offenders shall be sent

Provided that, if accommodation in a Reformatory School is not immediately available for such youthful offender he may be detained in the juvenile ward or such other suitable part of a prison as the Local Government may direct—

- (a) until he can be sent to a Reformatory School, or
- (b) until the term of his original sentence expires,

whichever event may first happen. Should the term of his original sentence first expire, he shall thereupon be released, but should he be sent to a Reformatory School, then the period of detention previously undergone shall be treated as detention in a Reformatory School.

13. (1) If at any time after a youthful offender has been sent to a Reformatory School it appears to the Committee of Visitors or Board of Management, as the case may be, that the age of such youthful offender has been understated in the order for detention, and that he will attain the age of eighteen years before the expiration of the period for which he has been ordered to be detained, they shall report the case for the orders of the Local Government.

(2) No person shall be detained in a Reformatory School after he has been found by the Local Government to have attained the age of eighteen years.

Discharge or removal by order of Government 14 The Local Government may at any time order any youthful offender—

(a) to be discharged from a Reformatory School;

(b) to be transferred from one Reformatory School to another, such school shall not be increased by such removal.

Power to Governor-General in Council to direct use of Reformatories in one province for reception of youthful offenders from another

offenders directed to be sent to any Reformatory School by any Court or Magistrate in any other province.

(2) Any such order may also provide for the removal of the youthful offender, and the cost of his maintenance, and may give any such further directions as may be necessary.

Note.—In sub-sec (1) of this section for the words 'one province' and 'any other provinces' respectively the words 'British India' and 'the Hyderabad Assigned Districts, the Hyderabad Residency Districts, the Cantonment of Secunderabad, Hyderabad Cantonment, and Raichur, and other

of India in the Foreign Department, No. 3244-I., B., dated the 26th August, 1891, and No. 3244-I., B., dated the 26th August, 1891, shall be substituted, 3 C. W. N. XVI.—Government of India, Notification No. 2779-I B. Youthful prisoners of Coorg, it has been notified, may be sent to the Reformatory School at Chingleput See Madras Local R. & O Vol. I, Pt II, p 111.

16. Nothing contained in the Code of Criminal Procedure, 1882 (now 1898) shall be construed to authorise any Court or Magistrate to alter or reverse in appeal or revision any order, passed with respect to the age of a youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment

Notes—1 Exact scope of the section.—“This section is not well drawn up, but apart from obvious verbal criticisms its object is clear enough. It does not exclude the exercise of Appellate or Revisional jurisdiction under the Cr P Code in all cases where the subordinate Court has ordered an offender to be detained in a Reformatory School. The exclusion is limited to two specific matters in regard to which the legislature considered the Court trying a youthful offender better placed in arriving at a sound conclusion than an Appellate or Revisional Court. First of these is the age of the youthful offender, a finding on which is under s. 11, a necessary condition precedent to every order for detention

School for transportation or imprisonment.” These words are not very general and, if read in the absolute literalness, would protect the most

whether under the circumstances imprisonment would be more suitable, as well as upon the question of age, the Court having the youthful offender before it, and observing his appearance and demeanour would be more likely to be right than a superior Court not having that advantage. But there the advantage ends. This section cannot have been intended to enable the most Junior Magistrate in the country to make at pleasure orders substituting detention in a Reformatory School for imprisonment in any case whatever for prisoners of any age or class or of either sex for any period of time in absolute disregard of the Act, without the possibility of correction. If this view is right, the words in this section protecting from appellate or revisional interference the substitution of an order for detention in a Reformatory School for transportation or imprisonment must be read with absolute literalness. The substituted orders to which the section refers are orders made under s. 6 or s. 9 or s. 10, not orders made outside the Act and wholly unauthorized by it. If the order is an order for substitution within the meaning of these sections then s. 16 applies and the order cannot be altered or reversed in appeal or revision. If it is not an order for substitution within the meaning of these sections, then s. 16 does not apply and it may be altered or reversed like any other illegal order. I do not think that this construction does violence to the terms of this section. It cannot be said that the section is unambiguous but in such a case we are at liberty to put on it a construction in accordance with the intention of the legislature.”—*PER STRACHAN, C. J.*, in 21 A. 391 at 395-396. This section only precludes interference of a superior Court with the original Court's order so far as it (a) determines the age of a youthful

offender, or (b) directs the substitution of detention in a Reformatory School for transportation, or made without jurisdiction, the provisions of the Act, and 159, and referring to 20 609; 25 C. 333; 21 M. 430; *ex-parte* Bradlaugh, 3 Q. B. D. 509; Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 419, 1 L. B. R. 63. It does not affect the jurisdiction of the High Court to consider in revision the legality, etc., of sentence or conviction, 5 C. W. N. 210 in 5 Sind L. R. 173=13 Cr. L. J. 44=13 Ind. Ga. 293, a Magistrate awarded imprisonment for one year and commuted it to detention in a Reformatory for four years. It was held though the High Court in revision cannot interfere with the last order directly, yet it can substitute whipping for the original sentence of rigorous imprisonment and since whipping cannot be commuted into detention in a Reformatory, the latter sentence will become ineffective.

There is nothing in this Act which deprives a convict of his right of appeal from a conviction. All that is provided by the section is, when the conviction and the primary sentence of imprisonment have become final, there can be no interference by the subsequent order directing the accused to be sent to a reformatory. 1910 P. R. (Cr.) 34

If an order for detention in a Reformatory School in substitution for transportation or imprisonment be not properly passed, a Court is not

of the powers of a Court of Appeal or Revision, 1907 P. R. (Cr.) 133; Magistrate sentenced to imprisonment in a Reformatory order, L. B. R. the exact scope of the powers of a Court of Appeal or Revision, does not however

terial order directing the detention of the petitioner in a Reformatory School when the petitioner had not been convicted of any offence and had not been sentenced to any term of imprisonment or transportation for which alone detention in a Reformatory could be substituted. 6 Bom. L. R. 550, where following 21 A. 391 (F. B.) it was held that this section does not exclude the exercise of Appellate or Revision jurisdiction in all cases, where the Subordinate Court has directed an offender to be detained in a Reformatory School. The exclusion is limited to a few cases such as the determination of the age of the youthful offender. In 28 C. 423=5 C. W. N. 211 it was held that the power of the High Court remains intact to consider the propriety or legality of any sentence passed upon a juvenile offender. Cancelling therefore an order of detention for four years, the High Court directed the youthful offender to be whipped by way of discipline. See also 5 C. W. N. 210. See, however, 3 C. W. N. 576.

2 It is desirable for the Court to record independent evidence as to age.—In 27 C. 133 at 136, PRINCE and HILL, JJ., observed: "We Magistrate is unaware of a person committing the delinquency and it is desirable that when it is

procurable, there should be some reliable evidence on the point, and especially when it may be necessary to determine the period of detention which is limited to his attaining eighteen years of age." In *M H C Cr Rev Case 93 of 1905* a Sessions Judge without considering an appeal on the merits as to whether a boy was rightly convicted or not, or as to the propriety of the sentence, reversed the conviction and sentence, and ordered a new trial simply on the incomprehensible ground that the Magistrate's order as to the boy's detention in the Reformatory was not legally made as the Magistrate had not made a judicial inquiry as to the age of the boy. But the High Court observed that under this section the Judge is prohibited from interfering with the Magistrate's order and his sole duty is to determine whether the boy is guilty or not and if guilty the propriety of the substantive sentence of imprisonment.

III — Management of Reformatory Schools

17. Appointment of Superintendent and Committee of Visitors or Board of Management
18. Superintendent may license youthful offenders to employers of labour
19. Cancellation of license
20. Determination of license
21. Cancellation of license in case of ill treatment
22. (a) Superintendent to be deemed guardian of youthful offenders (b) Power to apprentice youthful offender
23. Duties of Committee of Visitors
24. Powers of Board of Management
25. Power to appoint Trustees or other Managers of a School to be a Board of Management
26. Power of Board to make rules

IV — Offences in relation to Reformatory Schools

27. Penalty for introduction or removal or supply of prohibited articles and communication with youthful offenders
28. Penalty for abetting escape of youthful offender
29. Arrest of escaped youthful offender

V — Miscellaneous

30. Repealed by Act III of 1900, Sch III
31. (1) Notwithstanding anything contained in this Act or in any other enactment for the time being in force, any Court may, if it shall think fit, instead of sentencing any youthful offender to transportation or imprisonment or directing him to be detained in a Reformatory School, order him to be—
Power to deal in other ways with youthful offenders including girls

(a) discharged after due admonition, or

(b) delivered to his parent or to his guardian or nearest adult relative, on such parent, guardian or relative executing a bond,

offender, or (b) directs the substitution of detention in a Reformatory School for transportation, or imprisonment, where such detention is not made without jurisdiction, or is not otherwise illegal, having regard to the provisions of the Act, 21 A. 391 (F. B.) *overruling* 20 A. 158 and 159, and *referring* to 20 A. 160; 1 Bom. L. R. 162=1 Cr. L. J. 609; 25 C. 333; 21 M. 430; *ex-parte* Bradlaugh, 3 Q. B. D. 509; *Colonial Bank of Australasia v. Willan*, L. R. 3 P. C. 419, 1 L. B. R. 63. It does not affect the jurisdiction of the High Court to consider in revision the legality, etc., of sentence or conviction, 5 C. W. N. 210 in 5 Sind L. R. 173=13 Cr. L. J. 44=13 Ind. Ca. 284, a Magistrate awarded imprisonment for one year and commuted it to de-

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of the powers of a Court of Appeal or Revision, *see also* 27 C. 133; 18=1907 P. W. R. 43=1908 P. L. R. 55. This section does not however whether a conviction or 140 *see also* 11 C. W. N.

material order directing the detention of the petitioner in a Reformatory School when the petitioner had not been convicted of any offence and had not been sentenced to any term of imprisonment or transportation for which alone detention in a Reformatory could be substituted. *See also* 6 Bom. L. R. 550, where *following* 21 A. 391 (F. B.) it was held that this section does not exclude the exercise of Appellate or Revisional jurisdiction in all cases where the Subordinate Court has directed an offender to be detained in a Reformatory School. The exclusion is limited to a few cases such as the determination of the age of the youthful offender. In 28 C. 423=5 C. W. N. 211 it was held that the power of the High Court remains intact to consider the propriety or legality of any sentence passed upon a juvenile offender. Cancelling therefore an order of detention for four years, the High Court direct if the youthful offender to be whipped by way of discipline. *See also* 5 C. W. N. 210. *See, however*, 3 C. W. N. 576

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II—Offences in relation to Reformatory Schools

27 Penalty for introduction or removal or supply of prohibited articles and communication with youthful offenders,

28 Penalty for abetting escape of youthful offender

29 Arrest of escaped youthful offender

I—Miscellaneous

30 Repealed by Act III of 1900, Sch III

31 (1) Notwithstanding anything contained in this Act or in any other enactment for the time being in force, Power to deal with other ways with youthful offenders including girls any Court may, if it shall think fit, instead of sentencing any youthful offender to transportation or imprisonment or directing him to be detained in a Reformatory School, order him to, be—

(a) discharged after due admonition, or

(b) delivered to his parent or to his guardian or nearest adult relative, on such parent, guardian or relative executing a bond,

offender, or (b) directs the substitution of detention in a Reformatory School for transportation, or imprisonment, where such detention is not made without jurisdiction, or is not otherwise illegal, having regard to the provisions of the Act, 21 A. 391 (F. B.) *overruling* 20 A. 158 and 159, and referring to 20 A. 160; 1 Bom. L. R. 162 = 1 Cr. L. J. 609; 25 C. 333; 21 M. 430; *ex-parte Bradlaugh*, 3 Q. B. D. 509; *Colonial Bank of Australasia v Willan*, L. R. 5 P. C. 419, 11 L. B. R. 68. It does not affect the jurisdiction of the High Court to consider in revision the legality, etc., of sentence or conviction, 5 C. W. N. 210 in 5 Sind L. R. 173 = 13 Cr. L. J. 44 = 13 Ind. Ca. 284, a Magistrate awarded imprisonment for one year and commuted it to detention in a Reformatory for four years. It was held though the High Court in revision cannot interfere with the last order directly, yet it can substitute whipping for the original sentence of rigorous imprisonment and since whipping cannot be commuted into detention in a Reformatory, the latter sentence will become ineffective.

There is nothing in this Act which deprives a convict of his right of appeal from a conviction. All that is provided by the section is, when the conviction and the primary sentence of imprisonment have become final, there can be no interference by the subsequent order directing the accused to be sent to a reformatory. 1910 P. R. (Cr.) 34.

If an order for detention in a Reformatory School in substitution for transportation or imprisonment be not properly passed, a Court is not debarred from setting it aside. 27 C. 133; also 5 C. 333. . . . an appeal, . . . tory and the High Court can interfere with such an appeal. (1893-1900) 493. See also L. B. R. (1893-1900) 441. As to the exact scope of the powers of a Court of Appeal or Revision, See 1907 P. R. (Cr.) 18. 1907 P. W. R. 12. 1907 P. R. 12. . . . however.

XL

not been sentenced to any term of imprisonment or transportation . . . which alone detention in a Reformatory could be substituted. See also 6 Bom. L. R. 550, where following 21 A. 391 (F. B.) it was held that this section does not exclude the exercise of Appellate or Revisional jurisdiction in all cases, where the Subordinate Court has directed an offender to be detained in a Reformatory School. The exclusion is limited to a few cases such as the determination of the age of the offender. 3 C. 211. 3 C. W. N. 211 it was held that the High Court directed to consider the propriety of sentencing a youthful offender. Cancellation of the High Court directed the youthful offender to be whipped by way of discipline. See also 5 C. W. N. 210. See, however, 3 C. W. N. 576.

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31 (1) Notwithstanding anything contained in this Act or in any other enactment for the time being in force, any Court may, if it shall think fit, instead of sentencing any youthful offender to transportation or imprisonment or directing him to be detained in a Reformatory School, order him to be—

(a) discharged after due admonition, or

(b) delivered to his parent or to his guardian or nearest adult relative, on such parent guardian or relative executing a bond,

with or without sureties, as the Court may require, to be responsible for the good behaviour of the youthful offender for any period not exceeding twelve months.

(2) For the purposes of this section the term "youthful offender" shall include a girl.*

(3) The powers conferred on the Court by this section shall be exercised by Courts empowered by or under s. 8.

(4) When any youthful offender is convicted by a Court not empowered to act under this section, and the Court is of opinion that the powers conferred by this section should be exercised in respect of such youthful offender, it may record such opinion and submit the proceedings and forward the youthful offender to the District Magistrate to whom such Court is subordinate

(5) The District Magistrate to whom the proceedings are so submitted may thereupon make such order or pass such sentence as he might have made or passed if the case had originally been tried by him.

Note.—When sentence of whipping has been carried out, parents cannot be required to execute bond.—A boy of fourteen years was charged with carrying a dangerous weapon and sentenced to 10 strokes. Held, sentence, on their application, was quashed. *L J 720* See this section.

32. When a youthful offender

Procedure when youthful offender under detention in a Reformatory School convicted and sentenced

ment

in which it thinks fit.

APPENDIX IV.

MADRAS REGULATION XI OF 1816.

A regulation for the establishment of a general system of Police throughout the territories subject to the Government of Fort St. George.

* Cf. s. 399 of the Cr. P. Code, which applies to juvenile offenders of either sex.

8. Heads of villages shall reciprocally communicate any information which they may receive of offences committed, or of gangs of robbers or of suspicious persons having entered or taken refuge in each other's villages, and shall co-operate in all things for the apprehension of offenders and the general security of the country.

9. Heads of villages shall report to the Police-officer of the district the arrival in their villages of strangers of suspicious appearance, and all information which they may be able to collect concerning such persons.

10. *First.*—In cases of a trivial nature, such as abusive

ing parties shall be of any of the lower castes of the people on whom it may not be improper to inflict so degrading a punishment, to order them to be put in the stocks for a time not exceeding six hours.

Second.—Heads of villages shall report to the Police-officer of the district all cases in which they shall have exercised the power of punishment granted to them by the first clause of this section, but it shall not be necessary for them to report the cases in which they may dismiss parties.

Notes—1 Jurisdiction to try offences under this section.—A person

stolen exceeds one rupee, *theft of a sheep* when the value of the sheep is less than one rupee is cognizable by a Village Magistrate. *As per section read with s. 6 of Reg. IV of 1821* but he has no power of the fact scope
M. H.

2. Assaults and Affrays.—It is not necessary to construe these terms in the section with reference to their definition in the Indian Penal Code. They must be construed with reference to the meaning of the terms at the time the Regulation was passed. Where the person

3. Punishment of confinement—A Village Magistrate has no authority to send the regulation to any person convicted by him to be pass a sentence in village choul try, Weir I. 924.

4. Putting in Stocks.—To render a person liable to confinement in the stocks under this regulation, there must be a concurrence of two circumstances—(a) he must be a person belonging to some one of the lower castes of the people, and (b) he must be a person on whom from his social standing or otherwise it may not be improper to inflict so degrading a punishment, Weir I. 926

5. What classes of offenders are liable to be put in stocks—Not a Mussalman, 6 M. 247, nor one of the Kallar caste, 1910 M W N 52=1 M L T. 305, nor a member of the Blacksmith caste, Weir I. 927, or of the Bant caste in South Canara, Weir I. 928. Quære Whether ex-communication from caste would render one liable to this punishment. Weir I. 928 See the matter discussed in 24 M. 271=11 M. L J 23, where a *malu* convert to Christianity who earned his living by cooly work was convicted and sentenced to two hours' confinement in the stocks for having used abusive language. Held, that the test was not what the offender's *creed* was, but what was his caste, and that the question was whether the individual was from his social standing or otherwise, he improper to inflict so degrading a punishment on a person belonging to one of the lower castes of the people, but continues to belong to his caste under the Regulation. But if he abandons his caste, he could no longer be said "to belong to one of the lower castes of the people" and punishment by confinement in the stocks would no longer be legal.

6. Detention in stocks otherwise than as a punishment, is not legal custody.—Stocks are intended by the Regulation to be employed for a specific purpose, viz, the infliction on conviction for petty offences, of a form of punishment on the lower castes of people, Weir I. 199.

7. Power to summon witnesses—A Village Magistrate has authority, incidental to his jurisdiction, to issue a summons either to any person or to persons within the local area of his jurisdiction whose attendance is necessary for the trial of a case, but

8. Disobedience to order punishable—Disobedience to an order of a Village Magistrate directing an accused person to appear before him is punishable under s. 174, I. P. C., Weir I. 922

9. Cannot deal summarily for contempt.—A Village Magistrate has no jurisdiction to impose a fine upon a person who uses abusive language to the Village Magistrate in the course of a trial under this section. 5 M. H. C. R Appx XXXIII.

10. Cannot award compensation to accused—A Village Magistrate is not competent to direct the complainant to pay compensation to the accused for a false or vexatious complaint, *M H C Cr Rev Case 97 of 1907.*

11. General principles of Criminal Law not to be disregarded—

12. Procedure to be elastic and reference to the Code not to be taken too literally

into regular legal tribunals in the sense that they are to follow a formulated and strict legal procedure, any departure from which would avoid their decision—*G O., No 283 Judicial, dated 25th February, 1909* It is not illegal for a Village Magistrate to hold an inquiry on a Sunday, *Weir I 921.* He is not required to make any record of the evidence, *M. H C Cr Rev Case 272 of 1908*

13. No power to invoke aid of a superior Magistrate for his own petty accuse
Magis
that
in 1881

implicitly to the Village Magistrate all the powers necessary for the carrying out of the sentence and he should himself carry out the sentence, *M H C Cr Rev Case 547 of 1905*

14. Superior Magistrate cannot refuse to entertain complaints
and may be compelled by heads of a Magistrate, not competent to a
to bring a charge of
violation of heads of
If a complaint has
id to proceed under
to law, *Weir I 926.*

15. High Courts power of revision.—If is competent to the High Court, in the exercise of its powers of superintendence under s. 15 of the Charter Act, to set aside a conviction and sentence of a Village Magistrate, *Weir I 924 & 786.* A conviction may be set aside, if an application for stay of proceedings, with a view to obtain a transfer, is improperly rejected, *21 M L J. 755.*

16. District or Sub-divisional Magistrates' powers of transfer—A District or Sub-divisional Magistrate acting under s. 528, sub-sec (4) of Criminal Procedure Code, has no power to transfer a case under this section. His power so to transfer is limited to cases falling within s. 6 of Regulation IV of 1821, though the High Court may, acting under s. 29 of the Letters Patent, transfer a case falling under this section, *26 M 334 (F B)* A transfer of a case under this regulation, if

made by a subdivisional Magistrate, is liable to be quashed by the High Court—Madras Judicial index, 1910 p. 503, Cr. Rev Case 96 of 1910. This anomaly, due to an oversight, will soon be set right when the Cr. Pr. Code is amended.

11. *First*.—Where heads of villages may have credible information of stolen property being concealed and there may be reason to apprehend that it will be made away with unless prompt measures are taken, the head of the village shall search for the same and forward it to the Police-officer.

and forwarded with

If the place of concealment be a dwelling house, the search shall be made only between sunrise and sunset.

13. *First*.—The head of the village on receiving information of the discovery of the body of a person supposed to be dead shall examine every person who may be able to furnish information regarding the discovery of the body and its appearance when discovered or regarding the murder of the deceased, if the body should have been deprived of life by murder.

Second.—The head of the village on receiving information of the discovery shall also, without delay, send notice of such discovery to the Police-officer, which the body conducted under his superintendence.

Third.—If the Police-officer should not appear to conduct the inquiry, the head of the village shall cause the karnam to take down in writing the evidence of the persons who may be examined, and to record any necessary particulars respecting the appearance of the body and to frame a report of the whole proceedings. The head of the village shall attest such report with his signature, and, having procured it to be attested by two or more of the inhabitants who may be present at the investigation and by the Karnam, he shall forward it to the Police-officer of the district with the evidence he may have taken.

Fourth.—If on the proceedings of the head of the village there shall in any case appear ground for suspecting any person or persons who may be within his jurisdiction of having committed the murder, the head of the village shall immediately apprehend and send such person or persons to the Police-officer of the district.

Apprehension of person suspected of murder

14 Karnams shall keep registers of persons confined by the heads of villages under s 10 of this Regulation and these registers shall be transmitted monthly by the heads of villages to the Police officers of their respective districts, to be forwarded to the Magistrate.

Registers of persons confined to be kept by Karnams and transmitted to Police-officer

* * * * *

47. The Magistrate shall be charged with the maintenance of the peace within their respective zillahs, and whenever their establishments may be insufficient to resist banditti or other disturbers of the public peace, they shall apply for assistance to the nearest military station

Magistrates charged with the maintenance of peace

APPENDIX V

MADRAS REGULATION IV OF 1821

A REGULATION FOR GIVING GREATER EFFICIENCY TO THE SYSTEM OF POLICE ESTABLISHED IN THE PROVINCES SUBORDINATE TO THE PRESIDENCY OF FORT ST GEORGE

* * * * *

6 *First.*—The powers granted to heads of villages, under clause first, s 10, Regulation XI of 1816, to punish trivial offences, are hereby extended, under the rules and limitations therein specified, to the punishment of petty thefts not attended with aggravating circumstances nor committed by persons of notoriously bad character, and where the value of the property stolen does not exceed one rupee

Power to heads of village to punish petty thefts

Second.—Heads of villages shall report to the head Police officer of the district all cases in which they shall have exercised the power of punishment granted to them by clause first of this section

Report of Punishment

Note.—Power of superior Magistrate to transfer.—A District or Sub-divisional Magistrate may transfer a case under this section in virtue of the powers vested in him by s 528 (4) of the Criminal Procedure Code, 26 M 393 (F B). A *coram-vide* application for stay of proceedings, with a view to apply for transfer, if improperly rejected by the village headman, would vitiate his entire proceedings terminating in a conviction, even though s 526 (3), Cr P C, does not apply to the case, 21 M L J 755

APPENDIX VI.

MADRAS TOWNS' NUISANCES ACT
No. III OF 1889.*AN ACT TO PROVIDE FOR THE PREVENTION AND
CONTROL OF NUISANCES OUTSIDE THE TOWN OF MADRAS.

Preamble WHEREAS it is expedient to amend Act XXIV of 1859 and to consolidate and improve the law relating to nuisances in places outside the town of Madras: It is hereby enacted as follows:—

Short title 1. (1) This Act may be called the Towns' Nuisances Act, 1889

(2) Sections 1 and 2 of this Act extend to the

Local extent dency of F extend to

may have been or may hereafter be declared to be municipalities under Madras Act IV of 1884, or other Act of the same nature for the time being in force; and the Governor in Council may from time to time by notification† in the *Fort St George Gazette* extend such sections or any part or parts thereof permanently or for a time not exceeding six months.

Penalty for certain offences in public street 3. Whoever in any public street, road, thoroughfare or place of public resort commits any of the following offences shall be liable on conviction to fine not exceeding fifty rupees or to imprisonment of either description not exceeding eight days:—

Rash or negligent driving (1) Whoever drives or rides any animal, or drives, drags or pushes any vehicle, in a rash or negligent manner.

Causing obstruction by negligence in driving cattle (2) Whoever by negligence or ill-usage in driving cattle causes any mischief or obstruction by such cattle.

Driving, &c., otherwise than on near or left side of the road (3) Whoever without reasonable excuse and so as to cause danger or obstruction to any person shall drive, drag or push any vehicle otherwise than on the near or left side of the road.

* For statement of Objects and Reasons, see *Fort St George Gazette Supplement*, dated 12th February, 1889, p. 3; for Report of Select Committee, *ibid.*, 8th October, 1889, page 1, for Proceedings in Council, see *ibid.*, 20th March, 1889, p. 2; and *ibid.*, 12th November, 1889, p. 12.
† For notification extending the provisions of this Act to various towns, villages or unions, see *Madras List of Local Rules and Orders*, Edn 1911, Vol II, pp 749–764.

Leaving a vehicle or cattle without due control (4) Whoever, being in charge of any vehicle or cattle, leaves it or them at such a distance as not to have the same under due control

(5) Whoever causes any vehicle to remain or stand longer than may be necessary for loading or unloading except at places appointed for the purpose, or obstructs or in any way wilfully obstructs or causes obstruction to the free passage of any thoroughfare

Exposing goods so as to cause obstruction (6) Whoever exposes goods for sale so as to cause obstruction

Letting loose horses or ferocious dogs (7) Whoever negligently lets loose any horse or suffers any ferocious dog to be at large without a muzzle or sets on or urges any dog or other animal to attack, worry or put in fear any person or cattle

Begging (8) Whoever, so as to cause annoyance, begs or applies for alms or exposes or exhibits any sores, wounds, bodily ailment or deformity with the object of exciting charity or of extorting alms

Depositing rubbish, stones, &c (9) Whoever without reasonable excuse throws or lays down any dirt, filth, rubbish, or any stones or building materials.

Gambling or cock-fighting in street (10) Whoever is found gaming with cards, dice, counters, money or other instruments of gaming or publicly fighting cocks or taking part in such gaming or cock fighting.

Committing nuisance in street (11) Whoever wilfully and indecently exposes his person or commits a nuisance by easing himself, and whoever, having the care or custody of any child under 7 years of age, omits to prevent such child from committing a nuisance as aforesaid.

Drunkenness, or riotous or indecent behaviour (12) Whoever is found drunk and incapable of taking care of himself, or is guilty of any riotous, disorderly or indecent behaviour

Forfeiture of gaming instruments &c purpose of gaming shall be liable to forfeiture under orders of the Court

Notes.—1 Offences under this section and s. 4 are cognizable by Bench Magistrates — Offences under this and the following section are within the cognizance of a Bench of Magistrates, 13 M 142

2. Imprisonment in default of payment of fine may be awarded.—A sentence of imprisonment in default of payment of fine can be imposed for offences under the Police Act and for offences under this section and

s. 4 *infra* 18 M. 490. But the period of such imprisonment is governed by s 65, I. P. C., and therefore should not exceed $\frac{1}{2}$ of the maximum term provided for the offence. So where an accused was sentenced under this section to a fine and in default to undergo a week's imprisonment, the High Court in Revision reduced the period of imprisonment in default to one of 2 days only, as the maximum period of imprisonment under this section is only 8 days 22 M. 239

3. Offences under this section and s. 4 are now punishable with whipping.—Under the Government of India notification, referred to at p 974 under s 5 (b) of the Whipping Act offences under this section and s. 4 *infra* are punishable with whipping, the ruling in *Weir I. 845* being no longer Law.

4 Riding on an untrained bullock which the rider could not control is punishable under cl (1) —Riding on an untrained bullock which the rider could not control, in a public street is an offence under clause (1). 7 M. H C R., Appx. X.

5. Scope of cl. (4).—Where the accused was convicted under clause (4) for allowing a bull-calf belonging to him to stray on the public road and apart from his ownership of the animal there was nothing to indicate he was in any way responsible for its straying or that he was present in the vicinity at the time when it was seized and impounded, it was held by *AYLING, J.*, the conviction was unsustainable. The clause contemplates the offender being in personal charge of the cattle or vehicle on the road and he is held liable at such a distance as to be beyond son as owner would be only
In lex 1911 p. 31, Cr R. C.

4th of 1911.

6. What could constitute obstruction within the meaning of cls. (5) and (6).—Inconvenience is not an obstruction, and obstruction is

the roadside near the market, numbers of people coming caused an obstruction, *held* the exposing of the fish was an offence under this section, 18 M. L. J. 329=3 M. L. T. 400=8 Cr L J 149 where 25 M 17 is distinguished.

7 Acts which would not be an offence under cl (9).—(a) The spreading of clothes to dry in a public street, *Weir I. 913*; (b) allowing rank vegetation to grow in front of one's house in a street, *Weir I. 913*; (c) exposing paddy to dry in a street, *Weir I. 913*; (d) the charge of dung by a person's bullock in a public place, *Weir I. 913*. It has been *held* not within the clause. It was *held* in *Weir I. 914* that a person who allows his pigs to stray and commit nuisance on the

public road, cannot be said to throw or lay down dirt or filth on the public road, so as to make him liable under this clause. There is no *prima facie* presumption that rubbish found in front of a house-holder's house has been thrown there by the house-holder himself or with his consent. The matter is one of fact to be determined by evidence, Weir I. 914

8. Verandah of a house is not a public street.—The verandah of a house is not a public street within the meaning of this section so as to make it an offence to gamble or play on such a verandah. *As held that where the act was done on a verandah, it was not a public street, road, thoroughfare or a private house, no offence was committed. In M H C Crl Appeal No. 100 of 1914, the court held that a resort is a place which is not a hidden place to which*

9. Throwing stones at a religious procession is punishable under cl. (12).—Throwing stones at a religious procession is a disorderly behaviour punishable under clause (12), Weir I. 915.

4. Whoever neglects to fence in or protect any well, tank, or other dangerous place or structure or,

Whoever causes any offensive matter to run from any house, factory, dunghheap or the like into the street, shall be liable on conviction to fine not exceeding fifty rupees or to imprisonment of either description which may extend to one month

Note.—Street does not include a drain The conviction of the accused under this section for letting off offensive water from his house into a drain or ditch constructed alongside of the roadway was set aside on the ground "The word *street* not being defined in the Act, must be taken in its ordinary popular sense. A street is properly a paved way or road, but in ordinary usage any way or road in a city having houses on one side or both sides is a street. The definition excludes what is called a drain or ditch on either side of the roadway and therefore the drain in question did not form part of the street," 28 M. 17

5. Whoever cruelly beats, ill treats, tortures or drives rides, or otherwise uses any animal in an unfit state to be so driven, ridden or used, or causes any animal to be cruelly beaten, ill treated, tortured, or to be driven, ridden or used when unfit to be driven, ridden or used, shall be liable on conviction to fine not exceeding fifty rupees, or to imprisonment of either description not exceeding one month, or to both

Note —Cruelty to animals is punishable, even if not done publicly—To constitute an offence under this section, it is not necessary that the act made punishable should be done in a place of public resort, or that it should amount to a nuisance Weir I. 917

6. Whoever opens, keeps or uses or permits to be used any common gaming house, or conducts or assists in conducting the business of any common gaming house, or advances or furnishes any money for gaming therein, shall be liable on conviction to fine not exceeding five hundred rupees or to imprisonment of either description not exceeding three months, or to both.

Note — What would amount to keeping a common gaming house — In the absence of evidence that a house is either open to the public or kept for the benefit of any person as a place of public resort, a conviction under this or the following section cannot be sustained, Weir I. 917. Nor can any such conviction be sustained in the absence of evidence that gambling in a house is carried on for the profit and lucre of the occupant or the proprietor or that he supplied or charged for the instrument of gaming.

7. I 918. Gaming in a house, *infra*, 18 M. 46

7. Whoever is found gaming or present for the purpose of gaming in a common gaming house shall on conviction be liable to fine not exceeding two hundred rupees or to imprisonment of either description not exceeding one month; and any person found in any common gaming house during any gaming or playing therein shall be presumed to have been there for the purpose of gaming.

Police may arrest without warrant on view of offence

8. Any Police-officer may arrest without a warrant any person committing in his view any offence made punishable by this Act.

9. If any Magistrate, other than the head of a village, or officer of Police not below the rank of Assistant or Deputy Superintendent, has reason to believe that any enclosed place or building is used as a common gaming house, he may by an order in writing give authority to any Police-officer above the rank of a Constable to enter, with such assistance as may be found necessary, any such enclosed place or building, and to arrest all persons found therein and to seize all instruments of gaming and all moneys and securities for money and articles of value reasonably suspected to have been used or intended to be used for the purpose of gaming which are found therein and to search all parts of such enclosed place or building and also the persons found therein.

10. The District or Sub-divisional Magistrate may from time to time

Destruction of stray dogs

within such limits after such notification may be destroyed by any person in such manner as the District or Sub divisional Magistrate may from time to time direct

Act to form part
of General Police
Act

11. Sections 3 and 4 of this Act shall be read with, and form part of, Act XXIV of 1859.

APPENDIX VII.

THE CATTLE TRESPASS ACT No. I OF 1871

AN ACT TO CONSOLIDATE AND AMEND THE LAW RELATING TO TRESPASSES BY CATTLE

Preamble WHEREAS it is expedient to consolidate and amend the law relating to trespasses by cattle, It is hereby enacted as follows —

CHAPTER I

PRELIMINARY.

Title and extent 1 (1) This Act may be called the Cattle Trespass Act, 1871, and

(2) It extends to the whole of British India except the Presidency towns and such Local areas as the local Government, by notification in the *Official Gazette*, may from time to time exclude from its operation

Repeal of Acts 2. The Acts mentioned in the schedule hereto annexed are repealed

References to repealed Acts References to any of the said Acts in Acts passed subsequently thereto shall be read as if made to this Act

All pounds established, pound-keepers appointed and villages determined under Act No. III of 1857 (*relating to trespasses by cattle*), shall be deemed to be respectively established, appointed and determined under this Act

Note — Where a prisoner was properly convicted of illegally seizing cattle, but was sentenced under the old Act (III of 1857) which had been repealed by this Act, the High Court declined to interfere with the sentence, as no injustice had been done 16 W R (Cr) 12

3. In this Act, "officer of police" includes also village watchman, and "cattle" includes also elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats and kids, and

"local authority" means any body of persons for the time being invested by law with the control and administration of any matters within a specified local area, and

"local fund" means any fund under the control or management of a local authority.

CHAPTER II.

POUNDS AND POUND-KEEPERS.

4. Pounds shall be established at such places as the Magistrate of the District, subject to the general control of the Local Government, from time to time directs.

The village by which every pound is to be used shall be determined by the Magistrate of the District.

5. The pounds shall be under the control of the Magistrate of the District: and he shall fix, and may from time to time alter, the rates of charge for feeding and watering impounded cattle.

6. The Magistrate of the District shall also appoint for each pound a pound keeper:

Provided that, in the Presidency of Fort St. George, the heads of villages, and in the Presidency of Bombay the police patels, or (where there are no police patels) the heads of villages shall be the keepers of village pounds.

Every pound-keeper appointed by the Magistrate of the District may be suspended or removed by such Magistrate.

Any pound-keeper may hold simultaneously any other office under Government.

Every pound-keeper shall be deemed a public servant within the meaning of the

Duties of Pound-keepers.

To keep registers and furnish returns 7. Every pound keeper shall keep such registers and furnish such returns as the Local Government from time to time directs.

To register seizures 8. When cattle are brought to a pound, the pound-keeper shall enter in his register,

(a) the number and description of the animals.

(b) the day and hour on and at which they were so brought,

(c) the name and residence of the seizer, and

(d) the name and residence of the owner, if known,

and shall give the seizer or his agent a copy of the entry

To take charge of and feed cattle 9 The pound-keeper shall take charge of, feed and water the cattle until they are disposed of as hereinafter directed

CHAPTER III

IMPOUNDING CATTLE.

Cattle damaging land 10. The cultivator or occupier of any land, or any person who has advanced cash for the cultivation of the crop or produce on any land, or the vendee or mortgagee of such crop or produce, or any part thereof,

may seize or cause to be seized any cattle trespassing on such land, and doing damage thereto or to any crop or produce thereon and send them or cause them to be sent within twenty-four hours to the pound established for the village in which the land is situated.

Police to aid in seizures All officers of police shall, when required, aid in preventing (a) resistance to such seizures, and (b) rescues from persons making such seizures

Notes.—1. When Seizure lawful.— Certain cattle had escaped from the pound and were next day found grazing in charge of their owner, who resisted their being seized again. *Held*, that under the circumstances he did not commit any offence under s. 24 Ratanlal 294. Cattle can be seized and impounded only when they are actually trespassing. *Weir I. 709* But where there is no damage done by the trespassing cattle, the seizure is illegal, *ibid*. The provisions of this section are applicable where a person is guilty of negligence in guarding an animal which strays into the ground of a person not its owner, *9 B. 73*, and does damage. The power to seize comes into existence only when damage is being done, *Mad. Jud. Index, 1903, p. 35 Cr R C. 254 of 1908*

2. What interest in land would justify seizure.—Where the accused had grown indigo on their own land for a certain territory which supplied the seed and paid for the labour of sowing, the ~~and a factory procuring the plants~~ and a factory procuring the plants, attacked by the ~~on was not a person~~ on was not a person; the factory was ~~and though the~~ and though the factory had some interest in the crop, yet the interest was not such as is covered by this section and consequently the accused were not liable to be convicted for rescuing the buffaloes. 9 C. W. N. 624=2 Cr. L. J. 315

3. The person who conducts to the pound, need not himself be the person who seized.—The person seizing or causing to be seized cattle need not himself take them to the pound to render a rescue an offence under s. 1, 1882 P. R. Cr. J. No. 12 & 17

11.* Persons in charge of public roads,† pleasure-grounds, Cattle damaging public roads, canals and embankments, plantations, canals, drainage works, embankments, and the like, and officers of police may seize, or cause to be seized, any cattle doing damage to such roads, grounds, plantations, canals, drainage works, embankments and the like, or the sides or slopes of such roads, canals, drainage-works or embankments or found straying thereon.

and shall send them or cause them to be sent within twenty-four hours to the nearest pound.

Notes.—1 Cattle trespassing into Reserved Forests.—This section having been applied to Forests by s. 69 of the Indian Forests Act, VII of 1878, the seizure by a Forest officer of cattle found straying in a reserved forest is legal, even if no damage has been actually done. 22 B. 333 The accused forcibly opposed the seizure of their cattle by village officers who found them grazing in a reserved forest. They were acquitted on the ground that there was no trespass as the cattle had not gone into the reserved forest of themselves, but had been driven into it by the accused. On appeal against acquittal, held that under s. 69 of Act VII of 1878 and under this section, the cattle were liable to seizure. Ratanlal 602.

2. Power of D.P.W. officer to seize cattle.—Cattle are not liable to seizure by the officers of the Public Works Department, unless they were trespassing on public property in charge of the officers of the department. Where therefore the Magistrate had not decided whether the land on which the cattle were seized was public property and in charge of the Public Works Department, the conviction was quashed and the case directed to be re-tried. 24 M. 318

* As to the application of s. 11 to Forests, see Act VII of 1878, s. 69, Act XIX of 1881, s. 68, and Regulation VI of 1887, s. 66, to Railways, see Act IX of 1890, s. 125 (4).

† Public road in this section and in s. 26 *infra* includes a Railway [Act IX of 1890, s. 125 (1)]

12 For every head of cattle impounded as aforesaid, the pound keepers shall levy a fine according to the following scale —

Fines for cattle impounded

Elephant	two rupees.
Camel or buffalo	eight annas
Horse, mare, gelding, pony, colt, filly, mule, bull, bullock, cow, or heifer ...	four annas.
Calf, ass or pig	two annas
Ram, ewe, sheep, lamb, goat or kid	one anna

Provided that, when it appears to the Local Government from the report of a Magistrate of a District, or on the representation of a local authority, that, in any local area subject to the jurisdiction or control of such Magistrate or authority, cattle are habitually

as aforesaid, the pound-keeper shall levy such fine, not exceeding double the fine mentioned in the foregoing scale, as may be prescribed in the notification

All fines so levied shall be sent to the Magistrate of the District through such officer as the Local Government from time to time directs.

A list of the fines and of the rates of charges for feeding and watering cattle shall be stuck up in a conspicuous place on or near to every pound

The Local Government may, at any time, by notification in the *Official Gazette*, cancel or vary a notification under the proviso to

allowing his cattle to stray, because he has paid a fine under this section
7 B H. C. R. (Cr. Ca.) 55

2 Areas within which fines at enhanced rates are leviable.—On every head of cattle which may be seized and impounded, fines at double the rate specified in the section shall be levied in (a) portions of the

I, p. 1065), (f) Aravangad Condite Factory, (*Fort St. George Gazette*, 1906, Pt I, p. 231), (g) Pallaveram Cantonment, (*Fort St. George Gazette*, 1906, Pt I, p. 483), (h) Gundy Park, (*Fort St. George Gazette*, 1906, Pt I, p. 623). In Bellary town within a radius of five miles round, one and-a-half times the rate of the fine may be levied (*Fort St. George Gazette*, 1906, Pt I, p. 505)

* For power to prescribe a different scale for cattle impounded under Forest laws, see Act VII of 1878, s. 70, Act XIX of 1881, s. 19 and Regulation VI of 1887, s. 67. As to additional penalties in the case of cattle trespassing on a railway, see Act IX of 1890, s. 125 (1) and (2)

CHAPTER IV.

DELIVERY OR SALE OF CATTLE.

13. If the owner of impounded cattle or his agent appear and claim the cattle, the pound-keeper shall deliver them to him on payment of the fines and charges incurred in respect of such cattle.

The owner or his agent, on taking back the cattle, shall sign a receipt for them in the register kept by the pound-keeper.

14. If the cattle be not claimed within seven days from the date of their being impounded, the pound-keeper shall report the fact to the officer in charge of the nearest Police-station, or to such other officer as the Magistrate of the District appoints in this behalf.

Such officer shall thereupon stick up in a conspicuous part of his office a notice stating—

(a) the number and description of the cattle ;

(b) the place where they were seized,

(c) the place where they are impounded ;

and shall cause proclamation of the same to be made by beat of drum in the village and at the market-place nearest to the place of seizure.

If the cattle be not claimed within seven days from the date of the notice they shall be sold by public auction by the said officer, or an officer of his establishment deputed for that purpose, at such place and time and subject to such conditions as the Magistrate of the District by general or special order from time to time direct :

Provided that if any such cattle are, in the opinion of the Magistrate of the District not likely to fetch a fair price if sold as aforesaid, they may be disposed of in such manner as he thinks fit :

15. If the owner or his agent appear and refuse to pay the said fines and expenses, on the ground that the seizure was illegal and that the owner is about to make a complaint under section 20, then, upon deposit of the fines and charges incurred in respect of the cattle, the cattle shall be delivered to him.

16. If the owner or his agent appear and refuse or omit to pay or (in the case mentioned in section 13) to deposit the said fines and expenses, the cattle or as many of them as may be necessary, shall be sold by public auction by such officer, at such place and time, and subject to such conditions, as are referred to in section 14.

Deduction of fines and expenses The fines leviable and the expenses of feeding and watering, together with the expenses of sale, if any, shall be deducted from the proceeds of the sale

Delivery of unsold cattle and balance of proceeds The remaining cattle and the balance of the purchase money, if any, shall be delivered to the owner or his agent, together with an account showing—

- (a) the number of cattle seized;
- (b) the time during which they have been impounded,
- (c) the amount of fines and charges incurred, .
- (d) the number of cattle sold,
- (e) the proceeds of sale, and
- (f) the manner in which those proceeds have been disposed of

The owner or his agent shall give a receipt for the cattle delivered to him and for the balance of the purchase money (if any), paid to him according to such account.

Disposal of fines, expenses and surplus proceeds of sales 17 The officer by whom the sale was made shall send to the Magistrate of the District the fines so deducted

The charges for feeding and watering deducted under section 16 shall be paid over to the pound-keeper, who shall also retain and appropriate all sums received by him on account of such charges under section 13

The surplus unclaimed proceeds of the sale of cattle shall be sent to the Magistrate of the District, who shall hold them in deposit for three months, and, if no claim thereto be preferred and established within that period, shall, at its expiry, dispose of them as hereinafter provided

Application of fines and unclaimed proceeds of sales 18 Out of the sums received on account of fines and the unclaimed proceeds of the sale of cattle shall be paid—

(a) the salaries allowed to pound keepers under the orders of the Local Government,

(b) the expenses incurred for the construction and maintenance of pounds, or for any other purpose connected with the execution of this Act,

and the surplus * (if any) shall be applied, under orders of the Local Government to the construction and repair of roads and bridges and to other purposes of public utility

19 No officer of Police, or other officer or pound-keeper appointed under the provisions herein contained shall, directly or indirectly, purchase any cattle at a sale under this Act

Officers and pound keepers not to purchase cattle at sales under Act

* As to the crediting of surplus to Local Fund, see s. 31 *infra*

No pound-keeper shall release or deliver any impounded cattle otherwise than in accordance with the former part of this Chapter, unless such release or delivery is ordered by a Magistrate or Civil Court.

Pound-keepers
when not to release
impounded cattle

Note.—Where the accused, a Sub-Inspector of Police, was convicted of criminal breach of trust in respect of a pony impounded at his station in contravention of the provisions of this section, and the Magistrate found that there has been no public sale, but that the accused paid almost the approximate value of the animal, — *KEUR, Off. C. J.*, observed in setting aside the conviction. "It is to be regretted, in this case that the Magistrate did not express under s. 10 of Act of 1871, taken with s. evidence that no sale hold as a point of law under s. 405, I. P. C." : : ' A, r !

CHAPTER V.

COMPLAINTS OF ILLEGAL SEIZURE OR DETENTION

20. Any person whose cattle have been seized under this Act, Power to make or, having been so seized, have been detained complaints. in contravention of this Act, may, at any time within ten days from the date of the seizure, make a complaint to the Magistrate of the District or any Magistrate authorized to receive and try charges without reference by the Magistrate of the District.

Notes.—1. **Illegal seizure is an offence.**—Illegal seizure of cattle is now made an offence (*see* the definition of 'offence' under s. 4, Cr. P. Code); therefore the rulings under s. 22 *infra* reported in 9 M. 102, 13 C. 304, 15 C. 712, 23 C. 248, 18 A. 353, 2 C. L. R. 507, 9 M. 374 and 23 C. 442 at 445 are now superseded. Though in construing the word 'offence' occurring in s. 31 of the *Court Fees Act*, we are not entitled to use the definition in s. 3 (37) of the *General Clauses Act X of 1897*, yet as s. 31 of the *Court Fees Act* governs procedure it is reasonable to assign to the word 'offence' in that section the same meaning that it has in the *Code of Criminal Procedure*. The Court Fee paid on a complaint under this section may be ordered to be refunded, 4 L. B. R. 11 = 6 Cr. L. J. 122; *Weir I 713*; L. B. R. (1872-1892) 515

2. **Jurisdiction under this Chapter no longer a Special Power.**—Under the *Criminal Procedure Code of 1898*, cases under this section come within the ordinary jurisdiction of the Magistracy and therefore a Magistrate is competent under s. 192 (1) to transfer any case which he has taken cognizance clause of Schedule II of t triable by any Magistrate entertained by a Magistrate tried by any Magistrate deemed to be obsolete, 34 C. 926. From an order of committal

s 22 *infra* an appeal would lie under s 407, Cr P C, 29 M 517=5 Cr L J, 86; 4 L B R 10=6 Cr L J 121, Weir I 712, 1879 P R (Cr) 26 (F B), the term 'charge' in this section is used as equivalent to complaint, 11 C P L R (Cr.) 10 Several old rulings like 3 N W P H C R. 300, 10 B 230, Ratanlal 520, 15 C 72, Weir I. 711, 1896 P R (Cr) 2, 11 M. 359, 19 M. 238 are no longer law Offences under this section may be tried summarily See s 250 (1) (iii) Cr P. Code, 1896 A W. N 136

3 Suit for compensation will lie for wrongful seizure—The provisions of this Act are no bar to a suit for compensation for wrongful seizure 16 C 159 where 15 W R 279 is followed while 2 C L R, 344 is dissented from.

4. Conviction under the Act will not bar a fresh charge for attempt to extort—It was held by the Mad H C (Jud Ind, 1909, p. 195, Cr R C 256 of 1909) that where the illegal seizure amounted to an attempt to extort an award of compensation under s 22 *infra* will not bar a prosecution for the attempt at extortion by virtue of s 403, Cr P C.

5. Applicability of s. 250, Cr. P. C., where complaint is frivolous or vexatious.—If the complaint that is preferred to the Magistrate under this section is found to be frivolous or vexatious, compensation may be awarded to the accused, 1872 P R (Cr) 1

21. The complaint shall be made by the complainant in person, or by an agent personally acquainted with the circumstances. It may be either in writing or verbal. If it be verbal, the substance of it shall be taken down in writing by the Magistrate

If the Magistrate, on examining the complainant or his agent sees reason to believe the complaint to be well founded, he shall summon the person complained against, and make an enquiry into the case

Note—The person entitled to complain under this section is either the owner in person or an agent personally acquainted with the circumstances, hence where the cattle belonging to one person are in the custody of another and are seized from that custody, the owner, if he is not personally acquainted with the facts and circumstances, is not entitled to institute a complaint under this section 5 Bom L R. 205

22 If the seizure or detention be adjudged illegal, the Magistrate shall award to the complainant, for the loss caused by the seizure or detention, reasonable compensation, not exceeding one hundred rupees, to be paid by the person who made the seizure or detained the cattle, together with all fines paid and expenses incurred by the complainant in procuring the release of the cattle.

And, if the cattle have not been released, the Magistrate shall, besides awarding such compensation, order their release and direct that the fines and expenses leviable under this Act shall be paid by the person who made the seizure or detained the cattle.

Notes.—1. Compensation for loss caused by the seizure and detention.—"These words do not necessarily refer only to such special damage as is sustained by the seizure and detention prior to the release of the cattle, but also include all expenses necessarily incurred by reason of such seizure and detention, though it may be after the release. The Legislature intended to provide a summary and expeditious mode of recovering compensation for loss caused by such seizure and detention, probably on the ground that it is generally so small that it would be deemed inexpedient to have recourse to a regular suit for its recovery. The language is wide enough to include the Court and Process fees necessarily paid on account of the refusal to make compensation or refund the fine paid, and a narrower construction would, I think, defeat the intention of the Legislature."—*Per* MUTTUSAMI AYYAR, J. 7 M 345 at 346. An order which awards distinct amounts for compensation and for Court and Process fees, though improperly worded is not bad in Law if the intention was to include the costs in the compensation. *Weir* I. 75. Where some compensation was awarded in addition to the sum allowed on account of the fines paid and "expenses incurred in procuring the release of cattle," it was held, that the High Court was not bound by the insufficiency of the amount allowed. This section designated the amount regularly was merely one of form intention to award compensation.

2. Magistrate cannot refer parties to Civil Court. Proper object of section is compensation.—This chapter of the Act has no penal clause. It is compensation that is to be awarded and the granting of the power to award compensation ought to carry with it the power of deciding of the grounds on which the compensation is asked is good or bad, and on

complainant's cattle at night from a cattle pen, and then took them to the pound with the object of sharing with the pound-keeper the fees to be paid for their release. He was proceeded against under this Act, and under the provision of this section ordered to pay compensation to the complainant, and in default to undergo one month's rigorous imprisonment. *Held*, that this section was inapplicable to the facts of the case, and that the order must be set aside. On the facts it was not a case of "illegal seizure and detention" of cattle, but rather one of theft, as all the elements of that offence were present, and the accused should have been charged with and tried for that offence. 22 C 139

3. Though the complaint is of an offence, the compensation is not a fine.—This section does not authorize a Magistrate to impose a penalty in excess of the sum awarded to the complainant as compensation. 7 M H. C. R. Appx. 24, 27 C 992=5 C. W. N. 32: 1873 P. R. (Cr.) 36: 1880 P. R. (Cr.) 5. Proceedings under this section are quasi-criminal.

in their nature, a Magistrate being at liberty under this section to assess and enforce, in a summary manner, compensation for an injury or, therefore, for the against two persons proportionate amount payable by each, is good. 14 C. 175 The award should be by way of reasonable compensation and not as a penalty, 1878 P. R. No. 25.

4 Imprisonment in default is illegal—A sentence of imprisonment, in default of payment of compensation adjudged, is illegal. Weir I, 711 followed in Weir I 712; 7 M. 345; 2 C. L. R. 507, followed in 22 C 39; 9 M. 238 In default of payment of compensation, the procedure to be followed is that prescribed in s 386, Cr. P. Code. Weir I, 711. L. B. R. (1872-1892) 515 & 429 Orders under this section bear several points of analogy to an order under s 250, Cr. P. C.

23 The compensation, fines and expenses mentioned in section 22 may be recovered as if they were fines imposed by the Magistrate

Recovery of compensation

CHAPTER VI

PENALTIES.

Penalty for forcibly opposing the seizure of cattle or rescuing the same

24 Whoever forcibly opposes the seizure of cattle liable to be seized under this Act,

and willfully or from person be this Act,

shall, on conviction before a Magistrate, be punished with imprisonment for a period not exceeding six months, or with fine not exceeding five hundred rupees, or with both

pound escaped. The next day they were grazing in charge of their owner, the accused. When the Police *patel*, attempted to seize them *supra*, the accused resisted, and the *patel* instead of seizing the cattle, *supra* a complaint before a Magistrate who, under this section filed *supra* accused Rs 3 Held, that to resist the seizure of cattle under the circumstances was not an offence punishable under this section. *Retrial* 294; The conviction under this section can only be supported if the cattle were "liable to be seized under this act, otherwise the *supra* is no offence and the fact the rescuers had a special remedy *supra* does not affect the matter " 24 M. 38.

2 Pound Breach—Where the accused removed bull from the cattle-pound and returned them to the true owner, *supra* the accused were not guilty of theft, as there was no dishonest intent, but *supra* of pound-breach under this section. Weir I 716

* 25. Any fine imposed under the next following section or for the offence of mischief by causing cattle to trespass on any land, may be recovered by sale of all or any of the cattle by which the trespass was committed, whether they were seized in the act of trespassing or not, and whether they are the property of the person convicted of the offence, or were only in his charge when the trespass was committed.

Recovery of penalty for mischief committed by causing cattle to trespass.

26. Any owner or keeper of pigs who, through neglect or otherwise, damages or causes or permits to be damaged any land, or any crop or produce of land, or any public road, † by allowing such pigs to trespass thereon, shall, on conviction before a Magistrate, be punished with fine not exceeding ten rupees.

Penalty for damage caused to land or crops or public roads by pigs

Note.—Intention to damage necessary in the case of pigs.—Before any prosecution must be instituted, otherwise, damaged land or crops, or public roads, by allowing his cattle to trespass thereon. A personal neglect on the part of the owner and his allowing his cattle to trespass must, if they cannot be inferred from the circumstances of the case, be shown affirmatively to exist. *Ratanlal* 867 Where a Magistrate passed the maximum sentence in the absence of clear evidence of damage, the High Court reduced the sentence. 2 Bom. L. R. 335. In the case of other animals there must be an intention to cause damage or a knowledge that damage is likely to be caused. When, therefore, the accused admitted that he was the owner of the property, but that he was neither charged with nor proved to be negligent, the sentence was reversed. *Ratanlal* 60.

27. Any pound-keeper releasing or purchasing or delivering cattle contrary to the provisions of s 19, or omitting to provide any impounded cattle with sufficient food and water, or failing to perform any of the other duties imposed upon him by this Act, shall, over and above any other penalty to which he may be liable, be punished, on conviction before a Magistrate, with fine not exceeding fifty rupees.

Penalty on pound-keeper failing to perform duties

Such fines may be recovered by deductions from the pound-keeper's salary.

Notes.—1. Liability on pound-keeper.—A person *muree* started and by a Police *patel* who is *ex officio* the pound keeper, to look after the impounded cattle and to water them, cannot be convicted under this section 9 B. H. C. R 164.

2. This section does not bar other remedy.—A cattle pound keeper levied Rs. 5 for 5 buffaloes in his charge, but gave a receipt for

* As to the application of s 25 to the case of cattle trespassing on a *Ra bar*, see Act IX of 1890, s 123 (3).

† "Public road" in s 26 includes a Railway—see Act IX of 1890, s 123

Rs. 4 only to the owner of the cattle and entered only Rs. 4 in his accounts, but before the money was paid into the treasury altered his accounts and entered the proper amount. In such a case he cannot be charged under this section, but he should be charged under ss 40J & 511, I P C Ratanlal 632.

28. All fines recovered under s. 25, s. 26 or s. 27 may be appropriated in whole or in part as compensation for loss or damage proved to the satisfaction of the convicting Magistrate

Application of fines recovered under ss. 25, 26 or 27

CHAPTER VII

SUITS FOR COMPENSATION.

29 Nothing herein contained prohibits any person whose crops or other produce of land have been damaged by trespass of cattle from suing for compensation in any competent Court.

Saving of right to sue for compensation

30. Any compensation paid to such person under this Act by order of the convicting Magistrate shall be set-off and deducted from any sum claimed by or awarded to him as compensation in such suit

Set off

CHAPTER VIII

SUPPLEMENTAL

31. The Local Government may, from time to time, by notification in the *Official Gazette* (a) transfer to any local authority within any part of the territories under its administration in which this Act is in operation, all or any of the functions of the Local Government or the Magistrate of the District under this Act, within the local area subject to the jurisdiction of the local authority, or

Power of Local Government to transfer certain functions to Local authority and direct credit of surplus receipts to Local Fund.

(b) direct that the whole or any part of the surplus accruing in any district under s. 18 of this Act shall be placed to the credit of such Local Fund or Funds as may be formed for any local area or local areas comprised in that district

Note—The control of all cattle pound within the Municipal limits in

has been transferred from the District Magistrate to the Municipalities of Cochin, as per *George Gazette*, 1855, Pt. I, pp 820
Committees of Pallaveram and
851, and 1899, Pt. I, p. 111
ated to *Thasildars* and *Deputy*

Thasildars to adjust excess feeding charges and excess fines in respect of impounded cattle, G O No 767, Rev, dated 19-7-1904

SCHEDULE. (See Section. 2)

NO. AND YEAR.	TITLE OF ACT.
III of 1857	... An Act relating to trespasses by cattle.
V of 1860	... An Act to amend Act III of 1857.
XXII of 1861	... Do do

APPENDIX VIII.

THE BREACH OF CONTRACT ACT
No. XIII of 1859

AN ACT TO PROVIDE FOR THE PUNISHMENT OF BREACHES OF
CONTRACT BY ARTIFICERS, WORKMEN AND LABOURERS
IN CERTAIN CASES

WHEREAS much loss and inconvenience are sustained by manufacturers, tradesmen, and others in the several Presidency Towns of Calcutta, Madras and Bombay, and in other places, from fraudulent breach of contract on the part of artificers, workmen, and labourers who have received money in advance on account of work which they have contracted to perform and where the remedy by suit in the Civil Courts for the recovery of damages is wholly insufficient, and it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment; It is enacted as follows:—

Notes.—1. Proceeding under this Act can be instituted only on complaint—This Act can be put in motion only by the employer. When the employer has laid a charge for cheating under the Penal Code, the trying Magistrate is not entitled to make an order under this Act. 35 A 143=11 A. L. J. 117=14 Cr. L. J. 133=18 Ind. Ca 585. A person who is not an employer of labour but a mere broker or a middleman for the purpose of supplying labour to the employer or master is not entitled to take proceedings as an employer against a workman. 14 Bom. L. R. 956=1 Bom. Cr. Ca. 200=13 Cr. L. J. 853=17 Ind. Ca. 769 But a Government Forest Officer who had engaged coolies on behalf of Government may properly institute proceedings. 1903 U. B. R. 2nd Qr. 1 (W. B. C. Act)=11 Cr. L. J. 58=4 Ind. Ca 527 But a different result was arrived at in 3 L. B. R. 33 (F. B.). Where certain persons entered into contracts in the Town of Madras with the Secretary of State for India in Council represented by the Extra Assistant Conservator of Forests, Burma, to work in the Government Rubber Plantations in Burma, the question arose whether the Secretary of State for India in Council or the Government of India or the Local Government of any Province may be said to be a master or employer resident or carrying on business in any place to which the Act applies; Held per Fox and Birk, JJ., that the question should be

answered in the negative for the reason that though the Secretary of State is a master or employer, he does not carry on business within local extent of the Act. In dealing with matters relating to the general public, statutes are presumed to use words in their popular sense. The words "carrying on business" mean in the ordinary language the person who is engaged in the business does it with the object of acquiring gain or profit for himself or for himself and others jointly concerned with him and this view is strengthened by the preamble to the Act. *Hebl contra per THIRKELL WHITE, C J*, that the fact the Government cannot be considered as a person or entity of the same class as a manufacturer or tradesman does not preclude it from being a master or employer within the meaning of the preamble and that in conducting a rubber plantation on commercial principles, the Secretary of State is carrying on business for gain—not of course for his personal gain—but for the pecuniary gain of the State which he represents.

2. As a condition precedent to inquiry whether some fraud shall be disclosed?—This Act relates to fraudulent breaches of contract and

only been worked off by a
The condition precedent
of some kind should be
are (1) advance for work
and (2) wilful neglect or refusal by the artificer, workman, or
labourer. This view of the law was dissented from by STRAIGHT, J.,
in 11 A. 262 at 265 267 remarking "The learned Judges
decided that case mainly, if not entirely, with reference to the
language of the preamble and not in reference to the enacting clauses
contained therein which declare what shall be an offence and what
shall be its punishment. There can be no doubt whether it be the
fault of insufficient or ineffective drafting, that the preambles to
statutes do not always cover in the wide and general terms in which
they are necessarily couched, all the specific offences which are to be
found provided for within the enacting portions of the statute itself

contract entered into by the persons whom the Act concerns. There is
no mention in that section of the word *fraudulent* and in my opinion
it is legislating and not interpreting an Act of the legislature to read

contract on account of an attack of cholera he was held not liable to be
dealt with under this Act after his recovery, as his failure was not
wilful, *Madras Judicial Index 1903, p 176 Cr. R. C. 437 of 1903*.
The interference of the Magistrate under the Act is limited to
cases where the neglect or refusal to perform the work is *wilful and*

without lawful and reasonable excuse. 16 B. 368. Where therefore the non-performance of the contract was due to the differences between the parties as to their mutual liabilities, there cannot be said to be perverse or wilful neglect or refusal within the meaning of this section. 2 Bom. L. R. 301 Similarly where the employer fails to furnish the accused with a statement of the business accounts and to pay him his share of profits according to the terms of employment, the neglect or refusal on the part of the accused to continue the work cannot be said to be wilful, 36 C. 917=10 Cr. L. J. 577=4 Ind. Ca. 413.

3. Receipt of money in advance on account of work.—These words do not include mere loans or debts. 16 B. 368; nor money received jointly by several persons who agreed to repay it out of their wages jointly in instalments. 2 Bom. L. R. 545. A contract to work for twelve years, every day from 7 to 12 in the morning and from 2 to 5 in the afternoon.

option of either repaying the advance received or of continuing the work, the contract was held to be within the purview of this Act. 11 A. L. J. 152=15 Cr. L. J. 233=25 Ind. Ca. 185. But having regard to the terms of s. 21 (g) of the Specific Relief Act, a contract to work for more than three years being not specifically enforceable in a Civil Court, the Punjab Chief Court held in 15 Cr. L. J. 1562=2 Ind. Ca. 741 that, contract to serve for five years is altogether incapable of being enforced under this Act, not even for a limited period of three years. See *Mad. Jur. Index* [1908] p. 76 (Cr. R. C. 439 of 1908). A man cannot be treated as a criminal for not performing a contract which could not be enforced against him by civil process. For other instances of contracts not enforceable by civil process and therefore not within the purview of this Act, see 1914 P. W. R. 22=1914 P. L. R. 61 & 1913 P. R. 23. This Act is intended to apply only to a few specified classes of advances actually made to workmen and great care ought to be taken that the Act is not worked so as to interfere with free competition between capital and labour, 12 Bom. L. R. 135=11 Cr. L. J. 273=5 Ind. Ca. 853.

1. When any artificer, workman, or labourer shall have received from any master or employer resident or carrying on business in any Presidency Town, or from any person acting on behalf of such master or employer, an advance of money on account of any work which he shall have contracted to perform, or to get performed by any other artificers, workmen, or labourers, if such

artificer, workman, or labourer shall wilfully and without lawful or reasonable excuse neglect or refuse to perform or to get performed such work according to the terms of his contract, such master or employer or any such person as aforesaid may complain to a Magistrate of Police, and the Magistrate shall thereupon issue a summons or a warrant, as he shall think proper, for bringing before him such artificer, workman, or labourer, and shall hear and determine the case.

Notes—1 Power to take cognizance on complaint.—Proceedings may be instituted against a person either in a Court within whose jurisdiction

he resides, or in a Court within whose local limits the refusal to perform his contract occurred, and a warrant issued by the latter Court may be executed outside the limits of its local jurisdiction. It is hardly likely that the Legislature in passing an Act for the prosecution of employers intended to compel the latter to pursue a workman from district to district as often as he shifted his residence. 1896 P. R. (Cr.) 17 followed in 1910 P. R. (Cr.) 12=1910 P. W. R. (Cr.) 13=11 Cr. L. J. 3806 Ind. Ca. 618 See 10 M. 221 and Notes to s. 53, Cr. Pro. C., which applies to warrants issued under this section and consequently such warrants may be executed outside the local jurisdiction of the Magistrate issuing them. 20 M. 235, followed in 20 A. 123 Courts in British India have no power to take cognizance of a complaint of breach of contract to labour at a place out of the limits of British India, though the contract is made or the parties live in British India. Weir I. 671, followed in 10 M. 21. But the authority of these rulings is considerably shaken. In M. H. C. Cr. R. C. 217 of 1909 (Jud. Index 1909, p. 234) the accused received Rs. 500 in South Canara agreeing to work with 50 coolies in an estate in Mysore. MILLER, J., held the Mangalore Magistrate had jurisdiction to direct the repayment of the advance money within a month. When both the contract and the breach have taken place in a foreign territory, British Indian Courts have no jurisdiction, though the work is to be done here. 7 M. 354. A Presidency Magistrate of Calcutta may lawfully take cognizance under this section of a complaint in respect of a contract made in Calcutta, but the breach of which was committed beyond the local jurisdiction of his Court. The terms of this section do not state that the complaint is to be made to the Magistrate of Police in the place where the breach has taken place. 25 C. 637. The expression "Magistrate of Police" means Presidency Magistrate.

2. **Persons not coming within the scope of the Act.**—1. *contracting bricklayer*, who does not himself work. 7 M. 100, (but the ruling was disingnished in 7 L. B. R. 82=15 Cr. L. J. 235=23 Ind. Ca. 187 where a head carpenter who merely supervised the work, was held to be an artificer under this section), or a village Lumbardar who owns a cart which he works not personally for transport of goods but through his son or a servant. 1909 P. R. (Cr. 28-9 Cr. L. J. 107; or a butcher contracting to supply skins, 7 M. H. C. R. Appx 12; or a Mahut or an elephant driver. 8 C. L. R. 234; or a cartman contracting to carry load, Weir I. 690, Ratanlal 537; or a domestic servant (horsekeeper) 3 B. L. R. (A. Cr.) 32=2 W. R. (Cr.) 26, Weir I. 683, 1876 P. R. Cr. 20 or a cook. Weir I. 689, or a clerk. Weir I. 689 or *Tempe servants* Weir I. 689 or a contractor undertaking supply of firewood, 4 B. L. R. Appx 1, or a Kulkarni who undertook the cutting of grass and removing the same to cavalry depot, and occasionally himself lent a helping hand by taking part in cutting. 2 Bom. L. R. 801; or a person entitled to get the stipulated work performed on the contract system, receiving a share of profits as commission in lieu of pay, 36 C. 917=10 Cr. L. J. 577=4 Ind. Ca. 413, or one who enters into an agreement for services far higher than those of manual labour, i.e. to act as a shop assistant in a butcher's shop and render daily accounts of sales, 15 Cr. L. J. 383=23 Ind. Ca. 751; or an actor in a theatrical Company, 1904 P. R. (Cr.) 23; is not artificer, or labourer within the meaning of this Act. The term is restricted to a person who in the ordinary course would himself take part in the work he contracted for, Ratanlal 201. The Act apparently applies to cases where the defendant undertakes to get work performed as well as to cases where he personally undertakes to perform it, but the test is whether he himself works

at it. The Act cannot apply to contractor who is not also an artisan, workman or labourer (1902-1903) 1 U. B. R. 3, or a boat owner who undertook to convey salt, but who did not bind himself to render personal service; 13 M. 351 (which follows Weir I. 690), or a person binding himself in consideration of a sum of money to render service for agricultural and other purpose for a term, 7 B. 379. (contra, Weir I. 703); or a sub-contractor who had engaged to do certain work for which he was paid in advance, but did not himself work. Weir I. 693 10 B. 96; a cooly Sirdar or recruiter, whose functions terminate when he recruits his coolies and who has nothing to do with any work, 6 C. L. J. 180=6 Cr. L. J. 191. Weir I. 676 are not within the section. But in Burma a Cooly Gaung, though he does none of the work with his own hands has been held to be within the Act 1901 U. B. R. 1st quarter (W. B. of C. Act) 1=1 Cr. L. J. 551 Where an accused had received a sum in consideration of his promising to bring a number of recruits.

breach of trust, but cheating as defined in s. 415, 1 P. C. Weir I. 677. The test to be applied to contracts to supply coolies, which it is sought to render punishable under this Act, is—does the contract (to supply coolies) amount to a contract to work or to get certain work performed? Weir I. 677.

3. Contracts not coming within the Act.—A contract made in consideration of what was ostensibly an advance, but was in reality a deposit or loan to be refunded at the close of the period of contract. Weir I. 681, 682 & 683; or where money is advanced not for the purpose of assisting the workman to complete a specific piece of work but as an ordinary loan to be repaid out of the workman's wages, is not within the Act 35 A. 61=10 A. L. J. 468=13 Cr. L. J. 853=17 Ind. Ca. 797. See also 15 Cr. L. J. 384=22 Ind. Ca. 752, 13 Bom. L. R. 545=12 Cr. L. J. 402=11 Ind. Ca. 596; 15 Cr. L. J. 383=23 Ind. Ca. 751; 1910 P. R. (Cr.) 9=1910 P. W. R. (Cr.) 12=11 Cr. L. J. 329=5 Ind. Ca. 914 15 Cr. L. J. 166=22 Ind. Ca. 742; 14 Bom. L. R. 955=1 Bom. Cr. Ca. 200=13 Cr. L. J. 253=17 Ind. Ca. 789; 11 Cr. L. J. 564=8 Ind. Ca. 123; 3 L. B. R. 187=4 Cr. L. J. 200. Where work was agreed to be done in discharge of a debt due to complainant, and there was no advance. Weir I. 681; so too where the so called advance was fictitious. Weir I. 685. In 23 M. 203, one rupee was paid to defendant not to be repaid until after the expiration of the term of agreement and Rs. 10 advanced on the same date to be repaid by monthly instalments out of the wages earned, it was held the former sum could not be regarded as "money advanced on account of work to be performed," but the latter sum was such money. See also Weir I. 681, 682, 685 and 687. The Act has no application at all either when there is no advance of money under an agreement for work. Weir I. 693.

For breach of contract in not repaying the amount, he was directed by a Magistrate to perform the work according to the terms of the contract under this section. Held that the contract was not within the Act, as the sum of Rs. 62 was not money advanced on account of work contracted to be performed. It was a loan to be repaid by monthly instalments.

Rs. 2 out of the wages earned during the contracted period of service **Ratanlal 754**, following 7 M. H. C. R. Appx 30 and Weir I. 681. A contract by which defendant bound himself to work for complainant until the repayment of the sum advanced 7 M. H. C. R. Appx 30, or an agreement to serve in consideration of money, not received in advance by defendant, but due from him to complainant on account of previous debt. 9 B. H. C. R. 171, 1890 P. R. (Cr.) 17, or a contract which was nothing more than a loan of money, to which was attached a condition that the borrowers, in consideration of receiving the loan, should work for complainant and not transfer their services elsewhere until they repaid the money 16 B. 363; 3 A. 744—1881 A. W. N. 50, or a contract wherein the advance has not only been worked off by the defendant, but an actual balance is due to him. B. W. R. (Cr.) 69; or a contract for bringing and letting carts whether at the place where the bargain is made, or elsewhere, at a specified rate for the journey, **Ratanlal 349 & 537**, or a contract which is executed by the work being completed at the date of the complaint **Weir I. 670**, [followed in 28 M. 37—2 Cr. L. J. 149] or a contract where an advance was made to the defendant on condition that he should perform service but not on account of work to be performed **Weir I. 684**, or a contract where to induce the defendant to enter into the contract of service, the advance was made, but not for work contracted to be performed **Weir I. 694**, does not come within the operation of the Act. Where a goldsmith is entrusted with gold to be made into an ornament, but no money is received from the complainant as an advance, the Act does not apply **Weir I. 692**. Again where current coins are given, not as advance of wages, but as material to be worked up, there is no advance of money within the section **Weir I. 693** 6 M. H. C. R. Appx. 24.

one year **Weir I. 100**, or to work on machines as a labourer in a candy 7 M. 131, 23 M. 203; 14 Cr. L. J. 400—20 Ind. Ca. 224; or to work for an additional number of days after the lapse of the contract period in case of default **Weir I. 707** or to supply a certain number of coolies and to keep them at work for a specified time, 8 M. 373, 3 M. H. C. R. Appx 25 (1904-1905) U. B. R. 1—1 Cr. L. J. 551, 6 L. B. R. 89—5 Bur. L. T. 133 13 Cr. L. J. 580—15 Ind. Ca. 996 (even when the nature and extent of the work are not clearly specified 1 M. 280.) or to weave a certain number of cloths at a certain rate *per mensum* from materials and with machinery provided by the employer **Weir I. 686**, or to work as a cobbler till the sum advanced was worked off by the value of the shoes stitched, **Weir I. 687** or to work at a factory for four months in a year in consideration of an advance made 14 W. R. (Cr.) 29 [but see 18 W. R. Cr. 53 (72), where a similar contract was held by a Magistrate to be not enforceable, and the High Court declined to interfere in revision] is enforceable. In 9 Bom. L. R. 362—5 Cr. L. J. 337, a contract to serve as a cobbler for 3 years on receiving an advance of Rs. 170 was held following 14 W. R. (Cr.) 29 to be within the Act.

5 Duty of Magistrate before issue of process—In proceedings under this Act, it is the duty of the Magistrate to enquire into the facts and satisfy himself that a good *prima facie* case is made out before he issues process against any person but when any reasonable ground is made out, the Magistrate is bound to put the law into force and cannot refer the complainant to a Civil Court. But if the allegations made, though true, were utterly trivial, he might refuse to issue process 1896

P. R. No. 17. The refusal to work must not only be without any lawful excuse but also *wilful*; per KEMP, A. J. C. 15 Cr. L. J. 353=23 Ind C. 751.

6 Act not applicable to sureties.—This Act does not extend to

undivided coparcener of the person contracting in consideration of an advance, even though the latter may have undertaken to complete the work. Weir I. 693.

2. If it shall be proved to the satisfaction of the Magistrate that such artificer, workman, or labourer has received money in advance from the complainant on account of any work, and has wilfully and without lawful or reasonable excuse neglected or

repay the money advanced, or such part thereof as may seem to the Magistrate just and proper, or order him to perform, or performed, such work according to the terms of his contract.

And if such artificer, workman, or labourer shall fail to comply with the said order the Magistrate may sentence him to be imprisoned with hard labour for a term not exceeding three months, or if the

Notes —1. Jurisdiction of Magistrate when work has been completed.—The section pre-supposes that at the time when the complaint is brought before the Magistrate, the complainant has an option to demand back his advance or to get an order to have the work completed. If the complainant chooses the latter course, the remedy is of course open to him, but he cannot avail himself of the Penal provisions of this Act. It is true that this view restricts the scope of the Act in a way for which I can see no reasonable ground and shows that the Act fails to deal effectively with the case in which the preamble recites that it is intended to remedy, but as the Act is a Penal Act, it must be construed strictly and in favour of the subject. The strict interpretation of the words of the Act is that stated above. If the Legislature considers that the Act as at present worded does not give effect to the true intention of the Legislature, the remedy is to amend the wording of the Act.—J.R.

BENSON, J., in 28 M. 37 at 39=2 Cr. L. J. 149, followed in 14 Bom L. R. 956=1 Bom Cr. Ca. 200=13 Cr. L. J. 853=17 Ind. Ca. 789, 35 A. 51=10 A. L. J. 468=13 Cr. L. J. 833=17 Ind. Ca. 799. The Madras view was considered by a Full Bench of the Lower Burma Chief Court in 6 L. B. R. 89=5 Bur. L. T. 133=13 Cr. L. J. 580=15 Ind. Ca. 996, and *dissented* from on the ground that the Madras Judges have read into the section a provision not really within it and the impossibility to exact work would not deprive the master of his remedy of invoking Magisterial aid either to get back the advance or to punish the recalcitrant workman. See also 3 Sind L. R. 223=11 Cr. L. J. 414=6 Ind. Ca. 979, which takes the same view as the Lower Burma Chief Court, laying down there are only two conditions requisite to give jurisdiction to the Court, viz. (1) an advance of money, and (2) wilful failure to perform work.

2. Contract can only be enforced according to its terms and within the time contemplated — a contract within the scope of the Act can only be enforced in strict conformity with its terms. Where

proper order to
residue of the
& 703, 8 Ind.
16 Cr. R. C.

an order directing defendant to perform a contract to do plantation work for a year, such order being made three years after the date of the contract, was held to be illegal on the ground that the time contracted for had expired. *Weir I. 703*. The Madras High Court in 16 M. 347 held when the term had expired there was no reason why the Magistrate should not afford to the complainant the alternative remedy under this section even though the civil remedy to recover the same is barred. But in 35 C. 1028=12 C. W. N. 869=8 C. L. J. 313=8 Cr. L. J. 134, HOLMWOOD, J., held the two remedies under s. 2 are interlocked and interdependent, and if one has lapsed the other has lapsed also, though STEPHEN, J., was inclined to take a different view. As already remarked the Chief Court of Lower Burma has taken the same view as STEPHEN, J., in the above case, see 4 L. B. R. 270=8 Cr. L. J. 470 & 6 L. B. R. 89=3 Bur. L. T. 133=13 Cr. L. J. 580=15 Ind. Ca. 996 (F. B.).

3. Limitation Act offers no bar to proceedings under this section, — This Act being a penal enactment, the Limitation Act is no bar to a claim under this section to recover an advance made to a labourer. 11

weavers for 12 months or in default to pay back Rs. 100 borrowed, cannot be civilly enforced being barred by limitation, it cannot be made the basis of a prosecution under this Act. *Ratanlal 874* which follows 16 B. 368. When delay in making the fact the whereabouts of the plaintiff ought not to be dismissed. 6 L. B. R. 89=5 Bur. L. T. 133=13 Cr. L. J. 580=15 Ind. Ca. 996.

This Act is intended to provide for breaches of contract and to inflict

penalties. The matters to which these penalties are attached are offences. *Weir I. 673 & 697*. But the offence is not the neglect or refusal of the workman to perform the contract, but his failure to comply with the Magistrate's order that he should either resume work or repay the advance, 4 C W N. 253. Hence when a complaint was dismissed for default of prosecution and thus the Magistrate had never

... would
... Act had
... = 6 Bur.
... is follow-

ed. The proceedings of the Magistrate up to and inclusive of the passing by him of an order for either the repayment of the advance or the performance of the contract do not constitute a trial for any offence defined in the Cr. Pr. Code, 6 Bom. L. R. 253. Where the complainant withdrew the case before the Magistrate made an order, it was held the Court had no power to acquit the accused, as no offence under the Act had been committed. *Quære* whether the Criminal Procedure Code applies to offences under the Act? 24 M. 660

4. Procedure to be adopted in conducting inquiries and trials under this Act.—There is nothing in this Act or in the Cr. Pr. Code prescribing how evidence in a case where recognizance is taken from a defendant (under this section or s. 3) should be recorded or requiring a judgment to be written, and s. 370 of the Cr. P. C. does not apply to a case of this nature where no offence has been committed and where there is no accused. 27 C. 131 = 4 C W N. 221. Probably a proceeding under the first part of sec. 2 and sec. 3 is of a civil nature;

Ind. Ca. 740 A complaint of an offence of criminal breach of contract under this Act may not be tried summarily. 4 M. 234; *Weir I. 693 contra se. V*; 27 C. 131 = 4 C W N. 221; 2 L. B. R. 153; 14 Ind. Ca. ...
... nature, the High Court directed a further inquiry, holding the Magistrate was bound to find whether there was a contract between the parties and whether the accused wilfully and without lawful and reasonable excuse neglected or refused to perform the work according to the terms of the contract *Madras Jud. Index 1909, p. 253, Cr. R. C. 430 of 1909*

5. Contract for liquidated damages is no bar for prosecution.—A provision in the contract document for payment of a penalty does not bar the operation of the penal enactment. *Weir I. 674*; nor would the fact, that the defendant had suffered imprisonment for non-compliance with the Magistrate's order, discharge him from his civil liability to repay the money advanced to him. 2 M. H. C. R. 427

6. Form of the order. Magistrate is competent to make—A Magistrate's order should at the option of the complainant be either for repayment of the advance made (in whole or in part at the Magistrate's discretion) or for performance of the contract, and that in case of failure to comply with such order that a sentence of imprisonment can be passed. 21 C. 262. An order giving an option to the defendant either paying off the debt or working it off even if irregular is correct.

favour of the debtor and the complainant alone is entitled to object to it if irregular 1914 P. W. R. (Cr.) 22=1914 P. L. R. 61, ordinarily the Magistrate should ascertain from the complainant which of two orders, viz: either to finish the work or to repay the advance he desires and should pass that order as the complainant has the option under the Act (1902-1903) U. B. R. 1 (W. B. of C. Act). An order directing workmen to repay certain sums which they had received in advance, but omitting to specify any time within which the sums were to be repaid, is bad for uncertainty, Weir I. 696 *contra* Ratanlal 418. An order to repay an advance on the spot is not illegal Weir I. 699. Where a carpenter agreed to build, in a month's time a banyan out of materials to be supplied to him, and having made default was ordered eight months afterwards, to perform the contract *Held*, that the order was legal as time was not of the essence of the contract. The essential part of the agreement is that certain specific articles shall be made within a reasonable time, the month being fixed merely as a guide as to what would be a reasonable period Weir I. 703. But a Magistrate's order directing a defendant to work for as many days afterwards as he shall have made default is defective—1st, in not specifying the number of days the accused was bound to work afterwards, and 2nd, in assuming that the Court had power to order the defendant to work for any number of days in anticipation of default, after the date of the order Weir I. 707.

7 Order for repayment of advance cannot be made where sum cannot be ascertained — A, B and C in consideration of an advance of

under this section, if the complainant exercised the option of requiring repayment, to order A to repay the money advanced to him, for it was impossible to say how much A received, for though A agreed to do a third of the work, it was not alleged that he received as a fact a third of the money 2 Bom. L. R. 545. Where the contracts are several, an order directing the defendants to perform their contracts jointly is bad. Each defendant must be proceeded against separately. Weir I. 707.

8 A Magistrate can re-consider his order when infliction of

by him on or before a certain date, but subsequently he referred the complainant to a Civil Court, holding that the Act did not apply to cartmen. On reference that this latter order was irregular and *ultra*

the section for failure to comply with the order, whether the order was justifiable Ratanlal 537.

9 Compensation for breach of contract cannot be awarded — A mere breach of contract is not under the first part of this section an

accused, and no penalty had been imposed, the accused had disobeyed the order for the payment of the sum advanced to him. *Ratanlal* 534 followed in 6 Bom. L. R. 552, where it was held that in a case of conviction under this section, the order directing performance, and the refund of Stamp Duty and process fee (but not writing charges for the petition) ought to be passed, as the matters to which penalties under the Act are attached are offences.

11. When imprisonment can be awarded?—The order of imprisonment should not be made in the order directing performance, and the sentence of imprisonment should be made with the Magistrate's order.

H. C. R. Cr. C. 137, 3
13 Cr. L. J. 191 = 11
C. 1035n = 9 Cr. L.
 J. 188

12. Application of the doctrine of *Autrefois convict*—A contract for breach of contract of service under this section is a bar to any subsequent conviction on the same contract for a further breach for not returning to service. It cannot be held to be the intention of the Legislature that a contumacious labourer should be liable to imprisonment for several terms for several breaches so as to end in his imprisonment until the term of his contract has expired. This might be the consequence of a persistent refusal to perform a contract for a specific term. 21 C. 262.

13. No provision in the Act for return of materials—The payment of the money advanced and the return of goods given to be worked

4. The word "contract," as used in this Act, shall extend to all contracts and agreements whether by deed, or written or verbal, and whether such contract be for a term certain, or for specified work or otherwise.
- To what contract the Act extends

Note.—A contract to supply labourers and to get labour performed by them, even though the nature and extent of the work are not clearly specified, falls within the provisions of the Act, 1 M. 280. See also W. R. (Cr.) 6, as to garden coolies in Assam tea gardens, where the necessity for the work being of a specific character or otherwise is discussed. The matter was also dealt with in notes 2 & 3 to s. 1 *supra* at pp. 1017-1019.

5. This Act may be extended by the Governor-General of India in Council, or by the Executive Government of any Presidency or place, to any place within the limits of their respective jurisdictions. In the event of this Act being so extended, the powers hereby vested in a Magistrate of Police shall be exercised by such officer or officers as shall be specially appointed by Government to exercise such powers.
- Act may be extended by Government.

Note.—Outside the Presidency towns, powers under this Act may be exercised by Magistrates who have been specially empowered in that behalf. For notification extending this Act to all Districts of the Madras Presidency and empowering all Session Judges, Subordinate Judges, Principal Sudr Ameens, all Magistrates, Joint Magistrates, as well as Assistant Magistrates or Deputy Magistrates to exercise the powers vested in the Magistrate of Police by this Act, see notification in Fort St. George, No. 100 of 1902.

Magistrates as have been referred to therein as a class and is not limited to Ratanlal 701. When the Act is extended to the mofussil, the Magistrates there have all the powers in regard to masters and workmen as Presidency Magistrates have in Presidency towns. 35 C. 1025-12 C. W. N. 869=8 C. L. J. 312=8 Cr. L. J. 134, 1902 P. L. R. 65 (F. 8)=1902 P. R. (Cr.) 11

APPENDIX IX

THE INDIAN OATHS ACT, X OF 1873

AN ACT TO CONSOLIDATE THE LAW RELATING TO JUDICIAL OATHS, AND FOR OTHER PURPOSES

WHEREAS it is expedient to consolidate the law relating to judicial oaths and declarations and to amend the same;

Preamble

Enactments and declarations

Note.—For a discussion of the nature of judicial oaths and declarations and the history of Indian Legislation on the subject, see 10 A. 257

I.—PRELIMINARY.

Short title 1. This Act may be called "The Indian Oaths Act, 1873."

It extends to the whole of British India, and, so far as regards
Local extent. subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty.

2.

3. Nothing herein contained applies to proceedings before Courts martial,* or to oaths, affirmations or

Saving of certain
Oaths and Affir-
mations

to repeal.

II.—AUTHORITY TO ADMINISTER OATHS AND AFFIRMATIONS

4. The following Courts and persons are authorized to ad-
Authority to ad- minister, by themselves or by an officer em-
minister oaths and powered by them in this behalf, oaths and affir-
affirmations mations in discharge of the duties or in exercise
of the powers imposed or conferred upon them
respectively, by law —

(a) All Courts and persons having, by law or consent of parties, authority to receive evidence,

(b) The Commanding Officer of any Military Station occupied by troops in the service of Her Majesty provided

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a justice of the Peace is competent to administer in British India.

"
"
"

be questioned, if at all to the extent specified in s. 342, Cr P C. A Magistrate testing the petition of a surety under s. 122, Cr P C, is competent to administer an oath, 2 Sind L R. (Cr) 11, 26 A 311, as he has power to record evidence. But in a non-judicial proceeding the object of which is to discover the writer of a scandalous petition, it is not competent

* See the Indian Articles of War (Act V of 1869), the Indian Volunteers Act XX of 1869 the Indian Marine Act XIV of 1867

III.—PERSONS BY WHOM OATHS OR AFFIRMATIONS MUST BE MADE.

Oaths or affirmations to be made by 5. Oaths or affirmations shall be made by the following persons:—

(a) All witnesses, that is to say, all persons who may lawfully be examined, or give or be required to give, evidence by or before any Court or any person having by law or consent of parties authority to examine such persons or to receive evidence:—

Interpreters. (b) Interpreters of questions put to, and evidence given by, witnesses, and

Jurors (c) Jurors

Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Notes.—1. Presumption that oaths have been duly administered.—Where it does not appear from the record that oath was administered to a witness, the reasonable presumption would be in the absence of any suggestion to the contrary that the proper procedure in regard to administering of oath was followed. There is no provision of law which requires the Court examining a witness to record the fact that an oath was administered. 11 A. L. J. 933.

2. Witnesses to be sworn or affirmed.—A Sessions Judge being satisfied as to the capacity of a child witness to give evidence, intentionally omitted to administer an affirmation on the ground that he was of too tender years to render any attempt to bind his conscience expedient or practically operative. The Judge did not examine the child for the purpose of eliciting whether he knew it was wrong not to tell the truth, or whether he knew the difference between right and wrong, but he told him to tell the truth and permitted him to be examined as a witness: *Held* that the child should have been affirmed 18 N. 125. A child examined as a witness should be examined on oath or affirmation whether he understands the nature of an oath or not Oudh S. C. 311 10 C. W. N. 962. A witness may be examined on oath or solemn affirmation, but he cannot be both sworn and put on solemn affirmation at the same time, 13 W. R. (Cr.) 17. The omission to take any oath or any irregularity in the form in which it is administered does not invalidate the proceedings 21 W. R. Cr. 31. See a. 19 *infra*.

3. Circumstances under which prosecution for giving false evidence will not lie.—Where the petitioner made certain allegations against a Munsif before a Judge and on examination by the Judge made a statement on affirmation in support of his allegations which were subsequently found to be false, he could not be proceeded against for perjury, because the Judge had no authority to examine him on oath and the oath having been made and the evidence given on oath, the Judge, could not form the subject of a prosecution for perjury. 1881 W. R. (Cr.) 15. Similarly where the accused in a criminal case had sworn to a false affidavit in support of an application under s. 311 Cr.

P. C., for the transfer thereof. Weir 1 832; or where a person makes a false statement in a non-judicial proceeding, the object of which is to discover the writer of a scandalous petition against a Magistrate 11 B. H. C. R. 11.

4. Where Oath could legally be administered, to a party proceeded against.—In proceedings under s. 133, Cr P C., since a party to such a *quasi*-Civil Proceeding is not an accused person within the meaning of s. 469, Cr P C., 2 C. L. J. 149; an accomplice, if he is not an accused under trial in the same case, is a competent witness, and may be examined on oath 4 Cr. L. J. 145.

6. Where the witness, interpreter or juror is a Hindu or a Muhammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation
Affirmation by natives or by persons objecting to oaths

In every other case the witness, interpreter or juror, shall make an oath

Note.—The evidence of a witness who was examined on simple affirmation under the direction of the Judge is admissible as evidence, 14 B. L. R. 291; (JACKSON, J., *dissenting*) 22 W. R. (Cr.) 14

IV.—FORMS OF OATHS AND AFFIRMATIONS.

7. All oaths and affirmations made under s.5 shall be administered according to such forms as the High Court may from time to time prescribe.
Forms of oath and affirmations

And, until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use

Note.—For forms of judicial oath prescribed by the Madras High Court See Original Side Rules 1902, Rules 172 to 176 and forms referred to therein, Civil Rules of Practice 1903, Rules 90 to 93 and forms referred to therein, Appellate Side Rules 1905, Ch V, and High Court Dis. No. 729 dated 14th May 1906 The repeating of *Kalma* by a Muhammadan witness not being the form prescribed by the Chief Court of Punjab under this section, the refusal of a witness to repeat *Kalma* cannot be punished under s. 172, I P C., 1902 P. R. 20 = 1902 P. L. R. 47

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency and not purporting to effect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him
Power of Court to tender certain oaths

Note.—Operation of Section Confined to Civil Cases.—The expression party to a 'judicial proceeding' does not include either the complainant

to forego, and of which the Courts are competent to enforce a retraction. Weir I. 822. The provisions of ss. 8-11 do not apply to criminal proceedings at all, 5 Sind. L. R. 123=13 Cr. L. J. 23=13 Ind. Ca. 215. Again when certain persons sue or are sued under the provisions of O. I. R. 8 C. P. C. as representing a whole community, they are not entitled to have the suit decided by a special oath, *M. H. C. Jut Jak*: [1912] p. 139, C. M. A. 329 of 1911. *Quære*: whether a guardian or a next friend of a minor can agree to be bound by an oath of the opposite party without special leave of court 1912 P. W. R. 159=1912 P. R. 95=15 Ind. Ca. 161; the question was answered in the affirmative in 11 M. 483, where there was no proof of any fraud; 27 C. 229=14 C. W. N. 327. It has also been held that a pleader is not entitled unless authorized by a special Vakalat to bind his clients to an agreement to abide by an oath, 20 M. L. J. 386=7 M. L. T. 43=5 Ind. Ca. 514, where 14 B. 455 is followed.

2 An oath repugnant to decency cannot be accepted. -Where the plaintiff proposed to the defendant in the terms "If I be in saying that I did not strike the balance and had paid the debt, my wife be considered to have been divorced from me". It was held the Court was not competent to tender such an oath especially as it purported to affect a third person, 1910 P. R. 66=7 Ind. Ca. 479, where 1973 P. R. 36 is followed and 18 A. 46 dissented from.

3. The Court alone is competent to enforce agreement to abide by special oath.—The powers conferred upon the Court by this Act cannot be exercised by a commissioner authorized to take evidence, 1929 P. R. No. 89.

9 If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as mentioned in s. 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation.

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Note.—Parties cannot arbitrarily withdraw from their agreement to be bound by such oath or affirmation.

See also 354=1903 A. W. 358, are referred to M. L. J. 97 A. 339 P. 749, of 1903. (1903) p. 111, 15 A. 134 of 1906).

10 If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may cause the same to be administered by a person appointed for the purpose.

Notes—1 The agreement to be precise as to Form, Place, etc.—An agreement under this section should specify the form and place for taking oath, 21 M. L. J. 618=9 M L T. 234=9 Ind. Ca. 260; 7 M. L. T. 296; *Madras Jud Index 1910 p 323*. (C R. P. 590 of 1909) When the oath is to be taken in a mosque or a temple, a commission should issue to administer it If in the absence of the commissioner and the defendant the plaintiff makes an oath, a decree based upon such an oath cannot be upheld, 6 L. B. R 60=5 Bur. L. T. 165=17 Ind. Ca. 930. Where the defendant was willing to take the oath in the form proposed by the plaintiff but the plaintiff insisted on his taking the oath in another form, the Munsif was held right in decreeing for the defendant, 7 M L T 197

2. Result of withdrawal from agreement.—When plaintiff's offer to be bound by defendant's oath is accepted and defendant files a verified statement purporting to be his statement on oath, the defendant has done his part of the agreement, and it is no longer open to the defendant to say that his statement was not really made on oath, 1913 P. L R 80=1913 P W R 109=16 Ind. Ca 758 When a party resiles from his agreement to be bound by his oath, a decree cannot forthwith be passed against him taking the fact which was to have been proved as proved The trial must proceed in the ordinary way though the Court may be entitled to draw any legitimate inference from the conduct of the defaulting party, 1912 M W N 361=15 Ind. Ca. 195; 2 C L R 476 Where each of the parties refuses to be bound by the oath of the other, the weight to be attached to such conduct would be nil Similarly in the case of an important witness who has no direct interest in the result of the litigation, 7 N. L. R 50=10 Ind. Ca. 472; 15 M. G. C. R. 141; 11 M 356 But there is nothing illegal if a party so chooses in an agreement to abide by the oath of a witness, 1911 P. W. R 157

Evidence conclusive as against person offering to be bound

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated

Notes.—1. Conclusive proof—This expression must be understood in the sense in which it is defined by s 4 of the *Ind Ev Act 9 Bom. L R 19*=1 M. L. T. 63 where 4 B. L. R 97 (F B.) is followed. The Court must also consider whether the evidence of the person taking the oath completely disposes of the questions in controversy between the parties 22 M 231, 16 Ind Ca 733 *Madras Jud Index {1910} p 322* (S A 1322 of 1907), *Madras Jud Index (1908) p 131* (C. R. P No 364 of (1907) 31 A 315=6 A L J 244=2 Ind Ca 201 An oath may either dispose of the whole suit or be only conclusive proof as to one of the issues involved in it, 2 M 356; 14 A 141; 22 M 231; when the oath is conclusive proof of only some facts involved in the suit the Court should proceed to try the other issues necessary for a complete disposal, 3 M. L. T 103 When a case involves questions of law and fact, the record of the Court should clearly indicate the questions agreed to be decided according to the oath, 8 Ou. Ca. 11. In a proceeding under s 141, Cr. P. C. one of the parties undertook to withdraw his claim to the matter in dispute if the other party should take an oath. The latter took the oath in the form proposed. Held that the oath is not binding as conclusive proof in any proceeding other than that in which it was taken that the oath also being conclusive had in their mind

C. W. N. 501. As between the parties, a decree passed as the result of an oath is a final adjudication and has the same binding force as a decree passed on trial after contest, 24 M. 444.

2. Ordinary Oath has no such conclusive character.—This section must be read with s. 8. When a party is examined under the usual form of oath and not under any special oath under s. 9 *supra*, such evidence taken on oath has not the conclusive character referred to in this section, 22 W. R. (Cr.) 337. When parties agreed to be bound by the deposition of a particular person in the manner contemplated by ss 10 and 11 but the deposition was not specific and clear on some of the points at issue and the witness died before the final determination of the suit, it was held that the question should be determined in the ordinary way as the special agreement had become incapable of being enforced, 13 A. 386.

12. If the party or witness refuses to make the oath or solemn affirmation referred to in s. 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

V.—MISCELLANEOUS.

13. No omission to take any oath or make any affirmation, or substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

Notes.—1. Scope of the Section.—"This section is only one of many instances indicating the settled policy of the Indian Legislature to prevent justice being defeated by a technical irregularity. It rests on the legal obligation of a witness to speak the truth while at the same time it provides against the possible failure of justice through a technical irregularity."—*PER PARAKH, J.*, in 18 M. 103 at 116. "There is a difference between acts of omission and acts of commission and as this section mentions only acts of omission, I decline to extend the section to acts of commission."—*PER COLLINS, C. J.*, in *ibid* at 113.

2. 'Omission.'—This word is not limited to accidental or negligent omissions, 11 C. P. L. R. 16. It includes any kind of omission, 16 B. 359—*PER JALDINE, J.*, see also 14 B. L. R. 294 (F. B.). The expression refers not only to witnesses but also to failure to swear in jurors, 20 W. R. (Cr.) 19, or interpreters, 36 C. 808—13 C. W. N. 942—9 C. L. J. 672—19 Cr. L. J. 150—2 Ind. Ca. 697. In a prosecution for perjury it is not a defence to urge that the interpreter with whom and the evidence was given had not taken an oath or solemn affirmation, though intentional, is an irregularity, 16 B. 359, 21 W. R. (Cr.) 31. The offence of perjury as defined in s. 114 I. P. C., may be committed, although the person giving evidence has neither been sworn nor affirmed, 19 C. 353.

3. Effect of Intentional Omission to administer Oath or Affirmation to a child witness. In the case of a child if the Judge elects to

L J 161=22 Ind. Ca 737 But there are several rulings the other way, see 14 B. L. R. (F. B.) 294; 14 B. L. R. 54=22 W. R. (Cr) 14; 27 C. 428 at 440=4 C W N 169; 14 Cr L J. 485=20 Ind. Ca 741. The competency of a person to testify as a witness is the condition precedent to the administration to him of an oath or affirmation, and is a question distinct from his credibility when he has been sworn or affirmed. In determining the question of competency, the Court under s. 118 of the *Ind. Ev. Act* has not to enter into inquiries as to the witness's religious belief or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain in the best way it can whether from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he had seen or heard on a particular occasion. If a person of tender years or of a very advanced age can satisfy these requirements, his competency as a witness is established. 11 A 183=1839 A W. N. 65; 2 L. B. R 322.

Persons giving evidence bound to state the truth 14. Every person giving evidence on any subject before any Court, or person hereby authorized to administer oaths and affirmations, shall be bound to state the truth on such subject

Note.—Nullity of trial does not exempt from liability for giving false evidence.—The verdict of a jury, in a dacoity case was set aside and trial *de novo* directed on the ground that one of the jurors originally empanelled was deaf and partially blind. Held that the nullity of the original trial did not exonerate a witness from the obligation imposed by this section to speak the truth at the first trial 19 M. 375=6 M. L. J. 195.

Amendment of Penal Code, ss 178 and 181. 15 The Indian Penal Code, ss. 178 and 181, shall be construed as if, after the word "oath," the words "or affirmation" were inserted.

Official abolished oaths 16 Subject to the provisions of ss 3 and 5, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath or to make or subscribe any affirmation or declaration whatever.

INDEX.

[The figures in black type refer to the sections of the Code, those in ordinary type to the pages of the work in Parts I & II].

ABANDONMENT

See INFANT, 3

ABDUCTION

1. definition of offence, 362, I 215
force or deceit must operate on person abducted, II 579
in order to murder, 364, I 216
to confine secretly or wrongfully, 365, I 216
- 2 of woman with a view to compelling marriage or illicit intercourse, 366, I 216
does not apply where woman consents, II 580
what offence is then committed, *is*
of person to subject to grievous hurt, slavery, or unnatural lust, 367, I 217
wrongful confinement or concealment of person abducted, 368, I 217
what amounts to, II 581-582
of child under ten to steal from its person, 369, I. 217

ABETMENT

- 1 in what it consists, 107, I. 61, II 241
- 2 by instigation, I 242
by wilful misrepresentation or concealment, 107, Exp. 1, I. 61, II 241
act abetted must be an offence, II. 244
person abetted need not be an offender, 103, Exp. 3, I 62
nor the person who actually commits the offence abetted, 103, Exp. 4, I. 63 II. 242
where instigation countermanded, II 246
by letter, none till read, II 246
- 3 by conspiracy, what it is, II. 247
what must be done to carry it out, II. 247
acts must be for common purpose, *is*.
evidence in support of, II. 248
whether giving false evidence is an abetment, 249
conspirators need not be in direct communication, 103, Exp. 5, II 247
- 4 by aiding or facilitating offence, 107, Exp. 2, I. 61
what amounts to, II 250
case of master and servant, II 253
when offence upon one's self may be abetted, II. 253
by illegal omission, *is*
or abetment of such omission, 108, Exp. 1, I. 62
5. abetment complete, though nothing follows, 103, Exp. 2, I. 62
penalty in such case, 115, 116, 117, I. 68, I. 69, I. 70

ABETMENT—*continued*.

6. penalty where offence committed, 109, 115, 116, 117, I. 64, I. 68, I. 69, I. 70
 must be in consequence of abetment, 109, Exp. I. 64, II. 255
 where abettor is present at committal, 114, I. 66
 cannot also be punished as abettor, II. 253
 where act done with different intention or knowledge from that of abettor, 110, I. 65
7. where act done is different from that abetted, 111, I. 85, II. 256
 or is done by mistake, II. 257
 where both acts done, 112, I. 68, II. 257
8. 63
 4

ABSCONDING

- to avoid service of summons or order, 172, I. 100
- warrant of magistrate *no offence*, I. 100
- what amounts to, I. 101

ACCIDENT

- act done under, when no offence, 80, I. 47
- where act done is unlawful, II. 154
- where the act is innocent, II. 156
 or a mere statutory offence, II. 155
- where lawful act carelessly done, *ib.*
- difference between civil and criminal liability for, II. 155

ACT

- what the word denotes, 33, I. 15
- when it includes illegal omission, 32, I. 15
- offence partly by and partly by omission done by several, liability of each, 34, 35, 37, 39, I. 15, I. 16, I. 17
- See JOINT ACTS*

ACTS OF STATE

1. are not cognizable by any Court, II. 114
 except for deciding whether they are such, I. 114
 2. may be rendered such by ratification, II. 114
 3. what acts are
 all acts of a hostile character, II. 116
 dealings with Native States of India, II. 115—II. 119
 acts done in settling conquered country, II. 119
 not when under claim of legal title, II. 120
 II. 121
- acts done on national emergency, *ib.*

ADEN, I. 2

ADMIRALTY JURISDICTION

- its origin and transfer to Common Law Courts, II. 51
- conferred on High Courts by Charter, II. 53-53
- extended to Mofussil Courts, *ib.*

ADMIRALTY JURISDICTION—continued

supplemented by Merchant Shipping Acts, II 53-54
 Procedure and punishment to be Indian, II 63-64
 substantive law to be English, II 69, II 76
 exception as to territorial waters, II 29
 only applies to offences completed at sea, II 55

to pirates, II 64, II 67, II 68

See PIRACY.

ADMIRALTY OFFENCES

Colonial Act, 12 and 19 Vict., c 96, II 55

ADULTERATION

See NUISANCE, 5.

ADULTERY

who is said to commit, 497, I 279, II 839
 where marriage leaves woman free, II 839-840
 marriage not believed to exist, II 840
 evidence of, II 840
 consent or connivance, II 841-842
 acquiescence after knowledge of, II 843
 to one adultery bars indictment for another, II 844
 second prosecution for, II 845
 wife is not punishable as abettor, 497, I 279
 husband or person in charge for him must complain, II 849-850
 what amounts to a complaint, II 850
 death does not stop prosecution, II 850

AFFIRMATION—See APPENDIX IX.

solemn, when included in word "oath," 51, I 19

AFFRAY

what constitutes an, 159, I 89, II 327
 not when acts done in private place, *b.*
 or where public have no right of access, *ib.*
 punishment for committing, 160, I 89
 assaulting public officer in suppressing an, 152, I 85
 evidence of general fight sufficient to constitute, II 327

AGENT

of owner or occupier, not giving police notice of riot, 154, 155, I 87
 liability of, if riot, 156, I 88

ALLY OF THE QUEEN

See WAGING WAR, 3.

ALTERNATIVE

punishment where one of several offences found in the, 72, I 41
 charging contradictory statements, II 365

AMERICAN

to be sentenced to penal servitude, 56, I 21

ANIMAL

what the word denotes, 47, I 19

injury to

See MISCHIEF, 2

injury by

See NEGLIGENCE, 7.

ANNOYANCE

by a drunken man, 510, I 288

APPREHENSION

of offender or person charged with offence, wilfully neglecting to aid in, when bound to do, 187, I 116

preventing, by harbouring, etc., 216, I 138

public officer voluntarily omitting, 221, I 138

if offender is under sentence of court, 222, I 139

resisting, of one's self, 224, I 141

of another, 225, I 148

omission to apprehend by public servant, 225A, I 145

resistance to lawful, 225B, I 145

ARMY

offences relating to the, 131—410, I 79—I 81

ARREST

1. by police officers with warrant, II. 150

2. " " " " " " " " " " " "

3.

4

when death may be inflicted for, 16

5.

6

7. justification must depend on facts known at time, II. 152

where court had no jurisdiction, II. 153

it might have had, II. 153

different justification in civil and criminal proceedings, II. 152

ARTIFICER—*See APPENDIX VIII*

who is an, I. 276

ASSAULT

1. in what it consists, 331, I 211, II. 561

559

not aggravated by unforeseen result, II. 564

ASSAULT—continued

3. assault or criminal force otherwise than under provocation, 352, I. 211
 - to outrage female modesty, 354, I. 213, II. 562
 - with intention to dishonour, 355, I. 213
 - attempt to commit, 356, I. 214

in taking possession of enforcing a right, 141, I. 81

ASSEMBLY

See **TURBULENT UNLAWFUL ASSEMBLY**

ASSISTANCE

- to public servant, omission to give, 187, I. 116
- in aid of law cannot be refused by Government, II. 89

ATMOSPHERE

- making it injurious to health, 273, I. 169

ATTEMPT

1. to commit offence punishable with transportation or imprisonment, 511, I. 298
 - whether it applies to murder, II. 531—II. 533
 - only to offences under Code, II. 947
 - not punishable with whipping, *ib.*
 - or additionally on previous conviction, *ib.*
 - conviction for or on acquittal of complete offence, *ib.*
2. intention or preparation not an offence, II. 933
 - when act done towards commission, II. 935
 - offence prevented by matter external to offender, II. 936
 - one of series of means towards offence, II. 935-941
 - attempts to commit forgery, II. 942-45
 - rape, II. 597
 - proof of intention, II. 944
3. 76
 - to commit suicide, 305, I. 155
4. to commit murder or culpable homicide, 307, I. 192, 308, I. 193
 - what acts are capable of causing death, II. 530
 - person not guilty of may have committed an offence under s. 511, II. 531

BANKERS

See **BREACH OF TRUST**, 3

BELIEVE

- meaning of "reason to believe," 26, I. 12

BIGAMY

1. what constitutes offence of, 495, I. 277, II. 823

BIGAMY—*continued.*

- first marriage legal though voidable, II. 824
- still existing, 491, *Excep.*, I. 278
- divorce without legal process, II. 824
- 2.
- 3. proof that first spouse was living, II. 834
 - presumption as to life, *ib.*
 - absence for seven years, 491, *Excep.*, I. 278
 - must have been continuous, *ib.*
 - reasonable but mistaken belief of death, II. 837
- 4. offence takes place where second marriage performed, II. 833
 - what court has jurisdiction, *ib.*
 - only on complaint of husband, *ib.*
 - with concealment of previous marriage, 495, I. 278

BREACH OF TRUST

- 1. what constitutes a criminal, 405, I. 236
 - punishment for, 406, I. 237
 - what is a trust, II. 652
 - may be committed by person interested in property, II. 653
 - cases of husband and wife, II. 655
 - married women, II. 656
 - what is a breach of trust, II. 657
 - evidence of it, II. 659
- 2. by carrier, wharfinger, or warehouse-keeper, 407, I. 237
 - by clerk or servant, or person employed as such, 403, I. 237
 - who is a servant, II. 663
 - or employed as such, II. 664
- 3. by public servant, banker, agent, etc., 409, I. 237
 - must be in discharge of duty, II. 637
 - directors of Joint Stock Bank are bankers, II. 668
 - liable for dishonest dividend, II. 668
 - manager and accountant are not bankers, II. 663

BRIBE

- public servant taking, 161, I. 90
- 161, *Exp.*, I. 90
- 162, I. 91
- 92—I. 91
- 165, I. 94
- offer of a bribe is abetment of offence, 116, *illus.* (a), I. 69

BRITISH INDIA

- what the words denote, 15, I. 6

BRITISH SHIP, II. 61

BRITISH SUBJECT

See EUROPEAN BRITISH SUBJECT

BURIAL PLACE

trespassing on, with intent to insult, etc., 297, I 181
offering indignity to human corpse, *ib.*

CALENDAR

British "year" or "month" is calculated according to, 49, I 19

CAPACITY

false measure of, 265-267, I. 161-I 162

CANCELLING

documents with fraudulent intent, 177, I 265

CAPTAIN

of merchant ship, his right to punish crew, 11 128

CERTIFICATE

issuing or signing a false, 197, I. 123
using a false as true, 198, I 123

CHEATING

1 what constitutes offence of, 414, I 239, II 683
punishment for, 417, I 241
acts amount to deceiving, II 687
implied assertions, *ib.*
conduct without words, II 695
praise or depreciation, II 691
statement of false intention, II 693

2

what representation implied by sale, II 704, II 761
actual artifice to conceal, II 701
express conditions of sale, II 702
trade custom or fiduciary relation, II. 698

3 fraudulent intention, II 704
act done to secure supposed rightful advantage, II. 705
evidenced by previous acts, II 685
must be to bring about specified results, II 708
person must have been deceived, II 712
if not, offence may be charged as an attempt, II 713
4 by personation, 416, 419, I 241
by inducing delivery of property, or destruction of property,
420, I 241
cases held not to be forgery, but cheating, II 760-II. 764

CHILD

See INFANT.

CHOICE OF EVILS

CIRCULATING

false rumour to cause mutiny, or alarm, or offence against State,
505, I. 235

CLAIM

See FRAUDULENT CLAIM.

CLERK

See BREACH OF TRUST, 2. THEFT, 8

COHABITATION

under pretence of marriage, 493, I. 277

COIN

1. and Queen's coin, what it is, 230, I. 149
 - counterfeiting them, 231, 232, I. 150
 - what amounts to, II. 748, II. 751
 - evidence of, II. 750
 - abetting such counterfeiting out of India, 236, I. 151
 - making or selling instruments for counterfeiting them, 233, 234, I. 150—I. 151
 - acting in concert with police, II. 752
 - possession of such instruments, 235, I. 151
 - what amounts to, II. 752
 - knowledge of their nature necessary, *ib.*
 - evidence of other acts to prove, II. 753
2. import or export of either coin, 237, 238, I. 151
 - passing off coin known to be counterfeit at time of possession, 239, 240, I. 152
 - not the offence of the coin, II. 753
 - what is a fraudulent intention, II. 754
 - passing off coin known to be counterfeit after time of possession, 241, I. 152
 - must be delivered as genuine, II. 754
 - fraudulent possession of, known to be counterfeit when possessed, 242, 243, I. 153
 - evidence of knowledge, II. 756
3. frauds on coin by person employed in mint, 244, I. 153
 - of person employed in mint, 245, I. 153
 - of person employed in mint, 245, 247, I. 154
 - of person employed in mint, 248, 249, I. 154
4. Metal Tokens Act 1869, I. 156
 - making or issuing copper money without authority, I. 155
 - possessing such, with intent to issue, II. 751
 - burthen of proof as to intent, II. 752

COLONIAL COURTS ACT, 37 and 38 Vict., c. 27, II. 54

COLONIAL COURTS OF ADMIRALTY ACT, 53 and 54 Vict.,
c. 27, II. 52, II. 53

COMMITTING

for trial or to confinement, wilfully contrary to law, 220, I. 133

COMMUNICATION MADE IN GOOD FAITH

not an offence, when made for benefit of person harmed by it,
93, I 53
See DEFAMATION, 5

COMMUTATION

of sentence of death, 54, I 21
transportation for life, 53, I 21
in other cases, I 21

COMPANY

is included in word "person," 11, I 5
may be defamed, 499, Exp. 2, I 280

COMPOUNDING AN OFFENCE

taking gift for, 213, I 131
making gift to induce, 214, I 132
cases in which it is allowed, II 269
proof of validity of agreement, II. 269 70

COMPULSION

1 effect of foreign conquest, II 199
or civil war, 19
2 by private person, 94, I. 53
when no excuse, II 201
See FORCED LABOUR

CONCEALING

a birth, II 545
a married woman, II 847
material facts, when it amounts to abetment, 107, Exp 1, I 61,
II 242

design to wage war against the Queen 123, I 75
escaped prisoner of State or war, 130, I 78
deserter, 136, 137, I 80
evidence of commission of offence, 201, I 124

130
accuser 212, Except.

those apprehension has

no offence, if offender is husband or wife of concealer, 216, Except.,
I 134
person who has been abducted or kidnapped, 368, I 217

CONFINEMENT

wrongful, 340, I. 206

CONNIVANCE, II. 841

CONSENT

1. rules as to, when set up as a defence, 87—92, I. 49—I. 52, II. 190—II. 198
 - to what cases it applies, 87, I. 49
 - not to causing death or grievous hurt, II. 192
 - unless improbable or unforeseen, II. 191
 - contests of skill must be fairly conducted, II. 193
 - law of prize-fights, II. 193
2. acts done for benefit of consenting person, 88, I. 50, II. 194, II. 197
 - not of nature amounting to consent, 88, I. 50, I. 52
3.
 - not necessary that any act or illegal omission should take place, 121A, Exp., I. 75, II. 290, II. 291, II. 293
 - must go beyond intention, II. 288
 - correspondence with foreign State, II. 290
 - what words and writings are evidence of, II. 291
 - each liable for acts of others, II. 291
- inadmissible where act consented to is an offence, 91, I. 51

194

CONSPIRACY

- of a treasonable nature, 121A, I. 74
- in what it consists, II. 288, II. 289
 - not necessary that any act or illegal omission should take place, 121A, Exp., I. 75, II. 290, II. 291, II. 293
 - must go beyond intention, II. 288
 - correspondence with foreign State, II. 290
 - what words and writings are evidence of, II. 291
 - each liable for acts of others, II. 291
- 2 when it constitutes an abetment, II. 247—II. 250

CONTEMPT

- of lawful authority
 - See PUBLIC SERVANT, 3.

CONTEMPT OF COURT

- immediate cognizance of, I. 103
 - cannot, be tried by court offended, I. 104
 - procedure on punishment for, I. 104

CONTRADICTORY DEPOSITIONS, II. 360

CONTRIBUTORY NEGLIGENCE

- not a defence in criminal law, II. 446, II. 517

CONVEYANCE

- See FRAUDULENT TRANSFER.

CONVICT

- for life, murder by, 303, I. 190
 - attempt to murder by, 307, I. 192

CO-OPERATION

by distinct acts. 37. I. 16

CORONER

is a public servant. I, 9

language used by, when privileged, II 887

disobedience to summons of, punishable under a 174, I 102

proceedings before, are judicial proceedings. II 378

CORPSE

offering indignity to human corpse, 297, I 181

is not the subject of property, II 609

CORRECTION

I what cases of or lawful. II 127

must be moderate and reasonable, II 127

2. children, scholars and apprentices, II 127

not as regards servants, II 129

or wives, II 129

right of captain of merchant ship, II 129

COSTS

in prosecution under Merchandise Marks Act, II 782

COUNSEL

defamation by, in discharge of his duty, II 896

COUNTERFEIT

meaning of term, 28, I 13

See COIN FORGERY, STAMPS

COURTS OF JUSTICE

meaning of the term. 20. I 7

See CONTINUED JUDGE PUBLIC SERVANT

CRIMINAL LAW

its origin and development, 11 1

modern aspect of, 11, 2

CRIMINAL

BREACH OF TRUST FORCE INTIMIDATION. INSULT MISAPPROPRIATION TREASON *See those Titles*

CULPABLE HOMICIDE

See HOMICIDE.

CUMULATIVE PUNISHMENT

See PUNISHMENT, 2

CURRENCY AND BANK NOTES FORGERY ACT

what is a bank note. 489A, Exp. 1 272

counterfeiting currency or bank notes, 489A I 272

273

materials for counterfeiting.

4092, 4103

DACOITY

- in what it consists, 391, I. 225
- punishment for, 393, I. 228
- murder committed in act of, 396, I. 229
- deadly weapon used, or death, or grievous hurt attempted in, 397, I. 230
- person armed with deadly weapon attempting, 398, I. 231
- preparing to commit, 399, I. 231
- belonging to gang habitually committing, 400, I. 231
- assembling for purpose of committing, 402, I. 233

DEAF AND DUMB

- persons, how dealt with on trial, II. 186

DEATH

- what the word denotes, 46, I. 19
- sentences of may be commuted, 54, I. 21
 - or suspended, or remitted, I. 21
 - in cases of escape, II. 159
- causing for self-preservation, II. 159

DEFAMATION

1. *what is*

154

- 2.

3

- 3

10

undue circulation, II. 898

must be pleaded, II. 899

- 4 intention to injure, II. 857

inferred from character of imputation, II. 857 860

how rebutted, II. 858

5. imputation which are not defamatory, 499, *Excep 1-10*,

280, I. 284, II. 874

meaning of privileged communication, II. 874

extends to agent of party, II. 875

mutuality of interest, II. 877

necessary communication, II. 878

good faith, II. 879

burthen of proof, II. 860

6. privilege negatived by express malice, II. 882

what amounts to, II. 883

intentional or reckless falsehood, *ib*

use of extravagant language, II. 884

previous defamation, II. 885

must be found as a fact, *ib*

what evidence of necessary, *ib*.

7. cases of absolute privilege where express duty to make statement,

II. 885

Parliamentary or judicial proceedings, II. 886

DEFAMATION—*continued*.

principle of rule, II 888

----- " 890

8

must be fair and correct, *ib*

Parliamentary proceedings, II 886

quasi-judicial and official proceedings, II. 887

9 cases of fair comment, II. 920

matter must be of public interest, II 899, II 900

facts asserted must be true, *ib*.

criticism must be fair, II 900-921

10 Publication of, what it is, II. 864 II 865

not to person defamed, II 864-65

by one of several acting together, *ib*

jurisdiction in respect of, II 872

evidence of, II 865

11. province of judge and jury, II 921

where on question of privilege, II 922

where privilege alleged, II. 923

in case of fair comment, II 924

12 Punishment for, 500, I 284

printing or engraving matter believed to be defamatory, 501,
I 284

selling matter known to be defamatory, 502, I 284

DEFENCE

See PRIVATE DEFENCE

DEPREDAATION

on territories in alliance or at peace with the Queen, 126, 127, I 77

DESERTION

abetting, of soldier or sailor, 135, I 80

harbouring deserter, 136, I 80

concealing deserter on board merchant vessel, 137, I. 80

DESTRUCTION

of document, 204, I 126

DETAINING

a married woman.

See TAKING AWAY

DISAFFECTION

DISAFFECTION—*continued*.

4. publisher liable as well as writer, II. 304, II. 305
 what is publication, II. 307
 how far knowledge of contents necessary, II. 304

DISAPPEARANCE OF EVIDENCE

- offender must not be principal criminal, II. 390
 proof of knowledge and intention, II. 391

DISHONESTLY

- definition of the word, 24, I. 12
 in case of theft, robbery, etc., II. 613, II. 615, II. 697-693, II. 704 705

DISHONOUR

- assault, or using criminal force, with intent to, 355, I. 213
 or to outrage modesty of a woman, 354, I. 213

DISOBEDIENCE

1. to lawful order of public servant, 188, I. 117
 for removal of nuisances, II. 335-336
 maintenance of possession, id
 preservation of the peace, II. 344
 processions and music in streets, II. 342, II. 343
2. illegality of order when immaterial, II. 337
 cannot be set aside by civil court, II. 337
 no offence when order *ultra vires*, II. 339
 or depends on certain anticipated evils, II. 339
 II. 340
3. and show persons to whom it extends, II. 341
 must be known to knowledge of accused, II. 348
4. 349

DISPENSING

- power of Crown declared illegal, II. 88-89

DIVORCE

- II. 816 819

DOCUMENT

- what the word denotes, 29, Exp. 1, I. 13.
 public servant framing incorrect, 167, I. 96
 not producing or delivering up, 175, I. 102
 destruction of, to prevent production in court, 201, I. 116
See Forgery, 1.

DRIVING

rash or negligent, 279, I 163
when death caused by, *ib.*

DRUGS

See NUISANCE, 5

DRUNKENNESS

See INTOXICATION.

DUELLING, II 503, II-504**DWELLING**

See HOUSE TRESPASS, 1

EAST AFRICA

jurisdiction over offences committed in II 49

ENMITY

promoting of, between classes, 153A, I 86

ENTICING

Minors. *See* KIDNAPPING, 1

Married woman *See* TAKING AWAY

ESCAPE

public servant allowing, of prisoner of State or war, 128-129, I 77

aiding of prisoner of State or war, 130, & *Expl.*, I 78

if he has escaped from custody, or his apprehension has been ordered, 216, I 133

public servant intentionally suffering, of person accused, 221, I 138

public servant intentionally suffering, of person under sentence, 222, I 139

public servant suffering, in cases not otherwise provided for, 225A, I 145

negligently suffering of person charged or convicted, 223, I 140

making or attempting to make, from lawful custody 224, I 141
punishment to be in addition to that of original offence, 224,

Expl., I 141

in cases not otherwise provided for 225B, I 145

is not an obstruction of a public servant, I 115

See RESCUE, RETURN FROM TRANSPORTATION.

EUROPEAN

is to be sentenced to penal servitude, 55, I 21

EUROPEAN—BRITISH SUBJECTS

See JURISDICTION, 5

EXCEPTIONS

existence of must be proved by accused, *supra*

general, 76—106, I 46—I 60

See SPECIFIC TITLES.

EXPERTS

proof of foreign law by, II. 816

FACILITATING COMMISSION OF OFFENCES

1. by concealing or making false representation as to design, 118,
I 70, 120, I 72
where offender is public servant whose duty it is to prevent,
119, I 70
where offence is waging war against Queen, 123, I 75
2. Meaning of illegal omission, II 258
statutory obligation to inform, II. 259
See FALSE INFORMATION

FALSE CHARGE

1. instituting criminal proceedings or making false charge of an
offence, without just cause, 211, I 190
offences are different, II 411
2. false charge need not be to a magistrate, *ib*
nor be believed or acted upon, *ib*
must be to some one with authority, II 411, 412
I 410
3. knowledge of falsity essential, II 419
evidence to show belief, *ib*
mere rashness insufficient, II. 420
4. intention to cause injury, II 421
not established by groundlessness of charge, *ib*
may be inferred from it, *ib*
immaterial if charge true, *ib*
5. disposal of charge in favour of complainant, II 422
refusal to hear evidence, II 423
province of judge and jury as to evidence, II 422

FALSE EVIDENCE

1. elements of offence of giving, 191, I 119, II 351
meaning of evidence, II 351
2. who is legally bound to state truth, II 352
what is included in word "oath," *ib*
who may affirm, *ib*
oath omitted or wrongly administered, *ib*
case of children, *ib*
how proved or presumed *ib*
when designedly omitted, II. 353
3. legality of oath, II 354
want of jurisdiction to inquire, II 355
or to administer oath, *ib*
in what jurisdiction consists, *ib*
1. certain certificates, 197, I 123, II 357
declaration is receivable as evidence, 199 I 123
5. falsity of evidence, II 357
must be known to be false, II 358
expression of belief, 191, Exp. 2, I 119
6. contradictory depositions, II. 363
when mere production of sufficient, *ib*
how charged, II 363, II. 334
each, if false, must be punishable, II 364
sanction for prosecution of each, II 365

FALSE EVIDENCE—*continued.*

7. What is a fabrication of, 192, I 120, II. 365
 what is a fabrication of, I 120, II. 365
8. intention to cause erroneous opinion, II. 369
 what is a fabrication of, I 120, II. 365
9. what is a judicial proceeding, II. 372
 actual use of fabricated evidence not required, II. 371
 several false statements in some deposition only one offence,
 II 379
10. proof of alleged false statement, II 379
 when taken, in language different from that of witness,
 II. 380—II 381
 only one witness necessary, II. 383
 of facts which make statement evidence, *ib.*
11. using as true false or fabricated evidence, 196, I 123, II. 384
 or false declaration receivable as evidence, 200, I. 121
 proof of guilty knowledge, II. 384
 fabrication may have been intended for a different purpose,
 II. 386
12. false statement on oath to public servant, 181, I. 110, II. 378
 what facts must be proved, II. 379
 conviction improper, if evidence given in a judicial proceeding,
 II 388
 See FALSE INFORMATION.

FALSE INFORMATION

1. to public servant by person legally bound to afford it, 177, I 106
 nature of obligation, I. 107
 where it relates to offence or apprehension of offender, 177
 I 106
- 2 to public servant to cause change of conduct, 182 (a), I 110
 does not involve intention to injure any one, II. 412
- 3 to cause use of his power to injure or annoy any one, 182 (b),
 I. 111
 intention is essence of offence, II. 408, II. 413
 no actual result required, II. 410
 person injured may prosecute, II. 412
 affirmative intent to cause change of conduct, II. 423
4. I. 124
 I 125
 39, II 391
 and knowledge of it, *ib.*
 offender must be different from person screened, II. 399
 intention when material, *ib.* II. 399
 See CIRCULATING.

FALSIFICATION

of accounts by clerk, officer, or servant, 477A, I. 267

FIGHT

See HOMICIDE, 8, 9 PRIVATE DEFENCE, 4.

FINDING

See MISAPPROPRIATION.

FINE

- 1 when unlimited must not be excessive, 63, I 28
- imprisonment in default of, 64, I 28
- only awarded for offences under Penal Code, I 29
- nature and duration of, 65—67, I 29—I 30
- effect of complete or partial payment, 68, 69, I 21
- period during which it may be levied, 70, I 33
- imprisonment not satisfaction, I 33
- mode of enforcing fine, I 33

FIRE

- negligence, etc, as to, 285, I 171
- any combustible matter, 285, I 171
- using, to cause mischief, 435, 436, I 249
- to injure a decked vessel of more than twenty tons, 438, I 249

See EXPLOSIVE SUBSTANCE. MISCHIEF

FOOD

- adulterations of, 272, I 164
- selling, etc, adulterated 273, I 164
- noxious and unfit, 273, I 164

FORCE

- in what it consists, 349, I 209
- criminal, meaning of, 350, I 209
- See* ASSAULT

FORCED LABOUR

- unlawfully compelling to, 374, I 219
- what constitutes offence, II 595

FOREIGN CONQUEST

- its effect upon laws, II 199

FOREIGN ENLISTMENT ACT, 33 and 34 Vict, c 90, II. 285—II 286

- construction of in Jameson case, II 286—II. 287

FOREIGN GOVERNMENT

- justification under its orders, II 125

FOREIGN JURISDICTION, *See* Appx I.

- and Extradition Act (Indian), II 76, II 83-86
- Acts (Imperial), II 82

FOREIGN LAW

- mode of proving, II 816

FOREIGNERS

FOREIGNERS—*continued*

- nor for offences on foreign ships within territorial waters, II 27
- unless with leave of Government, II 28
- exemption of foreign ships of war, II 32
- to what persons it extends, II. 33
- right of asylum upon, *ib*

FORFEITURE OF PROPERTY

- effect of sentence of, 61, I. 25
- its operation on rights of sons, 20
- when it may be added to penalty, 62, I. 27
- for waging war against Government, 121, 122
- of property connected with depredation on allied State, 126, 127, I. 77

FORGERY

- 1 who is said to commit, 463, I 250
 - what is a document, 29, I 13
 - need not be legal evidence, II 757
 - making a false document, 463, I 250, II. 757
 - when authorized signature may be, *ib*.
 - 464, c. 3, I 260 Exp. 1, I. 301
 - II. 761
 - sed. *ib*.
 - 44, Exp. 2.
 - 1. 262, II. 100
 - II 761
 - 762
- 2 *frat*
 - II. 764
 - 1
 - where no injury intended or possible, *ib*
 - merely personal security desired, II. 767
 - meaning of "claim" and "property," II 771
 - difference between "dishonestly" and "fraudulently."
 - II. 770
3. publication unnecessary where *frat* intended, II. 712
- several persons joining in, II 773
4. using as genuine a forged document, 471, I. 264, II. 773
 - what is a forged document, 470, I. 265
 - must have been such before use, II 773, II 774
 - what is a using, II 773, II 774-775
 - where using is fraudulent, II 776
 - evidence of guilty knowledge, II 777
 - other similar acts, II. 778
5. possessing forged documents when an offence, 474, I 266, 475, 476, I. 266
 - fraudulent intention necessary, II. 778
 - evidence of, II. 778-79

FORGERY—continued

6. punishment for simple, 465, I. 262
 - of record of court, register, certificate or authority to sue, etc., 466, I. 262
 - valuable security, will, authority to adopt, transfer, or receive money, 467, I. 263
 - for purpose of cheating, 468, I. 264
 - harming reputation, 469, I. 264
 - making seal, plate, or instrument, for committing a, 472, 473, I. 265
 - possessing such seal, etc., *ib*
 - counterfeiting marks of authentication in order to commit, 476, I. 266
 - possessing material so authenticated, *ib*
 - falsification of accounts by clerk, officer, or servant, 477A, I. 267

FRAUDULENT

meaning of the word, 25, I. 12

FRAUDULENT CLAIM

- accepting or making to prevent judicial seizure of property, 207, I. 123
- suffering decree or execution without just cause, 208, I. 128
- making false claim in court, 209, I. 129
- obtaining decree or execution for unfound demand, 210, I. 129

FRAUDULENT GIFTS

See **FRAUDULENT TRANSFERS** 2

FRAUDULENT PREFERENCE

See **FRAUDULENT TRANSFERS**, 2—4

FRAUDULENT TRANSFERS

- 1 to prevent judicial seizure, 206, I. 127 II. 393
 - what amounts to fraud, II. 393
 - 13 Eliz., c. 5 adopted in India, II. 394
 - bona fides*, not inconvenience to creditors is the test, II. 395
 - fraud not negatived by value given II. 396 97
 - decisions in India, II. 397
 - other transfers evidence of intention, II. 398
- 2 in case of gift inferred from result on solvency, *ib*
 - voluntary conveyance to avoid forfeiture, II. 399
 - if *bona fide* for value, II. 400
 - mere preference of one creditor no offence, *ib*
 - proper remedy, II. 401
- 3 to prevent distribution of property among creditors, 421, I. 242
 - refers to proceedings in insolvency, II. 402
 - elements of fraud, II. 403
4. fraudulent preference, what it is, II. 401
 - what circumstances negative it, II. 404
 - inadequacy of consideration, II. 405
- 5 to prevent demand by creditor being enforced, 422, I. 242
 - containing false statement as to consideration or person taking benefit, 423, I. 242
 - benami* transaction not an offence, II. 406
- 6 dishonest removal or concealment of property, 424, I. 242
 - or release of claim, *ib*
 - one partner may commit in fraud of the others, II. 407

FUGITIVE OFFENDERS ACT, 1881 (Imperial), II. 85
 cases to which it applies, II. 85
 mode of procedure, II. 85
 final disposal of fugitive, II. 86

FUGITIVE SLAVES

or Criminals granting asylum to, II. 33

GENDER, 8, I. 5

GENERAL EXCEPTIONS, 76—106, I. 46—I. 60

GESTURE

making, to wound religious feelings, 298, I. 162
 when it may amount to an assault, 351, I. 211

GOOD FAITH

meaning of, 52, I. 20
 in reference to . . .

clamoration, II. 859, 894, II. 879

GOVERNMENT

meaning of, 16, 17, I. 6

illegal orders of . . .

not refuse legal assistance, II. 90
 heads of, exempt from Indian jurisdiction for public acts,
 II. 93-95
 orders of foreign, no justification beyond its own limits,
 II. 125-126
 legality of commission issued by, cannot be questioned,
 II. 32, II. 118

See MARTIAL LAW. ACTS OF STATE

GOVERNMENT STAMP

counterfeiting a, 255, and Exp., I. 156
 possessing instrument or material used for counterfeiting a, 256,
 I. 157
 making or selling, etc., instrument for counterfeiting a, 257, I. 157
 selling, etc., a counterfeit, 258, I. 157
 possessing a counterfeit, 259, I. 157
 using as genuine one known to be counterfeit, 260, I. 158
 where a, has been used, effacing writing with intent to cause loss to
 Government, 261, I. 158
 removing a, from a writing, etc., with intent, etc., 261, I. 158
 using one known to have been used before, with intent, etc.,
 262, I. 158
 erasure of mark upon, denoting that it has been used before, with
 intent, etc., 263, I. 159
 making or possessing fictitious, 263A, I. 159

GOVERNOR-GENERAL

assault on, with intent to compel or restrain exercise of any lawful
 power, 124, I. 75

GOVERNOR-GENERAL—*continued*

attempt to overawe or restrain by unlawful assembly, 124, I 75
 exempt from jurisdiction of High Courts, II 94
 forbidden to trade, I 98

GOVERNOR OF A PRESIDENCY

exempt from jurisdiction except for treason or felony, II 94
 assault on with intent to compel or restrain exercise of lawful
 power, 124, I 75
 attempt to overawe by unlawful assembly, etc., 124, I. 75
 forbidden to trade, I 98

GRATIFICATION

165, I 34
 public servant taking, etc., a thing without adequate consideration
 for it, 165, I 94
 accepting, etc., to screen offender, or abandon prosecution, 213,
 I 131
 giving, etc., in consideration of screening offender, etc., 214, I 132
 taking to help in recovery of property, 215, I 133

GRIEVOUS HURT

See HURT.

HABITUALLY RECEIVING

stolen property, 413, I 239

HARBOURING

escaped prisoner of State or war, 130, I 78

80
 screen him from
 I 131
 person escaped from custody for offence, or whose apprehension is
 robbers or dacoits, 216A, I. 133
 though offence committed out of India, 15
 unless by husband or wife of harbourer, 15.
 meaning of word "harbour" in s. 212 216, and 216A, 216B,
 I 135, II 262, II 263
 must be personal assistance to offender, II 265
 and done with specific intent, 15
 mere omissions are not, 15

HIGH COURTS ACT, 24 and 25 Viet., c. 104, II 69

HOMICIDE

1. when an infant becomes a human being, II. 467
what acts amount to the killing of an infant, II. 468
2. what amounts to a breach of legal obligation, II. 473
must be breach of legal obligation, II. 473
want of, or erroneous treatment, II. 475
improper treatment, II. 477
no limit as to time of death, II. 477
3. culpable homicide, definition of, 299, I. 184, II. 467
differs from manslaughter, II. 465
II. 431
453
4. proof of intention or knowledge, II. 523
death, II. 512
identification of corpse, II. 511
cause of death, II. 512
5. culpable homicide is not murder if it falls within certain exceptions, 300, I. 187
burthen of proof as to their existence, II. 513
6. provocation, 300, Excep. 1, I. 187, II. 489
may be given by words, II. 490
what amount of sufficient, *ib.*
loss of self-control necessary, *ib.*
7. II. 497
I. 183, II. 487
3, I. 183
8. II. 495, II. 500
must be done towards execution of his duty, II. 500
acts committed in sudden fight, 300, Excep. 4, I. 184, II. 494
II. 501
passion must be cause of act, II. 502
9. 3, I. 183, II. 507
applies to cases of duelling, II. 503, *ib.* 500, II. 50,
conflicting cases as to faction-fights, II. 503
illegal operations, II. 527
10. offence committed where persons not intended to be hurt
killed, 300, Excep. 1, I. 187, 301, I. 189, II. 516

HOMICIDE--continued

- punishment for murder, 302, I 189
 - by a person transported for life, 303, I 190
 - for culpable homicide not murder, 304, I 191
- attempting to commit murder or culpable homicide, 307, I 192, 308, I 193

HOUSEBREAKING

- See **HOUSE-TRESPASS**, 3, 4, 5.

HOUSE-TRESPASS

1. when criminal trespass becomes, 442, I 250
 - what is a human dwelling, II 743
 - residence, II 742, II 744
 - premises included in it, II 744
 - who is the owner, II 744-745
 - place for custody of property, 10
2. punishment for simple, 448, I 253
 - in order to commit offence punishable with death, 449, I 253
 - with transportation for life, 450, I 253
 - imprisonment, 451, I 254
 - after preparation for causing assault, hurt, or restraint, 452, I 255
3. lurking house-trespass, 443, I 250
 - by night, 444, I 250
4. 1. 445, I 250
 - 454, I 250
 - having made preparation for causing assault, hurt, or restraint, 455, I 256
5. lurking by night, or housebreaking by night with same intents, 456, I 256, 457, 458, I 257, I 258
 - attempting to cause death or grievous hurt while committing, 459, I 258
 - punishment of person acting jointly with such offender, 460, I 258
 - death or grievous hurt need not have been contemplated or the common object, II 746

HURT

1. who is said to cause it, 319, I 196
 - voluntarily causing, what it is, 321, I 197
 - does not involve premeditation, II 549
 - punishment for, 323, I 198
 - cases in which it is lawful, II 127
 - by using dangerous weapons, etc., 324, I 198
 - when done for extortion, or to force a person to do an illegal act, 327, I 199
 - or to extort confession, 330, I 201

331, I 203
 administering drug with intent to cause, 328, I 200

HURT—*continued*,

2. *grievous*, what is, 320, I; 196
voluntarily causing grievous, what is, 322, I. 197
when death ensues, not always culpable homicide, II. 530
punishment for, 325, I. 199
by dangerous weapons, etc., 326, I, 199
while committing dacoity or robbery, 397, I. 230
when done to extort property or to force to do an illegal act,
329, I. 201
to extort confession or to compel restoration of property, 331,
I. 202

35,

I. 206

HUSBAND AND WIFE

- wife not excused by marital influence, II. 129
- not precluded from criminal remedies against husband, *ib.*
- may commit theft from each other, II. 624-625
- or criminal breach of trust, II. 655-656
- liability of wife for criminal breach of trust in regard to strangers,
II. 656
- for receiving stolen property, II. 679

See ADULTERY. BIGAMY. HARBOURING. RAPE TAKING AWAY.

IGNORANCE

See KNOWLEDGE. MISTAKE.

ILLEGAL

meaning of word, 43, I. 18

ILLICIT INTERCOURSE

See ABDUCTION. ADULTERY. TAKING AWAY.

IMPRISONMENT

- two kinds of, 53, I. 20
- how imposed, 60, I. 23
- when transportation may be awarded in place of, 59, I. 22
- commences from date of sentence, 1. 24
- period of how calculated, *ib.*
- place of how changed, *ib.*
- in case of juvenile offenders, *ib.*

INDIA

act for the better Government of, 21 and 22 Vict., c. 103, II. 91

INFANTS

1. *inchoate offence*, 82, 83, I. 49
II. 161
I. 162

2

after birth, 315, I. 194.
II. 542
death of quick unborn, caused by act which could result in culpable homicide, 316, I. 195

INSANITY—*continued*.

7. incapacity for trial on account of, II. 186
acquittal on ground of, *ib.*
removal of insane person from India, II. 187

INSOLVENT COURT

officers of, forbidden to trade, I. 98

INSUBORDINATION

abetting act by soldier or sailor, 138, 139, I. 80, I. 81

INSULT

- to public servant sitting in judicial proceeding, 228, I. 147
- intentional, to provoke, breach of peace of committal of offence, 304, I. 285
 - actual effect immaterial, II. 930
- to female modesty, 509, I. 287
 - depends on intention and probability of result, II. 931
 - what is an intrusion on privacy, II. 932

INTENTION

1. different meanings of word, II. 10
 - differs from motive, II. 11
 - is involved in act done voluntarily, 39, I. 17
2. assumed where consequences, known, or believed to be likely result, 39, I. 17
 - or where they are natural or necessary consequences, II. 10, II. 859, II. 860
 - must be proved where act is itself indifferent, I. 97
 - or where specific intent is essence of offence, I. 298, I. 253, I. 256, II. 189, II. 241, II. 284, II. 309, II. 318, II. 389, II. 515, II. 704, II. 715, II. 726, II. 946
 - See INTOXICATION, 2 DISAFFECTION, 2

INTIMIDATION

1. *affirmative defence*, I. 522, I. 523

129

2. *negative defence*, I. 522, I. 523

excommunication or exclusion from caste, II. 929
See COMPELSION EXTORTION.

INTOXICATION

1. when it constitutes an excuse, 85, I. 49
 - diseased state induced by constant, II. 189
2. what degree of knowledge assumed, where voluntary intoxication, 86, I. 49
 - rule as to intention, II. 189
 - specific state of mind, *ib.*
3. misconduct by person in state of, 510, I. 254

INTRUSION

or privacy of female, 503, I. 387

IRREGULARITY

exercise of jurisdiction, II. 139

JOINT ACTS

1. liability of person who does one of several acts which make up single offence, 37, I. 16
each person may commit a different offence, 38, I. 17
2. union of several persons to effect a criminal purpose, 34 I. 15
liability limited by common purpose, *ib.*
inferred from preparation, *ib.*
not from mere presence without opposition, II. 269
where special intention necessary, must be proved as to each, II. 241
3. liability for acts of any member of an unlawful assembly, 146, 149, 150 I. 83, I. 84
of persons engaged in robbery, 394, I. 228
in Jacoity, 396 I. 229
in housebreaking, 460, I. 258
in forgery, II. 773
in defamation, II. 868

JUDGE

1. meaning of the word, 19, I. 6
every, is a public servant, 21, I. 7
of Supreme Court forbidden to trade, I. 98
2. protected against civil suits for acts done within jurisdiction, II. 138
3.
 - 1. Acts for which proceedings may be laid, II. 149
 - 2. Acts for which proceedings may not be laid, II. 149
 - 3. Acts for which proceedings may be laid, II. 149
 - 4. criminal proceedings in England against superior judges, II. 142, II. 896
justices of the peace, II. 144
quasi-judicial persons, II. 886
 - 5. acts done under authority of, 78, I. 47
See MINISTERIAL OFFICER
 - 6.

defamation, II. 868

JUDICIAL PROCEEDING

See FALSE EVIDENCE, 9

JURISDICTION

- 1 dependent on specific facts, II. 355
 - not affected by wrong finding, II. 336
 - or by irregular arrest, *ib.*
 - assumed in favour of superior courts, II. 207
 - facts limiting must be brought to notice, II. 141-142
2. of English Courts at common law limited to offences within
 - England, II. 56
 - extended to some offences committed abroad, II. 57
 - jurisdiction in foreign territory, *ib.*
 - exercised by admiralty, II. 58
- 3 of Indian Courts *prima facie* local, II. 25
 - none over offences by foreigner out of India, II. 50
- 4 offences committed out of British India on land by persons found
 - within British India
 - II. 40
- 5 procedure where offender remains out of British India, II. 41
 - power to legislate for persons out of India, II. 41
 - II. 44, II. 45
 - II. 39
 - with subject, II. 46-47
6. exercise of jurisdiction beyond British India
 - over Cantonments, II. 31-35
 - Civil Stations, II. 36
 - Railway lines, II. 37
7. offences committed at sea
 - under Admiralty jurisdiction, II. 52
 - Merchant Shipping Act, II. 53-54
 - over persons on board, or lately employed on British ship, II. 54, II. 59
 - European British subject, who is, II. 63
 - British subject on foreign ship to which he does not belong, II. 54, II. 59
 - II. 63
 - II. 61
 - 23
8. as regards persons
 - II. 64
 - 43
 - 274, II. 275
 - or any ship within a district, II. 33-34
 - or under Territorial Waters Act, II. 23
 - exemption of ships of war, II. 31
 - pirates *jure gentium*, II. 64
9. over East India Co., II. 92-93
 - Secretary of State for India, II. 94

JURISDICTION—continued

heads of Government and High Court judges how far exempted from, II 93-94

- 10 improper to assume by charging minor form of grave offence, II. 249, II 389, II 411

See ADMIRALTY JURISDICTION BIGAMY, 4. DIVORCE JUDGE, 7, 8 PIRACY

JUVENILE OFFENDERS

may be committed to a reformatory, I. 21

KIDNAPPING

- 1 two kinds of, 359, I 214
 - from British India, 360, I 214
 - lawful guardianship, 361, I 215
 - result of mistake as to age, II 561
 - as to mental capacity, *ib*
- 2 who is a lawful guardian, 361, Exp, I 215, II 565, II 566
 - legal right not essential, II 565
 - illegitimate children or orphans, II 567
 - rights of mother, *ib*
 - when minor is in keeping of, II. 568
- 3 taking or enticing, consent of minor immaterial, II 571, II 572
 - or unlawful purpose II 571
 - what amounts to, *ib*
 - temporary possession sufficient, II 574
- 4 presumption as to want of guardian's consent, II 574-75
 - consent of person with limited charge, *ib*
 - effect of mistake or ignorance as to, II 575-75
- 5 abetting offence of, II 576-77
 - jurisdiction over foreigners committing, II 577
- 6 punishment for, in ordinary cases, 363, I 215
 - where person is kidnapped to be murdered, 361, I. 216
 - to be wrongfully confined, 363, I 216
 - where a woman is kidnapped that she may be compelled to marry, etc, 366, I 216
 - where in order to subject person to grievous hurt, slavery, etc, 367, I 217
 - concealing or confining kidnapped person, 368, I 217
 - child to steal from its person, 369, I 217

KING

can do no wrong, meaning of maxim, II 83

KNOWLEDGE

in statute,

when ignorance must be proved II 14

I 676, II. 393,

LABOUR

See FORCED LABOUR

LACCADIVES, 2

LAW APPLICABLE TO OFFENCES

1. *Penal Code*

only repeals so far as it provides a law, 2, I. 2

certain laws not affected by it, 5, I. 3

applies to India and regions specially declared, 1, I. 1

by servants of King in allied States, 4, I. 2

European British subjects, in same State, II. 25,
II. 40

native Indian subjects wherever committed, 13
persons triable under act of Governor General
Council for offence out of India, 3, I. 2

9 *English law*

to offences under admiralty jurisdiction, 310

Merchant Shipping Acts, II. 53-54

territorial, II. 27

procedure is Indian, II. 71

punishment in conformity with Indian law, II. 75

LAWFUL GUARDIAN

See KIDNAPPING, 2.

LEGAL REMUNERATION

meaning of term, 101, Exp., I. 90

LEGALLY BOUND

meaning of term, 43, I. 18

LENGTH

false measure of, 265-237, I. 161-I. 162

See MEASURE

LETTERS PATENT of 1862, ss. 29, 32, II. 69, 1865, ss. 25, 26, II. 70,
ss. 33, II. 52, II. 70

LIABILITY

of one for acts done by another, 34, I. 15, 111-114, I. 65-I. 67, 145-
149, I. 83-I. 84

LIEUTENANT-GOVERNOR

assault on, 124, I. 75

attempt to overawe, 124, I. 75

LIFE

what the word denotes, 45, I. 19

See HOMICIDE, HURT.

LIGHT

exhibiting a false, 281, I. 170

LIGHTHOUSE

destroying or removing, etc., 433, I. 247

LIMIT OF PUNISHMENT

when offence is made up of several offences, 71, I. 31

LOCAL LAW

- meaning of the term, 42, I 18
- the word "offence" extended to certain breaches of, 40, I. 18
- no "local law" is repealed or affected by the Penal Code, 5, I. 3
- abetment may be committed in respect of, I 64
- breach of, may also be an offence under Code, I 4
- appeal against sentences under, 15

LOSS

See WRONGFUL LOSS.

LOST PROPERTY

- finder of, when punishable for misappropriating, 403, Expl 2, I 234
- See MISAPPROPRIATION.

LOTTERY

- what is a, 146
- keeping a, 294A I. 177

LUNACY

See INSANITY

LURKING HOUSE-TRESPASS

See CRIMINAL TRESPASS.

MACHINERY

- negligent conduct as to, in possession or charge of offender, 287, I, 172

MALICE, II 857-858

MAN

- meaning of the term, 10, I 5

MARINE SERVICE

- Indian included in offences regarding Navy, 139A, I 81

MARRIAGE

1. laws governing Indian, II 796
 - good by law where celebrated is good everywhere, 15, II 796 II 797,
 - marriage of necessity, II 798
 - rule limited to a Christian marriage, II 799
 - meaning of term, II 800
 - may be irregular and yet valid, II 798

803

- with deceased wife's sister, II 804
- 2 burthen of proof as to II 810, II 811
 - when presumed in civil cases, 15
 - absolute proof in criminal cases, II 811, II 813
 - what amount of sufficient, II 814
 - matters of form presumed, II 815
 - evidence of legal celebration, 15
 - proof of foreign law, II 816
 - in India, II 816

MARRIAGE—*continued.*

- 3 cohabiting with woman under pretence of, 493, I. 277
 going through invalid ceremony of, 496, I. 279
See ADULTERY. BIGAMY.

MARTIAL LAW

- is the test in cases to which it applies, *ib.*
 substitution of for ordinary law at periods of emergency, II. 102
 may be effected by Legislature powers, II. 102
 how far authorities protected by legislative powers, II. 107
 or condoned by Indemnity Act, II. 106, II. 109
 only covers *bona fide* acts, II. 110
 can Government proprio motu proclaim it? II. 103, II. 104
 Irish Rebellion, II. 103
 Ceylon Rebellion, II. 105
 Jamaica Riots, II. 108
 Sepoy Mutiny, II. 109
 its effect on rights of citizens in case of invasion, II. 113

MASCULINE

- includes feminine, 8, I. 5

MASTER

- 1
 as
 II. 19
 unless consent or connivance proved, *ib.*
 effect of his order on criminality of servant, II. 516
 2 when bound to manage property or business in particular way
 responsible for acts of delegate, 525, II. 13, 20
 cases of nuisance, II. 19
 statutory offences, II. 20, 21
 owners of land, 484, 455, I. 87
 civil liability of, II. 17
 3 abetting acts of servant, II. 253
 obligation to exercise care towards servant, II. 457, 459
 rights of to chastise apprentice, II. 127

MEASURE

- using a false, 264, 265, I. 160, I. 161
 as evidence of fraudulent intent, I. 160
 possessing, making, or selling with fraudulent intent 259
 270, I. 162, I. 163

MEDICAL MAN

- death caused by mistake of, II. 476—II. 517

MEMBER OF COUNCIL

113, II. 24

MENS REA

- meaning and origin of doctrine, II 8
- inapplicable to Penal Code, II 9

MERCHANDISE MARKS ACT,

1. general scope of, II 780-781
 - trade mark, what it is, 478, I 268
 - when right to is exclusive, II 783
 - colourable imitation of, II 787
 - how right to lost, II 788
 - does not protect article, II 783
 - trade name, what is, II 787
 - property mark, what is, 479, I 268
- 2 what is using false trade-mark, 480, I 268
 - property mark, 481, I 269
 - penalty for using or counterfeiting either 482, 483, I 269
 - counterfeiting mark used by public servant, 484, I 269
 - making or possessing instrument for counterfeiting trade or property mark, or possessing false trade or property mark, 485, I 270
 - selling, exposing, or possessing goods bearing false trade or property mark, 486, I 270
 - making or using false mark to deceive public servant, 487, 488, I 271-I 272
 - tampering with property mark, 489, I 272
- 3 meaning of trade description Act iv of 1889, s. 2 (2), 213, II 781, II 787
 - false trade description, ib (3), II 78
 - applying trade description, ib. 5, II 788, II 789
 - false trade description, ib. 4, II 781, II 787
 - need not be physically attached, II 789
 - applying trade name is a false trade description, II 788
- 4 applying false trade description with fraudulent intent, Act iv of 1889, s. 6, II 781, II 783, II 790 II 794
 - selling, exposing, or possessing goods with false trade description, ib 219, II 782, II 795
- 5 fraudulent intent, in what consists, II 790
 - must be made out, b
 - when assumed, II 791
 - when accused is bound to negative, 482, I 269, 486, I 270, 487, I 271-272, 488, Act iv of 1889, s. 6,
 - unintentional breaches of law Act iv, of 1889, s. 6 II 782, II 795
 - acts done by servant in good faith, ib , II 782, II 795
- 6 forfeiture of goods, ib , II 782
 - costs, ib , II 782
 - limitation of prosecution, ib , II 782

MERCHANT SHIPPING ACT, 1894, 57 and 58 Vict , c. 60, 488

METAL TOKENS ACT

MINISTERIAL OFFICER

- 1 protected against suit for acts done in execution of judicial warrant, II 145
 - though issued without jurisdiction, ib.

MINISTERIAL OFFICER—*continued.*

2

II. 149

always protected where jurisdiction, *ib.*3 liable for illegality of his own acts, *to.**See* ARREST, PRIVATE DEFENCE

MINOR

selling or buying for prostitution, 372, 373, I. 218

MINT

person employed in, causing coin to be of wrong weight or composition, 244, I. 153.

unlawfully taking a coining instrument from, 245, I. 153

MISAPPROPRIATION

when a finder of property commits, 403, Exp. 2, I. 334

article must be property, II. 648

when it is though lost, *ib.*

where no owner claims, II. 650

when no effort to discover owner, *ib.*

naming owner in charge, II. 651

of property possessed by deceased person at death, 404, I. 235

MISCARRIAGE

1 *ib.* 539
194

when attempt fails, II. 510

where means for are supplied but not applied, II. 512

2. causing without consent of woman, 313, I. 194

where death results, 314, I. 194

act must be done by accused, II. 512

knowledge of consequence not essential, 314, Exp. I. 194

if known may be murder, I. 511

MISCHIEF

1. What constitutes offence, 425, I. 243

intention to cause specified result, 425, II. 716

when presumed, *ib.*act done in supposed exercise of right, *ib.*

must affect property, II. 719

what injury to it sufficient, *ib.*

may be by joint owner, II. 720

indirect results of act, II. 722

2. punishment for, when simple, 426, I. 244

if damage done amounts to Rs. 50, 427, *ib.*by killing, maiming, etc., an animal within Rs. 10, 428, *ib.*

MISCHIEF—continued

by killing, maiming, etc., an elephant, camel, horse, mule buffalo, bull, or cow, or ox, 429, I 245

by destroying, or moving, etc., light-house, sea-mark, etc., 433, I 247

running vessel ashore to commit theft or misappropriation, 439, I 249

committed with preparation for causing death or hurt, or wrongful restraint, 440, I 249

with respect to a will, or valuable security, 477, I 267

MISFORTUNE

See ACCIDENT

MISTAKE OF FACT

when act done by reason of, not an offence, 76, 79, I 46, I 47.

general principle, II, 130

rules deduced from Prince's case, II 131, II 134

in statutory offence, excuses depends on frame of statute, II, 134

See KNOWLEDGE.

right of private Defence against person acting under, 98, I 506

MISTAKE OF LAW**MONOMANIA**

See INSANITY.

MONTH

meaning of the word and how calculated, 49, I 19

MORALS

offences against public, 292—294, I 174, I 174

See OBSCENITY

MOTIVE

differs from intention, II 11

immaterial when act done is either legal or illegal, II 11

important where offence involves special state of mind, II 11

MOVABLE PROPERTY

what the term includes, 22, I 11

in case of theft, 378, Exp 1, I. 240

MUNICIPAL COMMISSIONER

is a public servant, 21, II. 10
liability of for neglect of duty, II. 461

MURDER, 300, I. 116

See ATTEMPT. HOMICIDE, 3, 5, 10

MUTINY

abetting the act of, 131, I. 80
in an assault committed in consequence, 134, I. 80
abetting desertion, 135, I. 80
harbouring deserter, 136, I. 80
in a merchant vessel, 137, I. 80
abetting act of insubordination, 138, I. 80
circulating rumours, etc., with intent to excite, 505, I. 235

MUTINY ACT

whether Naval or Military, not repealed or affected by the Penal Code, 5, I. 3.
persons subject to not liable under code for offences against Military Law, 139, I. 80

MYSORE

European British subject cannot be tried in, II. 46
may be arrested by police, II. 46
can only be committed by Justice of Peace who is European British subject, II. 46
who are public servants in, II. 42
extradition to India, *ib.*

Bangalore assigned to British Government, II. 35

NATIVE INDIAN SUBJECTS

See JURISDICTION, 4

NAVIGATION

of a vessel, rash or negligent, showing want of regard for human life, etc., 280, I. 169
carrying passengers in unsafe vessel, 282, I. 170
obstructing public line of, 283, I. 170
injuring by mischief, 431, I. 246
endangering by removing lights, buoys, etc., 433, I. 247.
exhibiting false lights, buoys, 281, I. 170
See MISCHIEF.

NAVY

offences relating to, 131—140, I. 73, I. 79, I. 81

NEGLIGENCE

1. punishable apart from injury resulting, II. 442
what constitutes it in law, II. 443
where it is the act of a servant, *ib.*
must be made out affirmatively, II. 444
when it may be assumed, *ib.*
where evidence equally balanced, I. 445
province of judge and jury, *ib.*

ORDERS

- of officer or superior, when a justification, II. 99-100, II. 516
- of husband, no justification, II. 129
- of Government, II. 83, II. 112
- See ACT OF STATE MARTIAL LAW

OWNER

- See OCCUPIER.

PARENT

- may chastise child, II. 147
- right to custody of child, II. 565

PARTY

- defamation by, in judicial proceeding, II. 885

PEACE

- provoking to breach of the, 504, I. 285, II. 930
- See SECURITY TURBULENT ASSEMBLY

PENAL CODE

- See LAW APPLICABLE TO OFFENCES, I.

PENAL SERVITUDE

- in case of Europeans and Americans takes, the place of transportation 56, I. 21

PERIM, I. 1

PERSON

- meaning of the word, II, I. 3

PERSONATING

- a soldier, 140, I. 81
- any public servant, 170, 171, I. 99
- another, for the purpose of a suit, 205, I. 126
- a juror or assessor, 223, I. 149
- See CHEATING

PIRACY JURE GENTIUM

- in what it consists, II. 64 65
- differs from piracy by municipal law, 308, II. 66, 67
- belligerent acts of regularly commissioned vessel are not, II. 67
- attack by privateer on friendly State is, 6
- is punishable by captors wherever committed, II. 64
- jurisdiction over cannot be transferred, II. 67
- piracy by municipal law gives no jurisdiction over foreigners, 16
- only triable by High Courts, II. 64

POISON

- negligence with respect to, 284, I. 170
- administering with intent to hurt 323, I. 100

POSSESSION

- when a person is said to have, 27, I. 12, II. 734
- See THEFT, 2, 7 RECEIVING, 4, 4 4 TRESPASS, 2. COIVING, 1.

PRESIDENCY

meaning of the word, 18, l. 6

PREVIOUS CONVICTION

effect of increasing punishment, 75, I 43

must have been under Penal Code, I. 43

for attempt or abetment not sufficient, it.

when to be resorted to, 15.

mode of charging, I 45

and trying, I. 45

PRISONER

suffering or aiding escape of, 128—130, I. 77, I. 78, 221, 222, I. 139,
I. 139

PRIVATE DEFENCE

1. act done in exercise of, no offence, 96, I. 56

general principles of, II, 202, II, 216

cases to which it extends, 97, I. 56

though crime attempted by one who is personally exempt
from offence. 98, I. 56

or where necessary risk of harm to innocent person, 106, I 60

2. defence of the person, when killing justifiable, 100, l. 58

wrongful confinement, II, 218

when harm short of death justifiable, 101, I. 58

4. 1 57

103, I 59

when Martin Short of Omaha inquires, 107, p. 59

commencement and end of right, 103, I. 60, II 230

4. act must be, or be reasonably supposed to be an offence, II. 217, II. 228

case quarrel, II, 228

trespassers which are not criminal. II. 235

5. b7C, b7D, b7E, b7F, b7G, b7H, b7I, b7J, b7K, b7L, b7M, b7N, b7O, b7P, b7Q, b7R, b7S, b7T, b7U, b7V, b7W, b7X, b7Y, b7Z

6.

non-description or wrong description, 11. 26, 110

illegal execution of good warrant, II 210

arrest of wrong person, id

want of jurisdiction to order set, 11, 213

arrest by officer without warrant, If 214

where warrant unnecessary, *Id.* 214.

7. meaning of voluntarily causing death, or, II 221

when amount of violence excessive, II, 224

8. When amount of violence excessive, in 31 57

9.

21 204
Excep 2.1 189

PRIVILEGED COMMUNICATION

See DEFAMATION.

PROCESSIONS

- right to conduct, II 312
- Promoting class enmity liability a statutory one, II 328
- truth of statements no defence, II 328
- what is, 153A, I 86

PROPERTY

- See DISPOSAL OF PROPERTY THEFT, 2

PROPERTY MARK, 479, I 263

- See MERCHANDISE MARKS

PROSTITUTION

- when it is or is not a nuisance, II 403
- selling or disposing of minor for purpose of, 372, I 218
- buying or obtaining possession of minor for such purpose, 373, I 218
- special indent essential, II 558
- a *complete possession necessary*, *ib.*
- whether intervention of third party an element in offence, *ib.*
- or innocence of minor, II 590
- assisting voluntary prostitute, II 590
- cases of dancing girls, *ib.*

PROVOCATION

- See HOMICIDE, 6 ASSAULT, 3

PUBLIC

- what the word includes 12 I 5

PUBLIC JUSTICE

- offences against, 191—229, I 119—I 149

PUBLIC PLACE

- what is a, I. 177

PUBLIC SERVANT

- 1 who is or is not a, 21, I 7
- 2 offences by a—
 - abetting an offence which it was his duty to prevent, 116, I 69
 - concealing existence of design to commit such offence, 119, I 71
 - allowing prisoner of State or of war to escape, voluntarily, 128, I 77
 - negligently, 139, I 77
 - one who is, or expects to be, taking a gratification, etc., improperly, 161, I 90
 - abetting the giving of bribes or gratifications, 164, I 91
 - accepting valuable thing for inadequate consideration, 165, I 91
 - disobeying direction of law, with a view to injure any one, 166, I 95
 - framing incorrect document, 167, I 96, 218, I 136
 - unlawfully engaging in trade, 158, I 93
 - buying or bidding for property, 169, I 98

MUNICIPAL COMMISSIONER

is a public servant, 21, *Illus.*, I. 10
 liability of for neglect of duty, II. 461

MURDER, 300, I. 116

See *ATTEMPTED HOMICIDE*, 3, 5, 10

MUTINY

about

if assault is committed in consequence, 134, I. 80

circulating rumours, etc., with intent to excite, 503, I. 285

MUTINY ACT

whether Naval or Military, not repealed or affected by the Penal Code, 5, I. 3.

persons subject to not liable under code for offences against Military Law, 139, I. 80

MYSORE

European British subject cannot be tried in, II. 46

may be arrested by police, II. 46

can only be tried in, I. 46

Bangalore assigned to British Government, II. 35

NATIVE INDIAN SUBJECTS

See *JURISDICTION*, 4

NAVIGATION

of a vessel, rash or negligent, showing want of regard for human life, etc., 280, I. 169

carrying passengers in unsafe vessel, 282, I. 170

obstructing public line of, 283, I. 170

injuring by mischief, 431, I. 216

endangering by removing lights, buoys, etc., 433, I. 217.

exhibiting false lights, buoys, 281, I. 170

See *MISCHIEF*.

NAVY

offences relating to, 131—140, I. 73, I. 79, I. 81

NEGLIGENCE

1. punishable apart from injury resulting, II. 441

what constitutes it in law, II. 443

province of judge and jury, *ib.*

INTRUSION

or privacy of female, 503, I 287

IRREGULARITY

exercise of jurisdiction, II 139

JOINT ACTS

1. liability of person who does one of several acts which make up single offence, 37, I 16
each person may commit a different offence, 38, I 17
2. union of several persons to effect a criminal purpose, 34 I 15
liability limited by common purpose, *ib.*
inferred from preparation, *ib.*
not from mere presence without opposition, II 239
where special intention necessary, must be proved as to each, II 241
3. liability for acts of any member of an unlawful assembly, 146, 143, 150 I 83, I 84
of persons engaged in robbery, 394, I 228
in dacoity, 396 I 229
in housebreaking, 460, I 259
in forgery, II 773
in defamation, II 868

JUDGE

1. meaning of the word, 19, I 6
every, is a public servant, 21, I 7
of Supreme Court forbidden to trade, I 98
2. protected against civil suits for acts done within jurisdiction, II 138

3

whether existence of jurisdiction necessary, II 147

immunity extends to all judicial acts, ib.

charges of defamation, II 886

4. criminal proceedings in England against superior judges, II 142, II 886
justices of the peace, II 144
quasi-judicial persons, II 886
5. acts done under authority of, 78, I 47
See MINISTERIAL OFFICER
6. province of judge and jury in dealing with evidence, II 422
in cases of negligence II 445
provocation, II 496
defamation, II 923

JUDICIAL PROCEEDING

See FALSE EVIDENCE, 9

JURISDICTION

1. dependent on specific facts, II. 355
 - not affected by wrong finding, II. 356
 - or by irregular arrest, *ib*
 - assumed in favour of superior courts, II. 207
 - facts limiting must be brought to notice, II. 141-143
2. of English Courts at common law limited to offences within
 - England, II. 56
 - extended to some offences committed abroad, II. 37
 - jurisdiction in foreign territory, *ib*.
 - exercised by admiralty, II. 59
3. of Indian Courts *prima facie* local, II. 26
 - none over offences by foreigner out of India, II. 53
4. offences committed out of British India on land by persons *found*
 - within British India
 - by European British subject in allied States, II. 40
 - Native British subject everywhere, II. 59
 - where death happens or is caused within Charter of East Indian Co., II. 49
 - committed in Mysore,
 - against slave trade, II. 48
5. II. 41
 - II. 39
 - II. 46-47
6. exercise of
 - 7. offences committed at sea
 - under Admiralty jurisdiction, II. 52
 - Merchant Shipping Act, II. 53-54
 - over persons on board, or lately employed on British ship, II. 54, II. 59
 - European British subject, who is, II. 63
 - British subject on foreign ship to which he does not belong, II. 54, II. 59
 - who is a British subject, II. 63
 - what is a British ship, II. 61
8. as regards persons
 - 10
 - . . . 274, II. 275
 - or any ship within . . . an district, II. 32-31
 - or under Territorial Waters Act, II. 33
 - exemption of ships of war, II. 31
 - pirates *jure gentium*, II. 64
9. over East India Co., II. 92-93
 - Secretary of State for India, II. 94

JURISDICTION—continued

- heads of Government and High Court judges how far exempted from, II. 93-94
- 10 improper to assume by charging minor form of grave offence, II. 249, II. 383, II. 411
- See ADMIRALTY JURISDICTION. BIGAMY, 4 DIVORCE JUDGE, 7, 8. PIRACY

JUVENILE OFFENDERS

may be committed to a reformatory, I. 24

KIDNAPPING

- 1 two kinds of, 359, I. 214
from British India, 360, I. 214
lawful guardianship, 361, I. 215
result of mistake as to age, II. 564
- 2 566
- rights of mother, *ib*
when minor is in keeping of, II. 568
- 3 taking or enticing consent of minor immaterial, II. 571, II. 572
or unlawful purpose, II. 571
what amounts to, *ib*.
temporary possession sufficient, II. 574
- 4 presumption as to want of guardian's consent, II. 574-75
consent of person with limited charge, *ib*
effect of mistake or ignorance as to, II. 575-75
- 5 abetting offence of, II. 576-77
jurisdiction over foreigners committing, II. 577
- 6 punishment for, in ordinary cases, 363, I. 215
where person is kidnapped to be murdered, 364, I. 216
to be wrongfully confined, 365, I. 216
where a woman is kidnapped that she may be compelled to marry, etc., 366, I. 216
where in order to subject person to grievous hurt, slavery, etc., 367, I. 217
concealing or confining kidnapped person, 368, I. 217
child to steal from its person, 369, I. 217

KING

can do no wrong, meaning of maxim, II. 88

KNOWLEDGE

- of natural or necessary consequence of act assumed, II. 12
when necessary as regards particular facts, II. 12 II. 139
in case of statutory offences, depends on the object of the statute,
II. 12, II. 16

JURISDICTION

1. dependent on specific facts, II. 355
 - not affected by wrong finding, II. 356
 - or by irregular arrest, *ib*
 - assumed in favour of superior courts, II. 207
 - facts limiting must be brought to notice, II. 141-142
2. of English Courts at common law limited to offences within England, II. 56
 - extended to some offences committed abroad, II. 51
 - jurisdiction in foreign territory, *ib*,
 - exercised by admiralty, II. 58
3. of Indian Courts *prima facie* local, II. 26
 - none over offences by foreigner out of India, II. 53
4. offences committed out of British India on land by persons found within British India
 - by European British subject in allied States, II. 49
 - Native British subject everywhere, II. 50
 - where death happens or is caused within Charter of Fort Indian Co., II. 49
 - committed in Mysore,
 - against slave trade, II. 48
5. procedure where offender remains out of British India, II. 41
 - out of India, II. 41
 - II
 - 33
 - 425, 46
 - I 66 47
6. exercise of jurisdiction beyond British India
 - over Cantonments, II. 34-35
 - Civil Stations, II. 36
 - Railway lines, II. 37
7. offences committed at sea
 - under Admiralty jurisdiction, II. 52
 - Merchant Shipping Act, II. 53-54
 - over persons on board, or lately employed on British ship, II. 54, II. 59
 - European British subject, who is, II. 63
 - British subject on foreign ship to which he does not belong, II. 54, II. 59
 - II. 63
 - II 61
 - 24
8. as regards persons
 - European British subjects, II. 63
 - II 149
 - 271, II. 273
 - in district, II. 33-34
 - in Act, II. 24
 - exemption of ships of war, *ib*
 - pirates *jure gentium*, II. 64
9. over East India Co., II. 94-93
 - Secretary of State for India, II. 94

JURISDICTION—continued

- heads of Government and High Court judges how far exempted from, II. 93-94
10. improper to assume by charging minor form of grave offence, II. 249, II 389, II 411
- See ADMIRALTY JURISDICTION. BIGAMY, 4 DIVORCE JUDGE, 7, 8 PIRACY

JUVENILE OFFENDERS

may be committed to a reformatory, I. 24

KIDNAPPING

- 1 two kinds of, 359, I 214
 - from British India, 360, I 214
 - lawful guardianship, 361, I 215
 - result of mistake as to age, II 564
 - as to mental capacity, 1b
- 2 who is a lawful guardian, 361, Exp, I. 215, II 563, II 566
 - legal right not essential, II 565
 - illegitimate children or orphans, II 567
 - rights of mother, 1b
 - when minor is in keeping of, II. 568
- 3 taking or enticing consent of minor immaterial, II 571, II 572
 - or unlawful purpose II 571
 - what amounts to, 1b
 - temporary possession sufficient, II 574
- 4 presumption as to want of guardian's consent, II 574 75
 - consent of person with limited charge, 1b
 - effect of mistake or ignorance as to, II. 575 75
- 5 abetting offence of, II 576-77
 - jurisdiction over foreigners committing, II 577
- 6 punishment for, in ordinary cases, 363, I 215
 - where person is kidnapped to be murdered, 64, I 216
 - to be wrongfully confined, 365 I 216
 - where a woman is kidnapped that she may be compelled to marry, etc, 366, I 216
 - where in order to subject person to grievous hurt, slavery, etc, 367, I. 217
 - concealing or confining kidnapped person, 368, I 217
 - child to steal from its person, 369, I 217

KING

can do no wrong, meaning of maxim, II 85

KNOWLEDGE

- of natural or necessary consequence of act assumed, II 12
- when necessary as regards particular facts, II 12 II 189
- in case of statutory offences, depends on the object of the statute, II 12, II 16
- when ignorance must be proved II 14
- guilty, II 676, II 398,

LABOUR

See FORCED LABOUR

LACCADIVES, 2

LAW APPLICABLE TO OFFENCES

1. *Penal Code*

European British subjects, in same State, II 35.
II. 40

9 *English law*

to offences under admiralty jurisdiction, 310
Merchant Shipping Acts, II 53 54
territorial, II. 27
procedure is Indian, II. 71
punishment in conformity with Indian law, II. 75

LAWFUL GUARDIAN

See KIDNAPPING, 2.

LEGAL REMUNERATION

meaning of term, 101, Exp., I 90

LEGALLY BOUND

meaning of term, 43, I 18

LENGTH

false measure of, 265—237, I, 161—I 162

See MEASURE

LETTERS PATENT of 1862, ss. 29, 32, II. 63, 1865, ss. 25, 26, II 70,
ss. 33, II. 52, II. 70

LIABILITY

of one for acts done by another, 34, I. 15, 111—114, I, 65—I. 67, 145—
149, I. 83—I. 84

LIEUTENANT-GOVERNOR

assault on, 124, I, 75

attempt to overawe, 124, I. 75

LIFE

what the word denotes, 43, I. 19

See HOMICIDE, HURT

LIGHT

exhibiting a false, 281, I. 170

LIGHTHOUSE

destroying or removing, etc., 433, I. 247

LIMIT OF PUNISHMENT

when offence is made up of several offences, 71, I. 33

LOCAL LAW

breach of, may also be an offence under Code, I 4
 appeal against sentences under, *ib.*

LOSS

See WRONGFUL LOSS

LOST PROPERTY

finder of, when punishable for misappropriating, 403, Expl 2, I 234
See MISAPPROPRIATION

LOTTERY

what is a, 146
 keeping a, 294A, I. 177

LUNACY

See INSANITY

LURKING HOUSE-TRESPASS

See CRIMINAL TRESPASS.

MACHINERY

negligent conduct as to, in possession or charge of offender, 287, I, 172

MALICE, II 857-858

MAN

meaning of the term, 10, I 5

MARINE SERVICE

Indian included in offences regarding Navy, 133A, I 81

MARRIAGE

1. laws governing Indian, II 796
 good by law where celebrated is good everywhere, *ib.* II 796 II 797,
 marriage of necessity, II 799
 rule limited to a Christian marriage, II 799
 meaning of term, II 800
 may be irregular and yet valid, II 799
 what are absolutely invalid, II 802
ib. II 803

806, 807

2. burden of proof as to, II 810, II 811
 when presumed in civil cases, *ib.* II 813

MENS REA

- meaning and origin of doctrine, II 8
inapplicable to Penal Code, II 9

MERCHANDISE MARKS ACT.

1. general scope of, II 780-781
trade-mark, what it is, 478, I 268
when right to is exclusive, II 783
colourable imitation of, II 787
how right to lost, II 788
does not protect article, II. 783
trade name, what is, II 787
property mark, what is, 479, I. 268
- 2 what is using false trade-mark, 480, I 268
property mark, 481, I 269
penalty for using or counterfeiting either 482, 483, I 269
counterfeiting mark used by public servant, 484, I 269
making or possessing instrument for counterfeiting trade or pro-
perty mark, or possessing false trade or property mark, 485,
I 270
selling, exposing, or possessing goods bearing false trade or pro-
perty mark, 486, I 270
making or using false mark to deceive public servant, 487, 488,
I 271-I. 272
tampering with property mark, 489, I 272
- 3 meaning of trade description Act iv of 1889, s. 4 (2), 213,
II 781, II 787
false trade description, ib (3), II 78
Act v of 1889, s. 5 II 789 II 790
- 4 . . .
selling, exposing, or possessing goods with false trade descrip-
tion, ib 219, II 782, II 795
5. fraudulent intent, in what consists, II 790
must be made out, b
when assumed, II 794
when accused is bound to negative, 482, I 269, 486, I 270,
487, I 271-272, 488, *Act iv of 1889, s. 6,*
unintentional breaches of law *Act iv. of 1889, s. 6 II 782,*
II 795
acts done by servant in good faith, ib , II 782, II 795
- 6 forfeiture of goods, ib., II 782
costs, ib , II 782
limitation of prosecution, ib , II. 782

MERCHANT SHIPPING ACT, 1894, 57 and 58 Vict., c. 60. 288

METAL TOKENS ACT

MINISTERIAL OFFICER

- 1 protected against suit for acts done in execution of judicial
warrant, II 145
though issued without jurisdiction. it.

MINISTERIAL OFFICER - *continued.*

2. when such acts, no offence, 78, I. 46
must have believed in jurisdiction, *ib.*
grounds of belief may vary according to position of officer,
II. 149
always protected where jurisdiction, *ib.*
3. liable for illegality of his own acts, *ib.*
See ARREST, PRIVATE DEFENCE.

MINOR

selling or buying for prostitution, 372, 373, I. 218

MINT

... .. or compos-
... ..
... ..

MISAPPROPRIATION

- punishment for offence of dishonest, 403, I. 233
differs from theft or cheating, II. 643
cases of clerk or servant, *ib.*
for a time only is sufficient, 403, Exp. 1, I. 234
when a finder of property commits, 403, Exp. 2, I. 234
article must be property, II. 648
when it is though lost, *ib.*
where no owner claims, II. 650
when no effort to discover owner, *ib.*
naming owner in charge, II. 651
of property possessed by deceased person at death, 404, I. 245

MISCARRIAGE

1. 312 II. 538
... .. I. 131
... ..
quick with child,
... .. II. 542
2.
... ..
... ..
I 194
if known may be murder. I 541

MISCHIEF

1. What constitutes offence, 425, I. 243
intention to cause specified result, 425, II. 716
when presumed, *ib.*
act done in supposed exercise of right, *ib.*
must affect property, II. 719
what injury to it sufficient, *ib.*
may be by joint owner, II. 720
indirect results of act, II. 721
2. punishment for, when simple, 426, I. 244
if damage done amounts to Rs. 50, 427, *ib.*
by killing, maiming, etc., an animal within Rs. 10 428, *ib.*

MISCHIEF—continued

by killing, maiming, etc., an elephant, camel, horse, mule buffalo, bull, or cow, or ox, 429, I 245

by destroying, or moving, etc., light-house, sea-mark, etc., 433, I 247

running vessel ashore to commit theft or misappropriation, 439, I 249

committed with preparation for causing death or hurt, or wrongful restraint, 440, I 249

with respect to a will, or valuable security, 477, I 267

MISFORTUNE

See ACCIDENT

MISTAKE OF FACT

when act done by reason of, not an offence, 76, 79, I 46, I 47

general principle, II 180

rules deduced from Prince's case, II 131, II 134

in statutory offence, excuses depends on frame of statute, II 134

See KNOWLEDGE

right of private Defence against person acting under, 98, I 506

MISTAKE OF LAW

in general no defence, 76, 79, I 46, I 47

even in case of foreigners, II 135

unless it affects mental state when material to charge, II 137

cases of new statute unknown or not promulgated, II 136

MONOMANIA

See INSANITY.

MONTH

meaning of the word, and how calculated, 49, I 19

MORALS

offences against public, 292—294, I 173, I 174

See OBSCENITY

MOTIVE

differs from intention, II 11

immaterial when act done is either legal or illegal, II 11

important where offence involves special state of mind, II 11

MOVABLE PROPERTY

what the term includes, 22, I 11

in case of theft, 378, Exp 1, I 220

NEGLIGENCE—continued

- 2 doctrine of contributory, II 446
 - 114
 - 3
 - navigation of vessel, 220, I 103
 - exhibiting false light mark or buoy, 281, I 170
 - conveying for hire in unseaworthy vessel, 282, I 170
 - knowledge is an essential, II 448
 - what is unseaworthy vessel, *ib*
 - 4 obstruction of highway or navigation, 283, II 170
 - injury to individual suffering it, II 449
 - temporary obstruction, when allowable, *ib*
 - actual obstruction, must be found, II 450
 - must be natural result of act, *ib*
 - lawful but unusual use of property, II 453
 - injury resulting from *ex majore*, 625, II 159
 - permission to pass does not make a highway, II 460
 - duty attaching to proprietor, 461
 - 5 liability of occupant of property, II 452, 453
 - landlord, *ib*
 - municipalities liable in respect of highway, II 461
 - when for no default, II 462
 - effect of loss of possession, II 453
 - 6 in regard to poison, 284, I 170
 - fire or combustibles, 285, I 171
 - explosives, 286, I 171
 - machinery, 287, I 172
 - pulling down or repairing buildings, 288, I 172
 - 7 in respect of animals in possession, 289, I 173
 - knowledge of its dangerous nature, II 454
 - facts known to servants, II 455
 - untamed animals, *ib*
 - injury to trespassers, II 456, 457
 - servants, II 457
- See RAILROAD NEGLIGENCE Act*

NUISANCE

- difference between public and private, II 426
 - proper remedy for each, *ib*
- elements of a public, 268, I 163
 - brothels and gambling houses, II 428
 - prostitution, II 429
 - sentimental grievances, II 431
- 2 what amounts to an injury to the public, II 430
 - smells and noise, II 427, II 432

doing so maliciously, 430, 431

duties of persons in charge of infectious patients, II 439

cures of venereal disease, II 440

MUNICIPAL COMMISSIONER

is a public servant, 21, Illus, I. 10
 liability of for neglect of duty, II. 461

MURDER, 300, I. 116

See ATTEMPT, HOMICIDE, 3, 5, 10

MUTINY

shooting the - - - - -

harbouring deserter, 136, I. 80

in a merchant vessel, 137, I. 80

abetting act of insubordination, 138, I. 80

circulating rumours, etc, with intent to excite, 503, I. 235

MUTINY ACT

whether Naval or Military, not repealed or affected by the Penal Code, 5, I. 3.

persons subject to not liable under code for offences against Military Law, 139, I. 80

MYSORE

European British subject cannot be tried in, II. 46

may be arrested by police, II. 46

14 European

Bangalore assigned to British Government, II. 35

NATIVE INDIAN SUBJECTS

See JURISDICTION, 4

NAVIGATION

of a vessel, rash or negligent, showing want of regard for human life, etc., 280, I. 169

carrying passengers in unsafe vessel, 282, I. 170

obstructing public line of, 283, I. 170

injuring by mischief, 431, I. 246

endangering by removing lights, buoys, etc, 433, I. 247

exhibiting false lights, buoys, 281, I. 170

See MISCHIEF.

NAVY

offences relating to, 131-140, I. 73, I. 79, I. 81

NEGLIGENCE

1. punishable apart from injury resulting, II. 442

what constitutes it in law, II. 443

what constitutes it in fact, II. 444

what constitutes it in equity, II. 445

what constitutes it in common law, II. 446

province of judge and jury, 46.

NEGLIGENCE—*continued*.

- 2 doctrine of contributory, II 446
 - 3
 - navigation of vessel 280, I 169
 - exhibiting false light, mark, or buoy, 281, I 170
 - conveying for hire in unseaworthy vessel, 282, I 170
 - knowledge is an essential, II 448
 - what is unseaworthiness, *ib*
 - 4 obstructing highway or navigation, 283, II 170
 - injury to individual sufficient, II 449
 - temporary obstruction, when allowable, *ib*
 - actual obstruction must be found, II 450
 - must be natural result of act, *ib*
 - lawful but unusual use of property II 458
 - injury resulting from *vis major*, 625, II 459
 - permission to pass does not make a highway, II 460
 - duty attaching to proprietor, 461
 - 5 liability of occupant of property, II 452, 453
 - landlord, *ib*
 - municipalities liable in respect of highway, II 461
 - when for nonfeasance II 462
 - effect of loss of possession II 453
 - 6 in regard to poison, 284, I 170
 - for combustibles 285, I 171
 - explosives, 286, I 171
 - machinery 287, I 172
 - pulling down or repairing buildings 288, I 172
 - 7 in respect of animals in possession, 289, I 173
 - knowledge of its dangerous nature, II 454
 - facts known to servants, II 455
 - untamed animals, *ib*
 - injury to trespassers, II 456, 457
 - servants, II 457
- See RISE OF NEGLIGENCE ACT

NUISANCE

- difference between public and private, II 426
- proper remedy for each, *ib*
- elements of a public, 268, I 163
 - brothels and gambling houses, II 428
 - prostitution, II 429
 - sentimental grievances, II 434
- 2 what amounts to an injury to the public, II 430
 - smells and noise, II 427, II 432
 - lawfulness of act immaterial II 436
 - or lapse of time, or benefit to public, *ib*
 - acts authorized by statute, II 437
- 3 summary powers of removal, II 438
 - powers of municipalities, II 439
 - continuance of, after lawful order to discontinue, 291 I 173
- 4 spreading infectious and dangerous disease, 269
 - doing so malignantly, 270, I 163
 - duties of persons in charge of infectious patients, II 439
 - cases of venereal disease, II 440

MUNICIPAL COMMISSIONER

is a public servant, 21, II. 10
liability of for neglect of duty, II. 461

MURDER, 300, I. 116

See ATTEMPT. HOMICIDE, 3, 5, 10

MUTINY

definition of, 135, I. 80

abetting desertion, 135, I. 80
harbouring deserter, 136, I. 80
in a merchant vessel, 137, I. 80
abetting act of insubordination, 138, I. 80
circulating rumours, etc., with intent to excite, 503, I. 235

MUTINY ACT

whether Naval or Military, not repealed or affected by the Penal Code, 5, I. 3.
persons subject to not liable under code for offences against Military Law, 139, I. 80

MYSORE

European British subject cannot be tried in, II. 46
may be arrested by police, II. 46
can only be committed by Justice of Peace who is European
British subject, II. 46
who are public servants in, II. 42
extradition to India, 16.
Bangalore assigned to British Government, II. 35

NATIVE INDIAN SUBJECTS

See JURISDICTION, 4

NAVIGATION

of a vessel, rash or negligent, showing want of regard for human life, etc., 280, I. 169
carrying passengers in unsafe vessel, 282, I. 170
obstructing public line of, 283, I. 170
injuring by mischief, 431, I. 216
endangering by removing lights, buoys, etc., 433, I. 117.
exhibiting false lights, buoys, 281, I. 170
See MISCHIEF.

NAVY

offences relating to, 131—140, I. 73, I. 79, I. 81

NEGLIGENCE

1. punishable apart from injury resulting, II. 442
what constitutes it in law, II. 443
where it is the act of a servant, 15.
must be made out affirmatively, II. 444
when it may be assumed, 15.
where evidence equally balanced, I. 445
province of judge and jury, 16

NEGLIGENCE—continued

- 2 doctrine of contributory, II 446
 - its application to criminal law, II 446, II 517
 - must appear to have naturally led to injury charged, II 414
 - injury includes property, I 171, II 446
 - 3 rash or careless riding or driving, 279, I 169
 - navigation of vessel 280, I 169
 - exhibiting false light mark or buoy, 281, I 170
 - conveying for hire in unseaworthy vessel, 282, I 170
 - knowledge is an essential, II 443
 - what is unseaworthiness, *ib*
 - 4 obstructing highway or navigation, 283, II 170
 - injury to individual sufficient, II 449
 - temporary obstruction, when allowable, *ib*
 - actual obstruction must be found, II 450
 - must be natural result of act, *ib*
 - lawful but unusual use of property, II 458
 - injury resulting from *vis major*, 625, II 459
 - permission to pass does not make a highway, II 460
 - duty attaching to proprietor, 461
 - 5 liability of occupant of property, II 452, 453
 - landlord, *ib*
 - municipalities liable in respect of highway, II 461
 - when for nonfeasance, II 462
 - effect of loss of possession, II 453
 - 6 in regard to poison 284, I 170
 - fire or combustibles 285, I 171
 - explosives, 286, I 171
 - machinery 287, I 172
 - pulling down or repairing buildings, 288, I 172
 - 7 in respect of animals in possession, 299, I 173
 - knowledge of its dangerous nature II 454
 - facts known to servants, II 455
 - untamed animals, *ib*
 - injury to trespassers, II 456, 457
 - servants II 457
- See INDEX FOR NEGLIGENCE ACT

NUISANCE

- difference between public and private, II 126
 proper remedy for each, 5
 elements of a public, 268, I 163
 brothels and gambling houses, II 428
 prostitution, II 429
 sentimental grievances, II 434
 2 what amounts to an injury to the public, II 130
 smells and noise, II 427, II 432
 3
 4
 doing so magnanimity, 219, I 165
 duties of persons in charge of infectious patients, II 439
 cases of venereal disease, II 440

ORDERS

of officer or superior, when a justification, II. 99-100, II. 516
 of husband, no justification, II. 129
 of Government, II. 83, II. 112

See ACT OF STATE MARTIAL LAW

OWNER

See OCCUPIER.

PARENT

may chastise child, II. 147
 right to custody of child, II. 565

PARTY

defamation by, in judicial proceeding, II. 285

PEACE

provoking to breach of the, 501, I. 285, II. 930
 See SECURITY TURBULENT ASSEMBLY

PENAL CODE

See LAW APPLICABLE TO OFFENCES, I

PENAL SERVITUDE

in case of Europeans and Americans takes, the place of transportation 56, I. 41

PERIM, I. I

PERSON

meaning of the word, II. I 5

PERSONATING

a soldier, 140, I. 61
 any public servant, 170, 171, I. 99
 another, for the purpose of a suit, 205, I. 126
 a juror or assessor, 229, I. 149
 See CHEATING

PIRACY JURE GENTIUM

in what it consists, II. 61-65
 differs from piracy by municipal law, 308, II. 66, 67
 belligerent acts of regularly commissioned vessel are not, II. 67
 attack by privateer on friendly State is, *ib*

POISON

negligence with respect to, 284, I. 170
 administering with intent to hurt, 328, I. 100

POSSESSION

when a person is said to have, 27, I. 12, II. 734
 See THEFT, 2, 7 RECEIVING, 2, 3 4 TRESPASS 2 CONVICTION, 1

PROCESSIONS

- right to conduct, II 342
- Promoting class enmity liability a statutory one, II 348
- truth of statements no defence, II 349
- what is, 153A, I 86

PROPERTY

See DISPOSAL OF PROPERTY THEFT, 2

PROPERTY MARK, 479, I 263 —

See MERCHANDISE MARKS

PROSTITUTION

- when it is or is not a nuisance, II 403
- selling or disposing of minor for purpose of, 372 I 219
- buying or obtaining possession of minor for such purpose, 373, I 218
- special indent essential, II 558
- a complete possession necessary, *ib.*
- whether intervention of third party an element in offence, *ib.*
- or innocence of minor, II 590
- assisting voluntary prostitute, II 530
- cases of dancing girls, *ib.*

PROVOCATION

See HOMICIDE, 6 ASSAULT, 3

PUBLIC

what the word includes 12 I 5

PUBLIC JUSTICE

offences against, 191—229, I 119—I 149

PUBLIC PLACE

what is a, I 177

PUBLIC SERVANT

- 1 who is or is not a, 21, I 7
- 2 offence, by a—
 - abetting an offence which it was his duty to prevent, 116, I 69
 - concealing existence of design to commit such offence, 119, I 71
 - allowing prisoner of State or of war to escape, voluntarily, 128, I 77
 - negligently, 129, I 77
 - one who is or expects to be, taking a gratification, etc., improperly, 161, I 90
 - abetting the giving of bribe or gratification, 164, I 91
 - accepting valuable thing for inadequate consideration, 165, I 91
 - disobeying direction of law, with a view to injure any one, 166 I 95
 - framing incorrect document, 167, I 96, 218, I 136
 - unlawfully engaging in trade, 158, I 94
 - buying or bidding for property, 169, I 96

PRESIDENCY

meaning of the word, 18, I. 6

PREVIOUS CONVICTION

effect of increasing punishment, 75, I. 43

must have been under Penal Code, I. 43

for attempt or abetment not sufficient, *ib.*

when to be resorted to, *ib.*

mode of charging, I. 45

and trying, I. 45

PRISONER

suffering or aiding escape of, 128—130, I. 77, I. 73, 221, 222, I. 13.
I. 139

PRIVATE DEFENCE

1. act done in exercise of, no offence, 96, I. 56

general principles of, II. 202, II. 216

cases to which it extends, 97, I. 56

though crime attempted by one who is personally exempt
from offence, 98, I. 56

or where necessary risk of harm to innocent person, 106, I. 60

2. defence of the person, when killing justifiable, 100, I. 54

wrongful confinement, II. 218

when harm short of death justifiable, 101, I. 59

when harm short of death justifiable, 101, I. 59

I. 59

when harm short of death justifiable, 103, I. 57

commencement and end of right, 103, I. 60, II. 219

4. act must be, or be reasonably supposed to be an offence, II. 217,
II. 228

case quarrel, II. 228

5. II. 225 cl. 1, 2, I. 57
I. 57

6.

what authority is competent, II. 201

rule as to jurisdiction, *ib.*

where warrant on its face illegal, II. 203

non-description or wrong description, II. 203, 210

illegal execution of good warrant, II. 210

arrest of wrong person, *ib.*

want of jurisdiction to order act, II. 213

arrest by officer without warrant, II. 214

where warrant unnecessary, II. 214

7. meaning of voluntarily causing death, etc., II. 211

when amount of violence excessive, II. 214

8. where protection of law available, 99, cl. 3, I. 57

9. acts done in defence of others, 97, I. 56

in resistance to public servant II. 211, 214

in excess of right or not murder, 300, *Excep.* 2, I. 134

PRIVILEGED COMMUNICATION

See DECEPTION

PROCESSIONS

- right to conduct, II, 342
- Promoting class enmity liability a statutory one, II 348
- truth of statements no defence, II 328
- what is, 153A, I 86

PROPERTY

See DISPOSAL OF PROPERTY THEFT, 2

PROPERTY MARK, 479, I 263

See MERCHANDISE MARKS

PROSTITUTION

- when it is or is not a nuisance, II 403
- selling or disposing of minor for purpose of, 372, I 218
- buying or obtaining possession of minor for such purpose, 373, I 218
- special indent essential, II 538
- a complete possession necessary, *ib.*
- whether intervention of third party an element in offence, *ib.*
- or innocence of minor, II 530
- assisting voluntary prostitute, II 530
- cases of dancing girls, *ib.*

PROVOCATION

See HOMICIDE, 6 ASSAULT, 3

PUBLIC

what the word includes 12 I 5

PUBLIC JUSTICE

offences against, 191—229, I 119—I 149

PUBLIC PLACE

what is a, I 177

PUBLIC SERVANT

- 1 who is or is not a, 21, I 7
- 2 offences by a—
 - abetting an offence which it was his duty to prevent, 116, I 69
 - concealing existence of design to commit such offence, 119, I 71
 - allowing prisoner of State or of war to escape, voluntarily, 128, I 77
 - negligently, 129, I 77
 - one who is or expects to be, taking a gratification, etc., improperly, 161, I 90
 - abetting the giving of bribes or gratifications, 164, I 94
 - accepting valuable thing for inadequate consideration, 165, I 94
 - disobeying direction of law, with a view to injure any one, 166 I 95
 - framing incorrect document, 167, I 96, 218, I 136
 - unlawfully engaging in trade, 168, I 98
 - buying or bidding for property, 169, I 98

PUBLIC SERVANT—*continued.*

- disobeying directions of law to save offender or his property, 217, I. 135
- omitting to apprehend, or suffering escape of person sentenced, 222, I. 139
- negligently allowing escape of person in confinement, 223, I. 140
- culpable homicide by, in exercise of powers, 300, *Excep* 3 I. 188
- criminal breach of trust, 409, I. 237
- 3. offences against a—
 - omission by one legally bound to furnish information 178 I. 104
 - regarding offence committed, 202, I. 125
 - furnishing false information, 177, I. 106
 - regarding offence committed, 203, I. 125
 - to cause misuse of power to the injury of another, 182, I. 110
 - refusing to be sworn by, 178, I. 103
 - to answer question of, 179, I. 103
 - to sign statement before, 180, I. 109
 - resisting the taking of property, 183, I. 111
 - or its sale, 184, I. 113
 - illegal purchase of or bid for property, at public sale, 185, I. 113
 - omitting to assist, 187, I. 116
 - disobedience to duly promulgated order, 186, I. 117
 - obstructing in discharge of duty, 185, I. 113
 - threat of injury to, 189, I. 119
 - in order to prevent apprehension for protection by 190, I. 118
 - causing hurt or grievous hurt to deter him from discharge of duty 332, 333, I. 203
 - assaulting, etc., for same object, 353, I. 212
 - insulting or interrupting during judicial proceedings 374 I. 174
 - destroying, etc., landmark fixed by, 434, I. 247
 - counterfeiting mark used by, 454, I. 268
 - falsely marking receptacle for goods to deceive 457, I. 271
 - making use of such false mark, 459, I. 272
- 4. resistance to acts of—
 - See* PRIVATE DEFENCE, 5, 6, 9.

PUNISHMENT

- 1. when to be under Penal Code, 2, 3, 4, I. 2
- different kinds of, 53, I. 20
- power to commute or remit, 54, 55, I. 21
- fractional terms of, how calculated, 57, I. 21

PUNISHMENT—continued.

- 2 where one offence comprises several, 71, I 33
of the same sort, I 34
of different sorts, or of same sort affecting different persons,
I 36
where same facts come under different definitions, I 36
where compound offence includes minor offences, I 37
3 to be consecutive, on single conviction for several offences, II, 34
or when offence committed by person already under sentence, 15.
limitation of amount when inflicted by magistrate, 15
when cumulative, separate sentences should be given, 16
when conviction is in the alternative, 72, 39, I 41
after previous conviction, 75, I 43
See DEATH FINE FORFEITURE IMPRISONMENT PENAL
SERVITUDE TRANSPORTATION WHIPPING.

QUARANTINE ACT

- disobeying rule of, 271, I 163

QUEEN

- meaning of the word, 13, I 5
servant of the, 14, I 6

QUESTION

- re using to answer a, put by public servant when an offence, 179,
 I 108

RAPE

- 1 in what the offence consists, 375, I 219
punishment for, 376, I 420
where act is done "against will" of woman, II 592
offender must have reason to believe it was, id
when "without consent," id
consent under deception, II 594
age of, raised to twelve, II 595
when husband may commit, 375 Excep . I 420
or abet, II 595
- 2 ~~by agreement of non-party or without~~ II 594
 I..
- 597
3. charge of to be treated with caution, II 593
evidence of prosecutrix how tested, II 599
her character when admissible, II 600
complaints and statements by her, II 601
evidence of medical indication, II 601-603
marks of violence or resistance, II 602
dying declarations, II 604
cases of mistaken charge of, II 604

RASH OR NEGLIGENT ACT

- causing death by, not amounting to culpable homicide, 301A,
I 191, II 521, II 524
excludes cases of intentional injury, II 525
death from diseased spleen, II 528
includes unforeseen results of act, II 526
mistaken medical practice, II 527
endangering life or safety, 336, 339, I 205

PUBLIC SERVANT—*continued.*

- disobeying directions of law to save offender or his property, 217, I. 185
- making order, etc., contrary to law, 219, I. 137
- keeping person in confinement illegally, 220, I. 133
- omitting to apprehend, or suffering escape of person arrested, 221, I. 138
- omitting to apprehend, or suffering escape of person sentenced, 222, I. 139
- negligently allowing escape of person in confinement, 223, I. 140
- culpable homicide by, in exercise of powers, 300, *Excep* 1 I. 188
- criminal breach of trust, 409, I. 237
- 3. offences against a—
 - non-compliance with summons of court, 172, I. 101
 - non-production or delivery of document, 175, I. 102
 - omission by one legally bound to furnish information, 176, I. 104
 - regarding offence committed, 202, I. 125
 - furnishing false information, 177, I. 106
 - regarding offence committed, 203, I. 125
 - to cause misuse of power to the injury of a person, 182, I. 110
 - refusing to be sworn by, 178, I. 104
 - in order to prevent application for writ, 190, I. 118
 - causing hurt or grievous hurt to a person bound by duty, 332, 333, I. 203
 - assaulting, etc., for same object, 353, I. 212
 - insulting or interrupting during judicial proceedings, 374, I. 174
 - destroying, etc., landmark fixed by, 434, I. 247
 - counterfeiting mark used by, 434, I. 268
 - falsely marking receptacle for goods to deceive, 437, I. 271
 - making use of such false mark, 438, I. 274
- 4. resistance to acts of—
 - See Private Dweller*, 5, 6, 9

PUNISHMENT

- 1. when to be under Penal Code, 2, 3, 4, I. 2
- different kinds of, 53, I. 20
- power to commute or remit, 54, 55, I. 21
- fractional terms of, how calculated, 57, I. 21

PUNISHMENT—continued.

- 2 where one offence comprises several, 71, I 33
 - of the same sort, I 34
 - of different sorts, or of same sort affecting different persons, I 36
 - where same facts come under different definitions, I 36
 - where compound offence includes minor offences, I 37

3

after previous conviction, 75, I 43

See DEATH. FINE. FORFEITURE. IMPRISONMENT. PENAL
SERVITUDE. TRANSPORTATION. WHIPPING.

QUARANTINE ACT

disobeying rule of, 271, I 163

QUEEN

meaning of the word, 13, I 5

servant of the, 14, I 6

QUESTION

refusing to answer a, put by public servant when an offence, 179,
I 103

RAPE

- 1 in what the offence consists, 375, I 219
 - punishment for, 376, I 220
 - where act is done "against will" of woman, II 592
 - offender must have reason to believe it was, 10
 - when "without consent," 15
 - consent under deception, II 594
 - age of, raised to twelve, II 595
 - when husband may commit, 375 Excep. I 220
 - or abet, II 595
- 2 what amount of penetration sufficient, II 595
 - presumption against in cases of boy, II 596
 - he may abet or attempt, II 596
 - II 597
- complaints and statements by her, II 601
- evidence of medical indications, II 601-603
 - marks of violence or resistance, II 602
 - dying declarations, II 604
- cases of mistaken charge of, II 604

RASH OR NEGLIGENT ACT

causing death by, not amounting to culpable homicide, 301A,
I 191, II 524, II 524

REASON TO BELIEVE

meaning of, 26, I 12

RECEIVING

property taken from all of Government, 127.

RECEIVING STOLEN PROPERTY

1. what constitutes offence of, 411, I. 233, II 663
 what is stolen property, 410, I. 233, II 662
 must be the same, not its equivalent, *ib*
 ceases to be on reaching a legal owner, II 671
 transfer by thief, *ib*
 offence committed by innocent agent, II 672
2. proof of actual thief unnecessary, II 672
 criminal possession essential, *ib*,
 evidence of, *ib*
3. what is a receiving, II. 673
 may be joint possession with thief, *ib*
 benefit of receiver unnecessary, II 673
 may be by ratification, *ib*
 what is a retaining, *ib*
4. guilty knowledge, 411, I. 233
 evidence of, II. 673
 other acts of a similar kind, 676
 possession, II. 677
 case of husband and wife, *ib* II. 679
5. where property was obtained by dacoity, or from a dacoit, 412,
 I. 233, II 683
 habitually receiving stolen property, 413, I. 234, II 681
 assisting in concealing or disposing of stolen property, 414,
 I. 239, II. 681
 joinder of above offences, *ib*

RECORD

public servant framing incorrect, to injure another, 167, I 1
See FUGALRY.

REFORMATORY. *See* APPENDIX III.

juvenile offenders may be committed to, I 24

REFUSAL

to take oath when lawfully required, 178, I 104
 relationship no excuse, I. 104
 summary penalty for, *ib*
 to answer question, 179, I. 104
 to sign statement, 180, I 109

REGULATING ACT

13 Geo III. c. 63, II 91

RELEASE

fraudulent, of any demand, or claim, 421, 422, 423, I 411

RELIGION

offences against, 293-295, I 177

REMISSION

- of punishment, 54, 55, I 21
- violating condition of, 227, I 147

REMOVAL

- to transportation is ordered by Local Government,
from one jail to another, I 24

REPORT

- circulating false to incite to mutiny, 505, I 28
- See DEFAMATION

REPUTATION

- See DEFAMATION FORGERY

RESCUE

- of prisoner of State or of war, 130, I 78
- of any person from lawful custody for offence, 225, I 113
- in cases not otherwise provided for, 225B, I 113
- See ESCAPE HARBORING

RESISTING

- apprehension of himself for an offence, 224, I 111
- another, 225, I 113
- the taking of property by a public servant, 183, I 111
- a public servant in discharge of his duty, 353, I 112

RESTITUTION OF STOLEN PROPERTY

- corrupt agreement to help in, 215, I 133
- what constitutes the offence, II 271
- actual restitution immaterial, II 272
- offering rewards for, 10

RETURN

- from transportation, unlawful, 226, I 116

REWARD

- taking for recovery of stolen property, 215, I 133
- See RESTITUTION

RIGHT

- acts done under belief of, when not an offence—
- theft, extortion, robbery II 616, II 635, II 645
- mischiefs, II 716
- trespass, II 728
- no excuse for unlawful assembly, II 314, II 315

RIOTING

1. when unlawful assembly is guilty of 146, I 83, II 322
 - force or violence must be for common object, II 321
 - crime committed in course of, separately punishable, II 324-25
2. punishment for, 147, I 83
 - when armed with deadly weapons, 148, I 84
 - each person in a riot, guilty of offence committed by any other, 149, I 84
 - assaulting, etc., public officer suppressing riot, 152, I 85
 - provoking a, 153, I 85

REASON TO BELIEVE

meaning of, 26, I. 12

RECEIVING

property taken from all of Government, 127.

RECEIVING STOLEN PROPERTY

1. what constitutes offence of, 411, I. 233, II. 663
 what is stolen property, 410, I. 233, II. 662
 must be the same, not its equivalent, *ib*
 ceases to be on reaching a legal owner, II. 671
 transfer by thief, *ib*
 offence committed by innocent agent, II. 672
2. proof of actual thief unnecessary, II. 672
 criminal possession essential, *ib*.
 evidence of, *ib*
3. what is a receiving, II. 673
 may be joint possession with thief, *ib*
 benefit of receiver unnecessary, II. 673
 may be by ratification, *ib*.
 what is a retaining, *ib*
4. guilty knowledge, 411, I. 233
 evidence of, II. 675
 other acts of a similar kind, 676
 possession, II. 677
 case of husband and wife, *ib* II. 679
5. where property was obtained by dacoity, or from a dacoit 412, I. 238, II. 683
 habitually receiving stolen property, 413, I. 239, II. 684
 resisting in concealing or disposing of stolen property, 414, I. 239, II. 684
 joinder of above offences, *ib*.

RECORD

public servant framing incorrect, to injure another, 177, I. 1
See FORGERY.

REFORMATORY *See* APPENDIX III

juvenile offenders may be committed to, I. 44

REFUSAL

to take oath when lawfully required, 178, I. 104
 relationship no excuse, I. 104
 summary penalty for, *ib*
 to answer question, 179, I. 104
 to sign statement, 180, I. 107

REGULATING ACT

13 Geo. III. c. 64, II. 94

RELEASE

fraudulent, of any demand, or claim, 424, 425, 426, I. 44

RELIGION

offences against, 293—295, I. 177

REMISSION

- of punishment, 54, 55, I 21
- violating condition of, 227, I 147

REMOVAL

- to transportation is ordered by Local Government,
from one jail to another, I 24

REPORT

- circulating false, to incite to mutiny, 503, I 285
- See DEFAMATION

REPUTATION

- See DEFAMATION FORGERY

RESCUE

- of prisoner of State or of war, 130, I 78
- of any person from lawful custody for offence, 225, I 143
- in cases not otherwise provided for, 225B, I 147
- See ESCAPE HARBORING

RESISTING

- apprehension of himself for an offence, 223, I 141
- another, 225, I 143
- the taking of property by a public servant, 183, I 111
- a public servant in discharge of his duty, 333, I 212

RESTITUTION OF STOLEN PROPERTY

- corrupt agreement to help in, 215, I 134
- what constitutes the offence, II 271
- actual restitution immaterial, II 272
- offering rewards for, 10

RETURN

- from transportation, unlawful, 226, I 146

REWARD

- taking for recovery of stolen property, 215, I 134
- See RESTITUTION

RIGHT

- acts done under belief of, when not an offence—
 - theft, extortion, robbery, II 616, II 645, II 645
 - mischief, II 716
 - trespass, II 728
- no excuse for unlawful assembly, II 314, II 315

RIOTING

1. when unlawful assembly is guilty of, 146, I 83, II 322
 - force or violence must be for common object, II 322
 - crime committed in course of, separately punishable, II 324-25
2. punishment for, 147, I 83
 - when armed with deadly weapons, 148, I 84
 - each person in a riot, guilty of offence committed by any other, 149, I 84
 - assaulting, etc., public officer suppressing riot, 152, I 85
 - provoking a, 153, I 85

SE D U C T I O N

abducting or kidnapping a woman with a view to, 366, I 216
concealing person so abducted, 368, I 217

SELF-PRESERVATION

how far an excuse, II. 157
See PRIVATE DEFENCE

SERVANT

of Queen, who commits offence in Foreign State, 4, I 2
meaning of the term, 14, I 6
possession of, is possession of the master, when, 27, I 12
theft by, of master's property 381, I 223
criminal breach of trust by, 403, I 237
who is a servant II 662 663
See PUBLIC SERVANT MASTER

SERVICE

breach of contract of, during voyage or journey, 490, I 273
immaterial with whom contract was made, 490, Exp, I 274
to attend on, etc, helpless persons, 491, I 273
does not include servants hired by the month, I 275
whether charge negatived by bona fide belief of right to quit service,
II 276
contract in writing to serve at a distant place to which servant is
or is to be conveyed at master's expense, 492, I 275
meaning of artificer, workman, or labourer, II 276
whether renewed offence is punishable, ib

SLAVE TRADE ACT, 39 and 40 Vict, c 46, II 48

SLAVERY

--- 217

jurisdiction over offences under Slave Trade Act, II 48, II. 594

SLIGHT HARM

act causing, not an offence, 95, I 54

SOLDIER

is subject to general law in civil matters, II 94
not protected by orders which are plainly illegal, II 100
otherwise where reasonably supposed to be lawful, ib
wearing dress of, when not being a, 140, I 81

SOLEMN AFFIRMATION

substituted by law for an oath is included in term "oath," 58, I 19

SOLITARY CONFINEMENT, 73, 74, I 42, I 43

See IMPRISONMENT

SOVEREIGN

of the United Kingdom denoted in the Code by the word "Queen,"
13, I 5

SPECIAL LAW

- meaning of the term, 41, I. 15
- offence extended to breach of, in certain cases, 40, II. 17
- no "special" is repealed or affected by the Penal Code, 5, I. 1
- breach of, may be also an offence under Code, I. 4
- appeal against sentences under, I. 4
- abetting breach of, punishable under Code, I. 61

STAMP

- offences as to, 255—263A, I. 156—I. 160

STATE OFFENCES

- may be committed by resident foreigner, II. 274
- though of a hostile nation, II. 275
- or by unauthorized invader, *ib.*
- not by regular belligerent, *ib.*
- or by British subject in foreign service, II. 276
- how allegiance may be cast off, *ib.*
- what are, 121—130, I. 74—I. 78
- See WAGFO WAR, CONSPIRACY.

STATUTE

- acts authorized by, II. 437, II. 449

STOLEN PROPERTY

- taking or offering reward for return of, 215, I. 111
- definition of the term, 410, I. 233
- dishonestly receiving, 411, 412, I. 233
- habitually dealing in, 413, I. 233
- assisting in concealing, or disposing of, 414, I. 234
- See RECEIVING STOLEN PROPERTY

SUICIDE

- taking part in, of adult, 300. Except 5, I. 193, II. 529
- of person under age or incapable of giving consent, *ib.*
- abetting of, by child or person incapable of consent, 303, I. 193, II. 529
- by any person, 305, I. 192, II. 529
- attempting to commit, 309, I. 193, II. 529

SURGICAL OPERATIONS

- See CONSENT (2) HOMICIDE (2)
- rash act, Medical man, II. 526, II. 527

TAKING AWAY—*continued*

- husband, or in person charge for him, must complain, II 849
- II 850
- what is a complaint, II 850
- prosecution not ended by his death, II 850
- See KIDNAPING ABDUCTION

TENANT

- liability of, for nuisance on land II 452

TERRITORIAL WATERS

- Jurisdiction Act, 41 and 42 Vict., c 73, II 28

THEFT

- 1 when a person is said to commit, 378, I 420
 - what is movable property, 22, I 11, II 607
 - when things attached to earth become, 378, Exp 1, 2, I 221, II 607
 - value immaterial II 608
- 2 thing must be the subject of property, II 609, II 610
 - and in actual possession, II, 609
 - when animals, etc. are possessed, II, 609, II 610
 - property lost or mislaid, II 610
 - entrusted to a other, II 612
 - person from whom taken need not be owner, II 613
- 3 meaning of dishonest intention, 24 I 12, II 613, II 614
 - acts done under claim of right, II 615
 - right must justify act, II 616, II 617
 - personal benefit unnecessary, II 618
 - or improper motive, II 619
 - whether temporary detraction sufficient, II 620
- 4 must be without consent, II 620
 - what amounts to consent, 378, Exp 5, I 221
 - offering facilities to defector etc, II 621
 - consent obtained by fraud, II 622
 - unconcealed taking, II 622
- 5 what is a moving, 378 Exp 2—4, I 221
- 6 whether husband and wife can commit from each other, II, 624, II 627
- 7 evidence of from actual possession II 631
 - where possession is recent, II 632
 - must be exclusive, *ib*
 - identification of property, II 634
 - where species only is the same, *ib*
 - or actual loss not proved *ib*
- 8 by clerk or servant, 381, I 223, II 627
 - when property in possession of master, II 629
 - who is a servant, II 663, II 664
 - service need not be exclusive, *ib* 663
 - employed as clerk or servant, *ib*
- 9, in a building, tent etc 380, I 223
 - after making preparation to cause death etc, 382, I 223
 - when it is robbery, 390, I 226
 - belonging to gang of persons associated for, 401, I 232

THREATS

- acts done under, when no offence 94, and Exp, I 54

THREATS—*continued*

of injury to public servant, 189, I. 118

to restrain any person from applying to public servant for protection, 190, I. 118

See COMPELSION. EXTORTION. INTIMIDATION.

THUG

who comes under the denomination, 310, I. 193

punishment for being a, 311, I. 193

TITLE

bona fide claim of—

See RIGHT

TRADE

public servant unlawfully engaging in, 163, I. 93

who are forbidden to, I. 93

description, mark, on name—

See MERCHANDISE MARKS.

TRANSPORTATION

sentence of, may be commuted, or suspended, or remitted, 53, I. 21

may be awarded in place of seven years' imprisonment, 59, I. 21

several sentences cannot be joined to make up seven years, I. 22

limit of transportation in lieu of imprisonment, I. 23

cannot be awarded in default of fine, I. 23

nor by magistrates who cannot imprison for seven years, I. 23

cannot be inflicted on European or American, 56, I. 21

prisoners sentenced to, how dealt with until transported, 53, I. 21

place of, and mode of removal, how specified, I. 24

unlawful return from, 226, I. 146

convict must have reached penal station, I. 147

TRESPASS

1. what constitutes criminal, 431, I. 253 437, I. 253

unlawful entry or remaining, II. 725

offence varies according to intention, II. 722

evidence of each, *ib.*

acts done under claim of right, II. 727

meaning of "intimidate," "insult," "assault," II. 723 II. 725

what is an offence, II. 732

2.

WRONGFUL LOSS

what the term means, 23, I. 11

See CREATING MISCHIEF.

WRONGFUL RESTRAINT

definition of the term, 339, I. 206

when it amounts to wrongful confinement, 340, I. 206

punishment for, 341, I. 207

WRONGFUL RETENTION

effect and meaning of 23, I. 11

YEAR

What the word means, 49, I. 19

ZANZIBAR

jurisdiction over offences committed in, II. 49

